
THE LAW OF UNINTENDED CONSEQUENCES STRIKES AGAIN:

DOES MURDER HAVE A STATUTE OF LIMITATIONS NOW?

THE SKY WILL FALL UNLESS THE SUPREME COURT CHANGES ITS INTERPRETATION OF THE RIGHT OF CONFRONTATION*

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ABSTRACT

In its 2004 decision in Crawford v. Washington, the U.S. Supreme Court created the legal equivalent of a major earthquake by changing the interpretation of the Sixth Amendment right of confrontation from what it had applied for the previous 24 years under Ohio v. Roberts. Out-of-court statements were now excluded unless the declarant was unavailable and the defense had an opportunity to cross-examine. This Crawford interpretation was extended to forensic laboratory reports in Melendez-Diaz v. Massachusetts and Bullcoming v. New Mexico. In the most recent case of Williams v. Illinois, the Court was unable to reach a majority opinion on the admissibility of an expert's opinion that was based on another expert's DNA forensic laboratory report. As a result, it appears that if the same Melendez-Diaz-Bullcoming rules are applied to forensic autopsy reports, the cause and manner of death of the victim cannot be proved once the autopsy pathologist dies. This would lead to the unintended creation of a de facto statute of limitations for murder tied to the lifetime of the autopsy pathologist.

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The lower courts have been left to their own individual interpretations because the Court has not drawn a bright line that can be applied to autopsy reports. There is a split nationwide among the lower courts on this issue. The Author believes that some jurisdictions are misapplying the dictates of Melendez-Diaz–Bullcoming, in part because of necessity and public policy: they have been faced with the unintended consequences of those cases in a murder where the autopsy pathologist had died, something that the U.S. Supreme Court has yet to grapple with.

*This Article will examine how the slippery slope of the Crawford–Melendez-Diaz–Bullcoming line of cases has led to those unintended consequences and how the U.S. Supreme Court will either have to modify its interpretation of the right of confrontation or accept a *de facto* statute of limitations when faced with the proper murder case. This Article will also propose a solution to avoid the latter.*

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I. INTRODUCTION

In its 2004 decision in *Crawford v. Washington*,¹ the U.S. Supreme Court created the legal equivalent of a major earthquake by changing the interpretation of the Sixth Amendment right of confrontation from how it had been applied for the previous 24 years under *Ohio v. Roberts*.² Out-of-court statements offered as evidence against a criminal defendant are now excluded unless the declarant is both unavailable to testify at trial and available for cross-examination by the defense prior to trial. *Crawford* was

1. See *Crawford v. Washington*, 541 U.S. 36, 53–54, 61–65 (2004).

2. See generally *Ohio v. Roberts*, 448 U.S. 56 (1980), abrogated by *Crawford*, 541 U.S. at 36. “Roberts condition[ed] the admissibility of all hearsay evidence on whether it falls under a ‘firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness.’” *Crawford*, 541 U.S. at 60 (quoting *Roberts*, 448 U.S. at 66).

extended to apply to forensic analysts' laboratory reports in *Melendez-Diaz v. Massachusetts*³ and *Bullcoming v. New Mexico*.⁴ But if the same *Melendez-Diaz–Bullcoming* rules are applied to forensic autopsy reports, the cause and manner of death of a murder victim could not be proved once the autopsy pathologist dies; the autopsy report would be inadmissible and no substitute pathologist could satisfy the *Melendez-Diaz–Bullcoming* requirements.⁵ This would lead to the unintended creation of a de facto statute of limitations for murder dependent upon the lifetime of the autopsy pathologist and would abolish a very old common law rule in criminal law.⁶

The Court has not set out a bright-line rule that can be applied to autopsy reports to avoid this outcome. In *Williams v. Illinois*,⁷ its most recent case dealing with forensic laboratory reports, the Court was unable to reach a majority opinion on the admissibility of a DNA expert's opinion testimony that was based on information contained in another DNA expert's report.⁸ As a result, the lower courts have been left to forge their own interpretations and are split on the proper application of *Melendez-Diaz–Bullcoming* to autopsy reports and surrogate pathologist testimony. Some lower courts have found that an autopsy report and any surrogate testimony surrounding it are excluded by *Melendez-Diaz–Bullcoming* if the autopsy pathologist does not testify.⁹ On the other hand, other jurisdictions, including California, Ohio, and the Second Circuit, have applied the *Melendez-Diaz–Bullcoming* rules in a way that contradicts the specific holdings of those cases: they conclude that parts of the original autopsy report are admissible and that

3. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309–11 (2009).

4. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715–17 (2011).

5. *See id.* at 2715 (citing *Melendez-Diaz*, 557 U.S. at 319 n.6) (reiterating that “the analysts who write reports that the prosecution introduces must be made available for confrontation,” otherwise the reports are inadmissible).

6. *See, e.g.*, *Doggett v. United States*, 505 U.S. 647, 668 (1992) (Thomas, J., dissenting). The federal government and all 50 states exempt murder, among other homicide offenses, from the applicable statutes of limitations for felony offenses. *See CHARLES DOYLE, CONG. RESEARCH SERV.*, RL31253, STATUTES OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 2–3, 30–35 (2012), available at <https://www.fas.org/sgp/crs/misc/RL31253.pdf>.

7. *See generally Williams v. Illinois*, 132 S. Ct. 2221 (2012).

8. The plurality opinion was authored by Justice Samuel Alito and joined only by Justices John Roberts, Anthony Kennedy, and Stephen Breyer. *See id.* at 2227–44.

9. *See, e.g.*, *United States v. Ignasiak*, 667 F.3d 1217, 1231–35 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30, 72–73 (D.C. Cir. 2011); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 227–28 (Okla. Crim. App. 2010); *State v. Lui*, 315 P.3d 493, 504–05 (Wash. 2014).

Melendez-Diaz-Bullcoming permits surrogate testimony based on those parts.¹⁰ The Author believes that these jurisdictions are misapplying the dictates of *Melendez-Diaz* and *Bullcoming* but that they are doing so, in part, because of necessity and public policy; these courts have faced the unintended consequences of *Melendez-Diaz-Bullcoming* in murder cases when the autopsy pathologist had died or was otherwise unavailable, a scenario which the U.S. Supreme Court has yet to address.

This Article will examine how the slippery slope of the *Crawford-Melendez-Diaz-Bullcoming* line of cases has led to unintended consequences and how the U.S. Supreme Court will be forced to modify its interpretation of the right of confrontation or accept a de facto statute of limitations for murder.

Part II will briefly discuss the original *Roberts* rule and its criticism. Part III will discuss the major shift that took place with the 2004 *Crawford* decision and its progeny, how the U.S. Supreme Court is substantially divided on the true meaning of the Confrontation Clause, and how lower courts have not been provided with any bright-line test to apply. Part IV will discuss how various jurisdictions have applied the amorphous *Crawford-Melendez-Diaz-Bullcoming* rules to autopsy reports and surrogate testimony regarding cause of death in cases where the original autopsy pathologist had died or was otherwise unavailable. Part V will discuss some of the various proposals that have been suggested to resolve this issue and will present a construct of the right of confrontation that should be adopted by the Court as a matter of public policy to avoid creating a statute of limitations for murder.

II. THE PRE-CRAWFORD INTERPRETATION OF THE RIGHT OF CONFRONTATION

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him¹¹

As set out in the Court's decision in *Ohio v. Roberts*, the pre-*Crawford* conception of the right of confrontation required only that any admitted hearsay statement fall within a "firmly rooted hearsay exception" or bear

10. See, e.g., *United States v. James*, 712 F.3d 79, 97–99 (2d Cir. 2013); *People v. Rodriguez*, 319 P.3d 151, 187–88 (Cal. 2014); *State v. Maxwell*, 9 N.E.3d 930, 949–52 (Ohio 2014).

11. U.S. CONST. amend. VI.

“particularized guarantees of trustworthiness.”¹² Examples of “firmly rooted” exceptions are, *inter alia*, statements by a party opponent,¹³ declarations against interest,¹⁴ excited utterances,¹⁵ dying declarations,¹⁶ business records,¹⁷ and public records.¹⁸ These are exceptions that, for the purposes of *Roberts*, were treated as well-established at common law for more than a century.¹⁹ Under *Roberts*, an autopsy report was admissible under both the public records and the business records exception.²⁰

On the other hand, relatively new exceptions, such as the exception for statements of present sense impression,²¹ would only qualify if that exception demonstrated by its very nature a guarantee of trustworthiness equivalent to that of a “firmly rooted exception.”²² Even statements seeking admission through the Federal Rules of Evidence (FRE) residual exception²³ could qualify, under some circumstances, because the residual exception requires that proffered hearsay statements have “equivalent circumstantial

12. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004). A statement satisfying either requirement would be held to bear “adequate ‘indicia of reliability.’” *Id.*

13. *See FED. R. EVID. 801(d)(2); CAL. EVID. CODE § 1220; IOWA R. EVID. 5.801(d)(2).*

14. *See FED. R. EVID. 804(b)(3); CAL. EVID. CODE § 1230; IOWA R. EVID. 5.804(b)(3).*

15. *See FED. R. EVID. 803(2); CAL. EVID. CODE § 1240; IOWA R. EVID. 5.803(2).*

16. *See FED. R. EVID. 804(b)(2); CAL. EVID. CODE § 1242; IOWA R. EVID. 5.804(b)(2).*

17. *See FED. R. EVID. 803(6); CAL. EVID. CODE § 1271; IOWA R. EVID. 5.803(6).*

18. *See FED. R. EVID. 803(8); CAL. EVID. CODE § 1280; IOWA R. EVID. 5.803(8).*

19. *See Michael R. Dreeben, Prefatory Article: The Confrontation Clause, the Law of Unintended Consequences, and the Structure of Sixth Amendment Analysis*, 34 GEO. L.J. ANN. REV. CRIM. PROC. iii, ix–x, xxii–xxiv (2005); Liza I. Karsai, *The “Horse-Stealer’s” Trial Returns: How Crawford’s Testimonial–Nontestimonial Dichotomy Harms the Right to Confront Witnesses, the Presumption of Innocence, and the “Beyond a Reasonable Doubt” Standard*, 62 DRAKE L. REV. 129, 147–54, 159–63 (2013).

20. *See Marc D. Ginsberg, The Confrontation Clause and Forensic Autopsy Reports—A “Testimonial”*, 74 LA. L. REV. 117, 123–26 (2013).

21. *See FED. R. EVID. 803(1); CAL. EVID. CODE § 1241; IOWA R. EVID. 5.803(1).*

22. Indeed, if adequate guarantees of trustworthiness were shown, a statement could be admitted over a Confrontation Clause challenge notwithstanding the absence of a specific hearsay exception permitting its introduction. *See, e.g.*, *Dutton v. Evans*, 400 U.S. 74, 81–82 (1970) (plurality opinion) (quoting *California v. Green*, 399 U.S. 149, 155–56 (1970)).

23. *FED. R. EVID. 807; see also IOWA R. EVID. 5.807.*

guarantees of trustworthiness.”²⁴ *Roberts*’s focus was on reliability and trustworthiness,²⁵ and the *Roberts* rule was intended to assure that all reliable hearsay, and only reliable hearsay, be admitted into evidence.²⁶

The main criticism of the *Roberts* test was that its reading of the Confrontation Clause did not guarantee any greater protection than hearsay rules.²⁷ In most cases, if proffered evidence satisfied a hearsay exception, it also satisfied the Confrontation Clause’s reliability requirements. In a sense, the *Roberts* test was too narrow in that it would admit *ex parte* statements against a criminal defendant upon nothing more than a finding of reliability.²⁸ But the *Roberts* test was also too broad because it used “the same mode of analysis whether or not the hearsay consist[ed] of *ex parte* testimony.”²⁹ Reliability had become a substitute for confrontation. “To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular

24. See FED. R. EVID. 807.

(a) IN GENERAL. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

Id.

25. “Reliability” and “trustworthiness” are used interchangeably in this context.

26. See, e.g., *Idaho v. Wright*, 497 U.S. 805, 820–21 (1990).

27. This criticism surfaced in Justice Clarence Thomas’s concurrence in *White v. Illinois*: “[Roberts] implies that the Confrontation Clause bars only unreliable hearsay. Although the historical concern with trial by affidavit and anonymous accusers does reflect concern with the reliability of the evidence against a defendant, the Clause makes no distinction based on the reliability of the evidence presented.” 502 U.S. 346, 363 (1992) (Thomas, J., concurring).

28. *Crawford v. Washington*, 541 U.S. 36, 60 (2004); see also *White*, 502 U.S. at 363 (“Nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of *ex parte* affidavits found to be reliable.”).

29. *Crawford*, 541 U.S. at 60.

manner: by testing in the crucible of cross-examination.”³⁰ As Justice Antonin Scalia emphasized in *Crawford*: “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”³¹

Critics of *Roberts* also argued that “[r]eliability [was] an amorphous, if not entirely subjective, concept” and that the results of the application of the *Roberts* test were unpredictable and inconsistent.³² Trial judges were responsible for deciding what factors to consider in deciding reliability; however, separate courts could wind up attaching opposite weights to the same factors and come to opposite conclusions.³³

III. CRAWFORD AND ITS PROGENY

In 2004, the U.S. Supreme Court decided *Crawford*, overruling *Roberts*, and radically changed the 24-year-old interpretation of the Sixth Amendment right of confrontation.³⁴ Two justices dissented in *Crawford* and concurred in the exclusion of the hearsay statement at issue because the same result could be reached by simply applying the *Roberts* rule.³⁵ *Crawford*’s new framework was developed by a line of cases exploring the concept of “testimonial” hearsay statements, including *Davis v. Washington*, *Melendez-Diaz v. Massachusetts*, *Bullcoming v. New Mexico*, and *Williams v. Illinois*, which this Part will examine in turn.

A. Crawford v. Washington

In *Crawford*, the defendant stabbed the victim and claimed self-defense at trial.³⁶ The defendant’s wife, who was present during the stabbing, made statements to the police at the police station after the stabbing

30. *Id.* at 61.

31. *Id.* at 62.

32. *Id.* at 63.

33. *Id.* “For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was ‘detailed,’ while the Fourth Circuit found a statement more reliable because the portion implicating another was ‘ fleeting.’” *Id.* (citation omitted) (comparing *People v. Farrell*, 34 P.3d 401, 406–407 (Colo. 2001) with *United States v. Photogrammetric Data Servs., Inc.*, 259 F. 3d 229, 245 (4th Cir. 2001)); see also *Dreeben*, *supra* note 19, at xxi (citing *Crawford*, 541 U.S. at 63).

34. *Id.* at 50–51.

35. *Crawford*, 541 U.S. at 76.

36. *Id.* at 38, 40.

incident.³⁷ After the defendant invoked the marital privilege under Washington state law to prevent his wife from testifying at trial, the prosecution introduced her out-of-court statements at trial to counter the defendant's self-defense claim.³⁸ The statements were admitted pursuant to the state's hearsay exception for "statements against penal interest."³⁹ Ultimately, the Court held that the admission of those statements violated the defendant's right of confrontation.⁴⁰

The *Crawford* Court indicated 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."⁴¹ That concern originated from familiarity with the sixteenth century English Crown's Marian statutes that "required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court"—in essence, introducing hearsay evidence against the accused without calling the declarants as witnesses.⁴² The notorious case of Sir Walter Raleigh was one of the worst examples of the abuse permitted by the use of pretrial examinations as evidence in criminal trials.⁴³ Raleigh was convicted of treason based in part on the out-of-court statements of his alleged accomplice, Lord Cobham, who implicated Raleigh during a pretrial examination and in a letter to the English Privy Council; although Cobham did not testify before the jury, his statements and his letter were read to the jury over Raleigh's strenuous objections.⁴⁴ The jury returned a guilty verdict, and Raleigh was sentenced to death.⁴⁵

37. *Id.* at 39–40.

38. *Id.* at 40.

39. *Id.*

40. *Id.* at 68–69. The *Crawford* Court "readily concede[d]" that it could reach the same result "by simply reweighing the 'reliability factors' under *Roberts*." *Id.* at 67. In light of that admission, it is unclear why the Court chose this particular case to promulgate this new approach when its application allowed the defendant to profit from his decision to claim the marital privilege and prevent his hearsay declarant wife from testifying. The defendant, in essence, used the marital privilege both as a shield (by keeping his wife from testifying) and as a sword (by claiming he could not confront his wife at trial). *But see State v. Crawford*, 54 P.3d 656, 660 (Wash. 2002) ("[F]orcing the defendant to choose between [invoking] the marital privilege and confronting his spouse presents an untenable Hobson's choice . . . and undermines the marital privilege itself.").

41. *Crawford*, 541 U.S. at 50.

42. *Id.* at 43–44.

43. *Id.* at 44.

44. *Id.* (citing Raleigh's Case, 2 How. St. Tr. 1, 15–16, 24 (1603)).

45. *Id.* For a thorough discussion of Raleigh's trial, see generally Allen D. Boyer,

In *Crawford*, the legal battle turned on the meaning of the word “witnesses” in the Sixth Amendment. The *Crawford* Court rejected the view that the term applied only to in-court witnesses and not to hearsay declarants.⁴⁶ The Court looked at an 1828 dictionary’s definition of “witnesses” and concluded that the framers of the Bill of Rights in 1791 intended the word to mean “those who ‘bear testimony.’”⁴⁷ Turning to the same dictionary to define “testimony” in this context, the Court concluded that “testimony” meant “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁴⁸ As would become more evident in subsequent decisions, the critical language was the word “solemn.”⁴⁹ The Court explained that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”⁵⁰

However, the *Crawford* Court neither clearly defined nor provided a “comprehensive definition of ‘testimonial.’”⁵¹ Instead, it indicated that the term “testimonial” and, by extension, the right of confrontation applied “at a minimum to prior testimony at a preliminary hearing, before a grand jury,

The Trial of Sir Walter Raleigh: The Law of Treason, The Trial of Treason and the Origins of the Confrontation Clause, 74 MISS. L.J. 869 (2005).

46. *Crawford*, 541 U.S. at 50–51 (“Leaving 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. Raleigh was, after all, perfectly free to confront those who read Cobham’s confession in court.”).

47. *Id.* at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). The Court focused on how the word “witnesses” was prescriptively defined in 1828, 37 years after the enactment of the Sixth Amendment. That definition is not the critical touchstone that led to *Crawford*’s new approach and its departure from precedent; the definition of “testimony” that followed is the one that set in motion the domino effect of *Crawford*’s legacy. See Dreeben, *supra* note 19, at xxvi–xxix.

48. *Crawford*, 541 U.S. at 51 (alteration in original) (quoting WEBSTER, *supra* note 47).

49. See *infra* Part III.E (discussing how solemnity of the declarant’s statement became the crucial turning point in the Court’s decision in *Williams*).

50. *Crawford*, 541 U.S. at 51. The Court used “formal” and “solemn” interchangeably in its interpretation of the Confrontation Clause, which was necessitated by the factual context of *Crawford*—the hearsay statements at issue were made by the defendant’s wife while she was in police custody and were not made under oath. See *id.* at 65.

51. *Id.* at 68. Chief Justice William Rehnquist criticized this omission in his concurrence, arguing that “the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what . . . is covered by the new rule” against unkonfronted testimonial hearsay. *Id.* at 75 (Rehnquist, C.J., concurring).

or at a former trial; and to police interrogations,”⁵² because those were “the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.”⁵³

Beyond those examples, the Court did not settle on any bright-line rule for determining if other statements were testimonial; instead it gave examples of proposed tests to determine the scope of the Sixth Amendment “core class of ‘testimonial’ statements”:

[E]x *parte* in-court testimony or its functional equivalent—that is, 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,” “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” “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[.]” These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.⁵⁴

Because of *Roberts*’s “demonstrated capacity” to permit the admission of those “core testimonial statements that the Confrontation Clause plainly meant to exclude,” the Court determined that it must be overruled.⁵⁵

The Court concluded 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.”⁵⁶ On the other hand, “nontestimonial hearsay” is “exempted . . . from Confrontation Clause scrutiny altogether,” and its admissibility may be controlled by the applicable hearsay statutes of the forum jurisdiction.⁵⁷

The *Crawford* concurrence objected to the overruling of *Roberts*,

52. *Id.* (majority opinion) (emphasis added).

53. *Id.*

54. *Id.* at 51–52 (citations omitted). These were the tests proposed in the briefs submitted to the Court in *Crawford* and in Justice Thomas’s concurrence in *White v. Illinois*, 502 U.S. 346 (1992).

55. *Crawford*, 541 U.S. at 63.

56. *Id.* at 68.

57. *Id.*

finding it unnecessary and “not backed by sufficiently persuasive reasoning to overrule long-established precedent.”⁵⁸ The concurrence also argued that the majority’s “distinction between testimonial and nontestimonial statements” was too broad, too imprecise, and “no better rooted in history” than the *Roberts* rule.⁵⁹ The concurrence would have limited the testimonial classification to “sworn affidavits and depositions” since those *ex parte* statements were what “the Framers were mainly concerned about” when the Sixth Amendment was ratified⁶⁰ and any other inclusion of statements would be “somewhat arbitrary.”⁶¹

B. Davis v. Washington

Two years after *Crawford*, the Court had the opportunity to elaborate on what “testimonial” meant in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*.⁶² Both cases in *Davis* involved the admission of a domestic violence victim’s hearsay statements against the defendant at a trial in which the victim did not testify.⁶³ In an attempt to more clearly define “testimonial,” the Court introduced the “primary purpose” test:

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: 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*.⁶⁴

58. *Id.* at 69 (Rehnquist, C.J., concurring). Chief Justice Rehnquist and Justice Sandra Day O’Connor pointed out that the same result would have been achieved under the *Roberts* rule and considered the radical change of course by the majority to be a mistake. *Id.* at 76.

59. *Id.* at 69.

60. *Id.* at 71.

61. *Id.*

62. *Davis v. Washington*, 547 U.S. 813 (2006).

63. *Id.* at 817–21.

64. *Id.* at 822 (emphasis added).

The *Davis* statement was contained in a 911 call from the victim to the police, made while the assault was taking place.⁶⁵ In contrast, the *Hammon* statement was made by the victim to the police at the scene after the police had separated the defendant and the victim.⁶⁶ The Court ruled that the 911 call in the *Davis* case was not testimonial⁶⁷ but that the statements made in the police interview in *Hammon* were.⁶⁸

Justice Clarence Thomas concurred in the *Davis* judgment but dissented from the *Hammon* judgment and objected to the use of any primary purpose test.⁶⁹ He argued that the test would be unworkable, yield unpredictable results,⁷⁰ and go far beyond the Framers' intent of the Confrontation Clause.⁷¹ Trying to sort out all the police motives and determine their primary purpose" would be, to Justice Thomas, an "exercise in fiction."⁷² He insisted that the Clause only applied to "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."⁷³ Since neither statement involved such a formalized process, they were not testimonial and, therefore, there was no violation of the Confrontation Clause in either case.⁷⁴

It initially appeared that Justice Thomas's rejection of the primary purpose test would not carry much weight in future Confrontation Clause cases because he was the lone dissenter in *Davis*. However, his position

65. *Id.* at 817–18.

66. *Id.* at 819–21.

67. *Id.* at 826–29. While the declarant in *Crawford* "was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers," the *Davis* victim-declarant's "frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." *Id.* at 827.

68. *Id.* at 830 ("What we called the 'striking resemblance' of the *Crawford* statement to civil-law *ex parte* examinations is shared by [the victim's] statement here." (citation omitted)) (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)).

69. *Id.* at 834 (Thomas, J., concurring in part and dissenting in part).

70. *Id.* "Assigning one of these two 'largely unverifiable motives,' primacy requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible." *Id.* at 839 (citation omitted) (quoting *New York v. Quarles*, 467 U.S. 649, 656 (1984)).

71. *Id.* at 836–38.

72. *Id.* at 839.

73. *Id.* at 836 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)) (internal quotation mark omitted).

74. *Id.* at 840.

would be the critical deciding point in *Williams v. Illinois*,⁷⁵ which is discussed below.

After *Crawford* and *Davis*, lower courts were left to struggle with applying the still-imprecise testimonial test. Both *Crawford* and *Davis* dealt with victims' hearsay statements; the Court did not define the breadth of the definition of who else was a witness for Sixth Amendment purposes. It was inevitable that the Court would be faced with that issue in its next case on the subject, which occurred three years later in *Melendez-Diaz*.

C. Melendez-Diaz v. Massachusetts

The issue in *Melendez-Diaz* was whether a forensic laboratory analyst was a witness for Sixth Amendment purposes and whether the imprecise *Crawford* testimonial test applied to a lab report that was used to prove the nature of the drug.⁷⁶ The Court, in a 4–1–4 decision, held that the analysts' certifications were testimonial and that admitting them without making the analysts available for cross-examination was a violation of the defendant's right of confrontation.⁷⁷ The Court spent more time rebutting the dissent than asserting its own position and insisted that “the sky will not fall”⁷⁸ after this decision. According to the plurality, the “case involved little more than the application of” the *Crawford* holding.⁷⁹

The defendant was convicted of cocaine distribution and trafficking. Over the defendant's objection, the trial court admitted three “certificates of analysis” showing the lab analysis results of the seized drugs.⁸⁰ These certificates were “sworn to before a notary public” by the analysts who performed the testing, as required by Massachusetts law.⁸¹ Those analysts did not testify at trial and were not made available for cross-examination.⁸²

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

76. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307, 311 (2009).

77. *See id.* at 329. Justice Thomas concurred in the result reached by the plurality because of the formality/solemnity of the lab analysts' certifications. *See id.* at 329–30 (Thomas, J., concurring).

78. *Id.* at 326.

79. *Id.* at 329 (plurality opinion) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

80. *Id.* at 307–09.

81. *Id.* at 308 (internal quotation marks omitted) (citing MASS. GEN. LAWS, ch. 111, § 13 (2006)).

82. *Id.* at 309.

The plurality held that, while Massachusetts law referred to the documents in question as certificates, they fit the dictionary definition of affidavits: “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.”⁸³ Moreover, Massachusetts law set out that the “sole purpose” of the certificates was to prove that the drug was cocaine—the precise testimony the analysts would be expected to provide if called at trial.⁸⁴ Thus, the plurality held that the certificates were the functional equivalent of “live, in-court testimony, doing ‘precisely what a witness does on direct examination,’” and therefore testimonial.⁸⁵ As such, the Court declared that the analyst was a witness for Confrontation Clause purposes.⁸⁶

The dissent was adamant that analysts were not witnesses under the Sixth Amendment.⁸⁷ It argued that the plurality’s “fundamental mistake [was] to read the Confrontation Clause as referring to a kind of out-of-court statement—namely, a testimonial statement—that must be excluded from evidence.”⁸⁸ But, the Confrontation Clause “does not refer to kinds of statements,” nor does it contain the word “testimonial.”⁸⁹ Instead, the Confrontation Clause “refers to kinds of persons, namely, to ‘witnesses against’ the defendant.”⁹⁰ The dissent insisted that the Framers intended those words to refer to “conventional” witnesses, specifically those who perceive an event that gives them “personal knowledge of some aspect of the defendant’s guilt.”⁹¹ There should be a real difference between a laboratory analyst who performs scientific tests long after the commission of the crime and the percipient witness who contemporaneously observed the crime; the former is simply not a “witness against” the defendant as those words were intended by the Framers of the Sixth Amendment.⁹²

83. *Id.* at 310 (quoting BLACK’S LAW DICTIONARY 62 (8th ed. 2004)) (internal quotation marks omitted).

84. *Id.* at 310–11 (emphasis removed).

85. *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

86. *Id.* at 311.

87. *Id.* at 330 (Kennedy, J., dissenting).

88. *Id.* at 343.

89. *Id.*

90. *Id.*

91. *Id.* at 343–44.

92. *Id.* at 344. “Though there is ‘virtually no evidence of what the drafters of the Confrontation Clause intended it to mean,’ it is certain the Framers did not contemplate that an analyst who conducts a scientific test far removed from the crime would be considered a ‘witness against’ the defendant.” (alteration in original) (citation

The dissent was also concerned about the unlimited breadth of the majority's definition of "witness," particularly because it would "disrupt forensic investigations across the country" and "put prosecutions nationwide at risk of dismissal."⁹³ For example, many individuals may be involved in routine forensic testing of drugs: one laboratory analyst may initially handle, prepare a portion of the drug for analysis, and place it in a testing instrument; another analyst may retrieve the instrument's graph printout; another analyst may interpret the graph; and a specialized technician may certify that the instrument was properly calibrated and in good working order.⁹⁴ The dissent questioned whether all four analysts were witnesses under the plurality's interpretation of *Crawford* and *Davis* and, if so, whether each analyst was required to testify.⁹⁵ And what about the laboratory director that certifies the results? One could readily see the severe impact of this interpretation as laboratory analysts would be required to spend disproportionate amounts of time in court testifying instead of conducting investigative analyses.⁹⁶ The criminal justice system would be terribly inefficient and would slowly grind to a halt.⁹⁷

The plurality outright dismissed any notion that there are two different types of witnesses for Sixth Amendment purposes.⁹⁸ It insisted that statements recounting the result of scientific testing are no less subject to errors based on incompetence, flawed methodology, intentional fraud, subjectivity, or biases⁹⁹ and that the only way to assess this is by examining it with the "crucible of cross-examination."¹⁰⁰ It also questioned the accuracy

omitted) (quoting *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring in part and concurring in judgment)).

93. *See id.* at 340–43.

Because the Court is driven by nothing more than a wooden application of the *Crawford* and *Davis* definition of "testimonial," divorced from any guidance from history, precedent, or common sense, there is no way to predict the future applications of today's holding. . . . There is nothing predictable here . . . other than the uncertainty and disruption that now must ensue.

Id. at 337.

94. *Id.* at 332 (citing 2 P. GIANNELLI & E. IMWINKELRIED, SCIENTIFIC EVIDENCE § 23.03 (4th ed. 2007)).

95. *Id.* at 332–34.

96. *Id.* at 340–43.

97. *Id.* at 341–43.

98. *Id.* at 315–17 (plurality opinion).

99. *Id.* at 317–21.

100. *Id.* at 317 (quoting *Crawford v. Washington*, 541 U.S. 36, 61 (2004)).

of “the dissent’s dire predictions,”¹⁰¹ declaring that the prosecution need not call all possible individuals involved and may prove its case without them,¹⁰² and the defense may stipulate to much of the required scientific testimony.¹⁰³

At first glance, it did not seem that the one-paragraph concurrence by Justice Thomas would be significant in future confrontation cases.¹⁰⁴ He insisted the Confrontation Clause applied only when out-of-court statements “are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”¹⁰⁵ In the case at hand, the sworn certificates were “plainly affidavits” and therefore within the scope of the Confrontation Clause.¹⁰⁶ However, three years later in *Williams v. Illinois*, this formality requirement would become the deciding factor, just as the *Melendez-Diaz* dissent predicted.¹⁰⁷

After *Melendez-Diaz*, the direction given to the lower courts by the U.S. Supreme Court was still ambiguous. From *Crawford*, *Davis*, and *Melendez-Diaz*, the lower courts knew that the Sixth Amendment could apply to any hearsay declarants, whether the declarant was an eyewitness, a victim, or a forensic laboratory analyst. But, as the *Melendez-Diaz* dissent correctly argued, the plurality had not clarified how many analysts must

101. *Id.* at 325.

102. *See id.* at 311 n.1 (“It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.”).

103. *Id.* at 328. However, it may be ineffective assistance of counsel (IAC)—or even legal malpractice—if any defense attorney were to stipulate to the admission of such evidence after *Melendez-Diaz*, knowing that incriminating evidence would be excluded upon a Sixth Amendment objection and that the client could go free as a result. *See id.* at 354 (Kennedy, J., dissenting) (“Defense counsel will accept the risk that the jury may hear the analyst’s live testimony, in exchange for the chance that the analyst fails to appear and the government’s case collapses.”). Moreover, the scenario the plurality suggests would constitute totally irresponsible conduct for any defense attorney. Professional responsibility rules would require that a defense attorney refuse to stipulate unless he or she already knows that the analyst–witness is ready and willing to testify. *See id.* at 353 (citing ABA Model Code of Professional Responsibility, Canon 7-1, in ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS (2008)).

104. *See id.* at 329–30 (Thomas, J., concurring).

105. *Id.* at 329 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment)).

106. *Id.* at 330 (quoting *id.* at 310 (plurality opinion)).

107. *Id.* at 338 (Kennedy, J., dissenting) (“The facts of this case illustrate the formalistic and pointless nature of the Court’s reading of the Clause.”).

testify, and, if only one is required, which analyst's testimony would be sufficient.¹⁰⁸ That issue came before the Court two years later in *Bullcoming v. New Mexico*.¹⁰⁹

Six months before *Bullcoming*, the Court had to apply its still-imprecise testimonial test to a case involving the statements a murder victim made to the police before dying in *Michigan v. Bryant*.¹¹⁰ The victim's statement had been admitted under the state's hearsay exception for excited utterances; on appeal, it did not qualify as a dying declaration because the prosecutor had not established the foundation for that theory and the trial court judge had not ruled on it.¹¹¹ The Court returned to the *Davis* primary purpose test and held that the victim's statement to police was not testimonial because the primary purpose of questioning the victim was "to enable police assistance to meet an ongoing emergency"—that is, to protect the police and the public from the danger presented by the missing defendant.¹¹²

Five Justices joined in the *Bryant* majority's use of the *Davis* primary purpose test, and two others applied it to reach the opposite conclusion.¹¹³ Once again, Justice Thomas was the lone Justice opposed to using the primary purpose test to determine whether a statement was testimonial.¹¹⁴ Instead, he found that the police questioning "lacked sufficient formality and solemnity" for the hearsay statement to be testimonial.¹¹⁵

108. *See id.* at 332–33.

109. *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).

110. *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011).

111. *Id.* at 1151 n.1.

112. *Id.* at 1167 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)) (internal quotation marks omitted). The Court emphasized the urgency of the situation presented by "an armed shooter, whose motive for and location after the shooting were unknown." *Id.* at 1164.

113. *See id.* at 1149. Justices Scalia and Ruth Bader Ginsburg agreed that the primary purpose test applied, but they dissented as to the primary purpose of the victim's statements and concluded that his statements to the police were testimonial. *See id.* at 1170–71 (Scalia, J., dissenting); *id.* at 1176 (Ginsburg, J., dissenting). Justice Elena Kagan did not take part in the *Bryant* decision. *See id.* at 1149 (syllabus).

114. *See id.* at 1167–68 (Thomas, J., concurring).

115. *Id.*

D. Bullcoming v. New Mexico

The issue in *Bullcoming* was whether admission of the testimony of a substitute forensic analyst, who had not performed or observed any of the forensic testing, violated the Confrontation Clause.¹¹⁶ The defendant was convicted of driving while intoxicated based in part on a laboratory report stating that the defendant's blood alcohol level was 0.21.¹¹⁷ The analyst who performed the lab test affirmed the results in the report and signed a "certificate of analysis" affirming that all lab procedures had been followed but was not called as a witness.¹¹⁸ Unlike the report at issue in *Melendez-Diaz*, the report in *Bullcoming* was not sworn under oath; instead, it was certified by a "reviewer," who had reviewed the analysis performed, certified that the testing analyst was qualified to conduct the tests, and affirmed that established lab procedures had been followed; the reviewer was not called as a witness either.¹¹⁹ Instead, a substitute analyst from the same laboratory was called to lay the foundation for the report.¹²⁰ The substitute analyst was familiar with the protocol used at the laboratory, the scientific instrumentation used, and all the details involved with the testing in general, but had not been personally involved in any of the testing of the defendant's blood.¹²¹ The lab report was introduced into evidence after the substitute laid the foundation for it as a business record.¹²²

In a 5–4 decision, the U.S. Supreme Court held that testimony from the substitute analyst who had not performed or observed any of the testing could not satisfy the confrontation requirement and that the analyst who conducted the testing must be made available for cross-examination before the report could be admitted into evidence.¹²³ It was, in part, a fractured majority opinion: five Justices agreed that the lab report was testimonial;

116. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).

117. *Id.* at 2711. In terms of blood alcohol content, 0.21 is "an inordinately high level." *Id.* at 2710.

118. *See id.* at 2710–11. Before the defendant's trial, the analyst was placed on unpaid leave for unexplained reasons. *See id.* at 2711–12.

119. *Id.* at 2711.

120. *Id.* at 2715. Compare *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308 (2009), with *Bullcoming*, 131 S. Ct. at 2717.

121. *Bullcoming*, 131 S. Ct. at 2711–12.

122. *Id.* at 2712.

123. *Id.* at 2714–16 (majority opinion).

however, no five justices agreed as to what test should be used to define “testimonial.”¹²⁴ The majority stated that it would “not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.”¹²⁵ The majority found that the report’s formalities were “more than adequate to qualify [its] assertions as testimonial.”¹²⁶ The majority did not see any significant distinction between this report and the *Melendez-Diaz* report: the absence of an oath did not make the report informal and the analyst signed the certificate of analysis and affirmed how the test was conducted.¹²⁷

The majority insisted that the defendant would not be able to cross-examine the surrogate witness to bring out facts that could have been elicited from the analyst who performed the tests.¹²⁸ Cross-examination of the surrogate analyst could not convey information about what the testing analyst “knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed.”¹²⁹ Moreover, the majority indicated that it would “not tolerate dispensing with confrontation” even if questioning the surrogate could provide “a fair enough opportunity

124. *Id.* at 2716–17. It was an odd fractured opinion: Only Justice Scalia (who did not deliver the majority opinion) joined the opinion in full. *Id.* at 2709. He was the sole Justice who joined Part IV, which minimized the seriousness of the burden that the rule imposed on the prosecution. *See id.* at 2717–19. Only Justices Scalia, Sonia Sotomayor, and Kagan joined as to footnote 6, which focused on the primary purpose test established in *Davis*. *See id.* at 2714 n.6 (“To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.’” (alterations in original) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006))). Justice Sotomayor filed an additional concurring opinion, which is discussed below. *See id.* at 2719–23 (Sotomayor, J., concurring).

125. *Id.* at 2715 (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 334 (2009) (Kennedy, J., dissenting)) (internal quotation mark omitted).

126. *Id.* at 2717.

127. *Id.* (quoting *Melendez-Diaz*, 557 U.S. at 310–12 (plurality opinion)).

128. *Id.* at 2715–16.

129. *Id.* at 2715 & n.8. Cross-examination of the testing analyst could have raised jury questions regarding the proficiency of the analyst, the level of care he applied in performing his work, his veracity or trustworthiness, and the reason he had been placed on unpaid leave. *Id.* at 2715. Ironically, the majority conceded that, in all likelihood, the certifying analyst would not recall a particular test, given “the number of tests each analyst conducts and the standard procedure followed in testing.” *Id.* at 2715 n.7. If, as the majority concedes, an analyst is not expected to remember a particular test, and information about the general fallibility of laboratory testing procedures could be presented to the jury on cross-examination of the surrogate, then the purpose of requiring the certifying analyst to testify is unclear.

for cross-examination.”¹³⁰ This seems inconsistent with positions the Court has taken in other contexts, where the Court has held that the Sixth Amendment entitles the defendant to the right of confrontation but “not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”¹³¹

The vigorous dissent complained that the majority was now taking a “new and serious misstep of extending [the *Melendez-Diaz*] holding” to cases where an analyst *did* testify as to the foundation of the lab report and the procedures employed at the laboratory.¹³² This, in turn, extended and confirmed *Melendez-Diaz*’s “vast potential to disrupt criminal procedures.”¹³³ The dissent argued that the majority had no clear vision of the *Crawford* rule, which created “persistent ambiguities” and produced rulings “not amenable to sensible applications.”¹³⁴

The lab report at issue “was the result of a scientific process comprising multiple participants’ acts, each with its own evidentiary significance.”¹³⁵ Even after a close reading of the majority opinion, it was unclear what testimony from which of the three analysts involved in the testing would be required to make the report admissible.¹³⁶ After all, the testifying surrogate

130. *Id.* at 2716.

131. *United States v. Owens*, 484 U.S. 554, 559 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)) (internal quotation mark omitted). In that case, providing the defendant an opportunity to cross-examine a victim–witness who had suffered brain damage and near-total memory loss was held to be sufficient to allow admission of the victim–witness’s prior statements, even though the victim–witness could not be cross-examined meaningfully about those prior statements. *See id.* at 559–60.

132. *Bullcoming*, 131 S. Ct. at 2723 (Kennedy, J., dissenting). The same four Justices who dissented in *Melendez-Diaz* dissented in *Bullcoming*; Justice Kennedy filed dissenting opinions in both cases, and Chief Justice Roberts, Justice Breyer, and Justice Alito joined both of them. *See id.* at 2723–28; *Melendez-Diaz*, 557 U.S. at 330–63 (Kennedy, J., dissenting).

133. *Bullcoming*, 131 S. Ct. at 2725 (quoting *Melendez-Diaz*, 557 U.S. at 331) (internal quotation marks omitted). The *Bullcoming* dissent noted that, two years after *Melendez-Diaz*, the evidence of its undue burden on the prosecution had already begun to mount; it cited amici briefs showing that “each blood-alcohol analyst in California processes 3,220 cases per year on average,” and “the 10 toxicologists for the Los Angeles Police Department spent 782 hours at 261 court appearances during a 1-year period.” *Id.* at 2728 (citations omitted).

134. *Id.* at 2726.

135. *Id.* at 2724.

136. “[T]his case involved “three laboratory analysts who, respectively, received, analyzed, and reviewed analysis of the sample.” *Id.*

analyst helped oversee the administration of the blood-alcohol testing programs throughout the entire state and was qualified to answer questions about each step of the scientific procedures involved, and in all likelihood the test analyst would not recall a particular test.¹³⁷ And how would the majority rule apply in cases where a DNA analysis involves “the combined efforts of up to 40 analysts”?¹³⁸ To the dissent, all this confusion stemmed from the majority’s interpretation of the word “witnesses” that was “at odds with its meaning elsewhere in the Constitution” and “at odds with the sound administration of justice.”¹³⁹ As the dissent insisted, it was “time to return to solid ground.”¹⁴⁰

Justice Sonia Sotomayor concurred that the report was testimonial.¹⁴¹ She was one of three Justices who joined in the footnote advancing the use of the primary purpose test to determine whether the report was testimonial.¹⁴² She did, however, leave a ray of hope for clarification in future cases. In her concurrence, Justice Sotomayor emphasized the limited reach of the majority opinion¹⁴³ and pointed out that (1) no alternative primary purpose for the creation of the lab report had been suggested;¹⁴⁴ (2) the surrogate witness was not a supervisor with even limited personal knowledge of the test;¹⁴⁵ (3) the surrogate witness did not express any independent opinion based on a report that was not admitted into evidence;¹⁴⁶ and (4) this was not the case where the raw data printout of the scientific instrument had been introduced into evidence.¹⁴⁷

After *Bullcoming*, the already unclear test for testimonial statements became even more unclear. What were the outer limits of testimonial statements?¹⁴⁸ Was there a testimonial difference between a forensic

137. *Id.*

138. *See id.* (quoting Brief for State of Indiana et al. as Amici Curiae at 10, 130 S. Ct. 1316 (2010) (No. 07-11191)).

139. *Id.* at 2728.

140. *Id.*

141. *Id.* at 2721 (Sotomayor, J., concurring).

142. *See id.* at 2714 n.6 (majority opinion) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

143. *See id.* at 2719–23 (Sotomayor, J., concurring).

144. *Id.* at 2722.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Williams v. Illinois*, 132 S. Ct. 2221, 2244 (2012) (Breyer, J., concurring).

laboratory report and a forensic autopsy report? If not, was that one of the unintended consequences of the *Crawford–Melendez–Diaz–Bullcoming* domino effect? As the *Bullcoming* dissent correctly pointed out, the lower courts were left to guess what future rules the Court would create and “to struggle to apply an ‘amorphous, if not entirely subjective,’ ‘highly context-dependent inquiry’ involving ‘open-ended balancing.’”¹⁴⁹ On the other hand, Justice Sotomayor’s suggestion about offering an expert’s independent opinion based on a nonadmitted report seemed to point toward a practical and workable solution that would be supported by a majority of the Court.¹⁵⁰ All one could hope for was that the Court would clarify matters in its next Confrontation Clause case. That opportunity came one year later in *Williams v. Illinois*.¹⁵¹

E. Williams v. Illinois

All hope for a bright-line rule was shattered with the even more severely fractured opinion in *Williams*. Five Justices agreed on the result, but only four agreed on the rationale supporting it.¹⁵² Justice Thomas concurred with the plurality as to the judgment only but disagreed as to the rationale—no other Justice joined his concurrence or agreed with his rationale.¹⁵³ Four Justices completely disagreed with the separate results reached by the plurality and Justice Thomas.¹⁵⁴ The five Justices who agreed on the judgment “agree[d] on very little” and “left significant confusion in their wake.”¹⁵⁵ It was not even clear if the previous amorphous rule from *Melendez–Diaz* and *Bullcoming* remained the same after *Williams*.¹⁵⁶ Nevertheless, it is important to carefully examine all the opinions in order to understand what the Court may decide when it is faced with questions regarding the admission of autopsy reports or expert testimony regarding an autopsy report in a case in which the autopsy pathologist has died or is

149. *Bullcoming*, at 2726 (Kennedy, J., dissenting) (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1175 (2011) (Scalia, J., dissenting)).

150. *See id.* at 2722 (Sotomayor, J., concurring).

151. *Williams*, 132 S. Ct. 2221.

152. The plurality opinion was delivered by Justice Alito; Justice Kennedy, Justice Breyer, and Chief Justice Roberts joined it. *See id.*

153. *See id.* at 2255–64 (Thomas, J., concurring).

154. *See id.* at 2264–77 (Kagan, J., dissenting). Justice Scalia, Justice Ginsburg, and Justice Sotomayor joined Justice Kagan’s dissent. *See id.*

155. *Id.* at 2277.

156. *Id.* (“What comes out of four Justices’ desire to limit *Melendez–Diaz* and *Bullcoming* in whatever way possible . . . , is—to be frank—who knows what.”).

otherwise unavailable.

Williams was convicted of rape after a bench trial in which a DNA expert from a state lab, operated by the Illinois State Police (ISP), testified that a DNA profile generated by an outside lab matched the defendant's DNA profile.¹⁵⁷ The victim's rape kit samples had been sent by the state lab to Cellmark Diagnostics Laboratory (Cellmark), an accredited and well-established DNA forensics lab.¹⁵⁸ Cellmark generated a profile from the seminal fluids in the sample and sent that profile back to the ISP lab.¹⁵⁹ The defendant was later arrested on unrelated charges, and the ISP lab generated his DNA profile from his postarrest sample.¹⁶⁰ The ISP lab DNA expert compared the two profiles and testified at trial that they matched.¹⁶¹ The Cellmark report was neither admitted into evidence nor shown to the finder of fact, and no witness from Cellmark testified at trial.¹⁶² Evidence of the chain of custody of the DNA sample to and from Cellmark and the receipt of the Cellmark report by ISP were presented through testimony of ISP witnesses.¹⁶³

It has long been accepted in the trial courts that an expert may express an opinion based on otherwise-inadmissible hearsay evidence as long as the matters were the type on which experts in the field reasonably relied.¹⁶⁴ This was codified in the Federal Rules of Evidence when they were enacted in 1975.¹⁶⁵ But the Court had not yet considered the validity of this rule in light of *Melendez-Diaz* and *Bullcoming*, and it was unclear whether it would survive modern Sixth Amendment scrutiny.

The *Williams* plurality opinion held that the ISP lab expert's opinion did not violate the defendant's Sixth Amendment confrontation rights for two independent reasons: (1) the expert's reference to the report content was not offered for the truth of the matter asserted, and therefore was not controlled by the Confrontation Clause,¹⁶⁶ and (2) even if the report had

157. *See id.* at 2229–30.

158. *See id.*

159. *See id.*

160. *See id.* at 2229.

161. *See id.* at 2229–30.

162. *See id.* at 2230.

163. *Id.*

164. *Id.* at 2234.

165. *See FED. R. EVID.* 703. Illinois has a similar rule, which the Illinois trial court relied upon in this case. *See ILL. R. EVID.* 703.

166. *See Williams*, 132 S. Ct. at 2235.

been admitted to prove the truth of the matter asserted, it was not testimonial because its primary purpose was not to accuse a targeted individual but rather “to catch a dangerous rapist who was still at large.”¹⁶⁷ As the dissent pointed out, this latter test was narrower than and very different from the *Davis* primary purpose test, in that it included two additional requirements: (1) an accusation and (2) a targeted individual.¹⁶⁸

Justice Thomas disagreed with both rationales of the plurality but concurred in the result “solely because Cellmark’s statements lacked the requisite ‘formality and solemnity’ to be considered ‘testimonial’ for purposes of the Confrontation Clause.”¹⁶⁹ He reiterated his previous position in *Davis* that the use of a primary purpose test to decide testimoniality was inappropriate but also added that the plurality’s modified “accusatory primary purpose” test was even more inappropriate.¹⁷⁰ Unlike the plurality, Justice Thomas concluded that the Cellmark report referenced by the expert was introduced for the truth of the matters it asserted but that it was not testimonial simply because it was not sufficiently formal.¹⁷¹

The dissent disagreed with the plurality and with Justice Thomas’s concurrence on almost every single point. The dissent insisted that the use of the reference by the expert was admitted for the truth of the matter asserted, the Cellmark report was testimonial,¹⁷² and the plurality’s new primary purpose of accusing a targeted individual test had in fact been rejected in *Bullcoming*.¹⁷³ The dissent also asserted that Justice Thomas’s solemnity approach would “grant[] constitutional significance to minutia, in a way that can only undermine the Confrontation Clause’s protections.”¹⁷⁴ It would find that the “difference in labeling—a ‘certificate’ in [*Bullcoming*], a ‘report of laboratory examination’ in [*Williams*]—is not of constitutional dimension.”¹⁷⁵

Justice Stephen Breyer joined with the plurality opinion in full and

167. *Id.* at 2243.

168. *See id.* at 2273–74 (Kagan, J., dissenting).

169. *Id.* at 2255 (Thomas, J., concurring) (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring)).

170. *Id.* at 2261–63.

171. *Id.* at 2256, 2260.

172. *Id.* at 2275 (Kagan, J., dissenting).

173. *Id.* at 2277.

174. *Id.* at 2276.

175. *Id.*

wrote separately to add that it was time to define the “outer limits” of “testimonial statements” within the meaning of the *Crawford* line of cases.¹⁷⁶ Justice Breyer would have preferred to invite further briefings and reargument on that issue¹⁷⁷ and indicated that that there was “no logical stopping place between requiring the prosecution to call as a witness one of the laboratory experts who worked on the matter and requiring the prosecution to call *all* of the laboratory experts who did so.”¹⁷⁸ Justice Breyer pointed out that any modern lab report consists of “layer upon layer of technical statements (express or implied) made by one expert and relied upon by another” and that lower courts and treatise writers had suggested a variety of solutions to the problems that *Melendez-Diaz* and *Bullcoming* had created.¹⁷⁹

Justice Breyer endorsed one possible solution: forensic lab reports would presumptively fall outside the category of testimonial statements.¹⁸⁰ The presumption would be rebuttable if there was evidence that the testing methodology was flawed or if any other factor suggested the results were not accurate.¹⁸¹ Under such circumstances, the report would then be considered testimonial and subject to the Confrontation Clause.¹⁸²

Finally, Justice Breyer foresaw some of the unintended consequences of the sequence of *Crawford–Melendez-Diaz–Bullcoming* decisions; he predicted that the dissent’s position could backfire and “undermine, not fortify, the accuracy of factfinding at a criminal trial.”¹⁸³ Classifying forensic DNA analyses as testimonial statements could bar other reliable documents—“such as, say, autopsy reports.”¹⁸⁴ Justice Breyer queried: “What is to happen if the medical examiner dies before trial? Is the Confrontation Clause effectively to function as a statute of limitations for murder?”¹⁸⁵ Unfortunately, no other Justice addressed the autopsy question, and lower courts resolving cases that present similar questions have been left to come up with their own answers.

176. *Id.* at 2244 (Breyer, J., concurring) (internal quotation marks omitted).

177. *Id.* at 2245.

178. *Id.* at 2246.

179. *See id.* at 2247–48.

180. *Id.* at 2251.

181. *Id.* at 2252.

182. *Id.* at 2249–52. For further discussion of Justice Breyer’s proposal, see *infra* Part V.C.1.

183. *Id.* at 2251.

184. *Id.*

185. *Id.* (citations omitted) (internal quotation marks omitted).

Before *Williams*, the *Melendez-Diaz–Bullcoming* analysis seemed to be the appropriate way to deal with autopsy reports; after all, an autopsy report is also a forensic report similar to the DNA report in *Williams*. It is hard to tell how *Williams* has affected that analysis, if at all, but one thing that is clear after *Williams* is that the Justices are deeply divided and appear very much entrenched in opposite positions. Without any bright-line directive from the U.S. Supreme Court, lower courts have likewise split on how the amorphous testimonial test applies when dealing with the admissibility of an autopsy report and, more importantly, whether it is permissible to allow opinion testimony of a surrogate pathologist on the cause of death in a case where the original autopsy pathologist has died or is otherwise unavailable. Some lower courts have come to the conclusion that *Williams* does not affect autopsy reports at all and that the proper analysis is under *Melendez-Diaz–Bullcoming*.¹⁸⁶ Other courts have concluded that *Williams* does affect analyses of autopsy reports offered without opportunity for confrontation.¹⁸⁷ Part IV surveys how the lower courts have addressed these issues.

IV. AUTOPSY REPORTS AND SURROGATE EXPERT OPINION TESTIMONY AS TO THE CAUSE OF DEATH IN MURDER CASES

A survey of recent post-*Williams* lower court decisions shows a surprising trend by many courts of allowing surrogate expert testimony on cause of death if the opinion of the surrogate is based on the observations of the autopsy pathologist that are noted in the autopsy report but not on the conclusions of that pathologist. This seems inconsistent with the dictates of *Melendez-Diaz* and *Bullcoming*, which rejected the notion that contemporaneously recorded observations of facts or events surrounding forensic inquiries were nontestimonial even if the recorder has “the scientific acumen of Mme. Curie and the veracity of Mother Teresa.”¹⁸⁸ The majority of lower courts come to that conclusion by finding that the part of the report lacks formality or that the primary purpose test for testimoniality is not satisfied.¹⁸⁹

186. See *infra* Part IV.A.

187. See *infra* Part IV.B.

188. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 n.6 (2009)) (internal quotation marks omitted).

189. Most of the decisions are not unanimous, mirroring the split of the Justices of the U.S. Supreme Court.

**A. Examples of Courts That Have Concluded That Surrogate Autopsy
Expert Testimony Is Nontestimonial**

1. California

The leading case in California is *People v. Dungo*.¹⁹⁰ A detailed discussion of *Dungo* is appropriate because it illustrates the approach of many other jurisdictions that have come to the same conclusions. *Dungo* was charged with second-degree murder for strangling his girlfriend; *Dungo*'s mitigation defense was that he killed her in the heat of passion during an argument over his parenting skills and therefore was only guilty of voluntary manslaughter.¹⁹¹ The difference in sentences between second-degree murder and voluntary manslaughter was substantial.¹⁹²

The autopsy of the victim was performed by Dr. Bolduc, who worked for the San Joaquin County Coroner.¹⁹³ Bolduc was not called as witness, and there was no showing of his unavailability; instead, the prosecution called Dr. Lawrence, who “at the time of trial was Bolduc’s employer,” to testify as to cause of death.¹⁹⁴ Lawrence had not been present at the time of the autopsy. At a pretrial evidentiary hearing, Lawrence testified that: (1) Bolduc had previously been employed as a coroner in Kern County but had been fired from that job; (2) Bolduc had previously resigned as a coroner for

190. *People v. Dungo*, 286 P.3d 442 (Cal. 2012). *Dungo* enumerated principles that have been applied in many subsequent cases, including a death penalty case on which the U.S. Supreme Court recently denied certiorari. *See People v. Edwards*, 306 P.3d 1049 (Cal. 2013), *cert. denied*, 134 S. Ct. 2662 (May 27, 2014). In *People v. Edwards*, Dr. Richards performed the murder victim’s 1986 autopsy, written an autopsy report, and since retired from the medical group that had a contract with the Orange County Sheriff’s Department to perform autopsies in Orange County. The autopsy report was not admitted into evidence; it was signed but not sworn or certified. Dr. Fukumoto formed his own opinion after reviewing Dr. Richards’s autopsy report, autopsy photographs, X-rays, and microscopic slides of organ tissues; at trial, Dr. Fukuyama opined that the victim died as a result of “asphyxiation due to a ligature strangulation,” and he agreed with the prosecutor this was consistent with Dr. Richards’s opinion. *See id.* at 1065–67; *see also People v. Rodriguez*, 319 P.3d 151, 195 (Cal. 2014) (applying *Dungo*).

191. *Dungo*, 286 P.3d at 444–46.

192. Second-degree murder currently carries a “15 years to life” penalty. *See CAL. PENAL CODE § 190(a) (2014).* Voluntary manslaughter carries a penalty of either three years, six years, or 11 years at the discretion of the sentencing judge. *See CAL. PENAL CODE § 193(a) (2014).*

193. *Dungo*, 286 P.3d at 445.

194. *Id.*

Orange County “under a cloud”;¹⁹⁵ (3) various newspaper articles claimed that Bolduc was incompetent; (4) several California prosecutors refused to use Bolduc as an expert witness in homicide cases; and (5) he had not seen any evidence that Bolduc “ever did anything incompetent.”¹⁹⁶ Lawrence also stated that he had reviewed Bolduc’s autopsy report and the accompanying photographs and agreed with Bolduc’s conclusion that the victim died from “asphyxia due to neck compression.”¹⁹⁷ The trial court ruled that Lawrence could be called to testify as to the cause of death, but that the defense could also cross-examine him about Bolduc’s qualifications as a pathologist, “as this was relevant to the trustworthiness of the facts stated in Dr. Bolduc’s autopsy report.”¹⁹⁸

At trial, Lawrence testified that after reviewing the autopsy reports and the photographs, he concluded that the victim “died from asphyxia caused by strangulation.”¹⁹⁹ He testified about the condition of the victim’s body, including the fact that her hyoid bone was not fractured.²⁰⁰ Lawrence had no personal knowledge of these observations that were included in Bolduc’s autopsy report.²⁰¹ Based solely on the facts recorded in that report, Lawrence gave his independent opinion as to the cause of death and opined that the victim had to have been strangled for “more than two minutes” because the hyoid bone was not fractured.²⁰² Neither the autopsy report nor the photographs were admitted into evidence.²⁰³ The autopsy report was not certified.²⁰⁴

In closing arguments, the prosecutor cited Lawrence’s testimony and

195. The California Supreme Court took judicial notice of its opinion in *People v. Beeler*, where it had dealt with Bolduc’s testimony in an Orange County capital murder case and noted that another pathologist testified that Bolduc had caused “consternation” in a prior case because he based “his conclusion regarding the cause of death on a police report rather than on medical evidence.” *Id.* at 445 n.2 (quoting *People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995)) (internal quotation marks omitted).

196. *Id.* at 445–46.

197. *Id.* at 446.

198. *Id.* Oddly, the defense never cross-examined Dr. Lawrence about the Bolduc issues. *See id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* The *Dungo* court took judicial notice of the actual autopsy report for the purpose of resolving the legal issues on appeal. *Id.* at 446 n.3.

204. *Id.* at 452.

argued that the defendant could not have been acting under the heat of passion for “more than two minutes,” that any passion would have dissipated during that length of time, and that “therefore the killing was murder rather than manslaughter.”²⁰⁵ The defendant was convicted of second-degree murder.²⁰⁶ On appeal, the defendant claimed that Lawrence’s testimony violated his Sixth Amendment confrontation right.²⁰⁷ The California Supreme Court held (5–2) that there was no violation of the Sixth Amendment.²⁰⁸

The California Supreme Court reviewed *Crawford*, *Melendez-Diaz*, *Bullcoming*, and *Williams*, noting that the “widely divergent views” of the U.S. Supreme Court Justices’ opinions in those cases “highlight the complexity of the issue.”²⁰⁹ The *Dungo* court observed that the autopsy report was not admitted into evidence and that Lawrence never described Bolduc’s conclusions that were contained in the report.²¹⁰ As such, the question presented was limited to Lawrence relying on a limited portion of the autopsy report: Bolduc’s descriptions of the condition of the victim’s body.²¹¹ The question was “whether Dr. Lawrence’s testimony about these objective facts entitled the defendant to confront and cross-examine Dr. Bolduc”—in short, were Bolduc’s recorded observations testimonial?²¹² If they were, then so was Lawrence’s testimony that was based on them.²¹³

The *Dungo* court examined the two factors that the U.S. Supreme Court Justices agreed on as a test to determine if a statement was testimonial: (1) formality or solemnity and (2) primary purpose.²¹⁴

205. *Id.* at 446.

206. *Id.* at 447.

207. *Id.*

208. *See id.* at 444; *see also id.* at 458 (Corrigan, J., dissenting).

209. *Id.* at 448.

210. *Id.* at 449. Dr. Lawrence’s reliance on the autopsy photographs did not pose any problem because photographs are not hearsay.

211. *Id.*

212. *Id.*

213. *See id.* That logic is consistent with the conclusions of the five Justices in *Williams*, who concluded the Cellmark DNA report was admitted for the truth of the matter when the surrogate DNA expert based his testimony on its contents. *See Williams v. Illinois*, 132 S. Ct. 2221, 2256 (2012) (Thomas, J., concurring); *id.* at 2268 (Kagan, J., dissenting).

214. *Dungo*, 286 P.3d at 449–50. The *Dungo* court also recognized the profound disagreement between those Justices on how to define these terms. *See id.*

An autopsy report typically contains two types of statements: (1) statements describing the pathologist's anatomical and physiological observations about the condition of the body, and (2) statements setting forth the pathologist's conclusions as to the cause of the victim's death. The out-of-court statements at issue here—pathologist Bolduc's observations about the condition of [the victim's] body—all fall into the first of the two categories. These statements, which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions. They are comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment. Such observations are not testimonial in nature.²¹⁵

Accordingly, the California Supreme Court held that Bolduc's descriptions of the victim's body were not sufficiently formal or solemn so as to be testimonial.²¹⁶ The fact that the autopsy was mandated by a statute that required public findings and notification of law enforcement²¹⁷ did not imply that those statements were formal and solemn, but they could be relevant in the analysis of the primary purpose.²¹⁸

Turning to the primary purpose of the autopsy report, the *Dungo* court initially noted that the coroner's statutory duty to investigate was the same “regardless of whether the death resulted from criminal activity.”²¹⁹ As the court pointed out, the autopsy report's usefulness is “not limited to criminal investigation and prosecution”—an autopsy report could be used by insurance companies to determine their liability for coverage of a certain death; the decedent's relatives could use it as a basis for filing a wrongful

215. *Id.* at 449 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2 (2009) (noting that “medical reports created for treatment purposes . . . would not be testimonial under our decision today”)).

216. *Id.* at 450.

217. See CAL. GOV'T CODE § 27491 (2014) (requiring California county coroners to “inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths,” which includes “deaths under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another” but also includes deaths from causes unrelated to criminal behavior, such as alcoholism, contagious disease, or sudden infant death syndrome); *id.* (requiring county coroners to notify law enforcement in all cases in which they have reasonable grounds to believe that death was caused by a criminal act).

218. *Dungo*, 286 P.3d at 449–50.

219. *Id.* at 450.

death suit; the report may “satisfy the public’s interest in knowing the cause of death” in some cases; or the report may provide answers to the decedent’s grieving family.²²⁰ Accordingly, the court concluded that “criminal investigation was not the *primary purpose*” for the descriptions of the victim’s body contained in the autopsy report; “it was only one of several purposes.”²²¹ The report “was simply an official explanation of an unusual death” and, as such, it was not testimonial.²²² The presence of the police at the autopsy and the coroner’s statutory duty to report suspicious findings to law enforcement “do not change that conclusion.”²²³

Having failed both the formality and the primary purpose tests, the descriptions of the body were not testimonial; it followed that Lawrence’s testimony that was based on Bolduc’s descriptions was not testimonial and the defendant was not entitled to confront Bolduc.²²⁴

Justice Kathryn Werdegar filed a concurring opinion that was also joined by three other justices.²²⁵ She pointed out that an autopsy examination follows a structured process that is “largely that of a medical examination, not an interrogation.”²²⁶ She noted that the National Association of Medical Examiners’ (NAME) professional standards indicate that “[p]erformance of a forensic autopsy is the practice of medicine.”²²⁷ Moreover, “[a] professionally prepared autopsy report should record the pathologist’s observations of the external examination and, where performed, the internal examination of the decedent’s body, with a description of all internal and external injuries observed ‘in sufficient detail to support diagnoses, opinions, and conclusions.’”²²⁸ Justice Werdegar concluded that the recording of autopsy observations was governed “primarily by *medical* standards rather than by legal requirements of formality or solemnity”²²⁹ She also concluded

220. *Id.*

221. *Id.*

222. *Id.* (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009)).

223. *Id.*

224. *Id.*

225. *Id.* at 451 (Werdegar, J., concurring).

226. *Id.* at 452.

227. *Id.* (quoting NAT’L ASS’N OF MED. EXAM’RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS, std. B4, at 10 (2011) [hereinafter NAME, PERFORMANCE STANDARDS]).

228. *Id.* (quoting NAME, PERFORMANCE STANDARDS, *supra* note 227, at std. H31.8, p.25).

229. *Id.* at 452–53.

that the nontestimonial aspects of the physical observations made by pathologists during autopsies predominated over the testimonial qualities: the pathologist records his observations “to support or refute interpretations” and “to serve as a record,” not just to “provide evidence for court.”²³⁰

The dissent in *Dungo* would find that Lawrence’s testimony was testimonial because the observations of the victim’s body in the autopsy report were sufficiently formal²³¹ and the primary purpose of recording that information was “to establish facts for possible use in a criminal trial.”²³² The dissent pointed out that there is no distinction between the forensic pathologist’s anatomical observations of the victim and the conclusion as to the cause of death in deciding the testimonial issue; such a distinction, the dissent argued, had been considered and rejected in *Bullcoming*.²³³

2. Ohio

The Ohio Supreme Court (5–2) very recently came to a similar conclusion in the death penalty case of *State v. Maxwell*, and went even further by also allowing the admission of the autopsy report.²³⁴ Maxwell was charged with the capital murder of his girlfriend who was shot to death at close range.²³⁵ Dr. Dolinak, a medical examiner who was employed by the county coroner’s office, performed the autopsy on the victim.²³⁶ By the time of trial, Dolinak had moved to become a medical examiner in Austin, Texas.²³⁷ The prosecution called Dr. Felo to testify to the autopsy and to the cause of death even though he had no personal knowledge of the autopsy.²³⁸ “Dr. Felo testified that he had reviewed the autopsy report and the autopsy photographs and x-rays of the victim and looked at tissue slides under the microscope.”²³⁹ Over objection, Felo discussed the physical condition of the

230. *Id.* at 453 (quoting NAME, PERFORMANCE STANDARDS, *supra* note 227, at std. E15, p.15).

231. *Id.* at 464 (Corrigan, J., dissenting).

232. *Id.* at 467.

233. *Id.* at 463 (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714–15 (2011)).

234. *See State v. Maxwell*, 9 N.E.3d 930, 941 (Ohio 2014).

235. *Id.* at 944.

236. *Id.* at 943.

237. *Id.* at 945.

238. *See id.*

239. *Id.*

victim and evidence of the proximity of the gun that fired the fatal bullets.²⁴⁰ He presented his independent opinion that the cause of death was gunshot wounds to the head.²⁴¹ The autopsy report was also admitted into evidence over defense counsel's objection.²⁴²

The Ohio Supreme Court focused on the primary purpose test and did not address the formality issue.²⁴³ It held that an autopsy report is nontestimonial because it "is neither prepared for the primary purpose of accusing a targeted individual nor prepared for the primary purpose of providing evidence in a criminal trial."²⁴⁴ "Although autopsy reports are sometimes relevant in criminal prosecutions, . . . they are not created primarily for a prosecutorial purpose."²⁴⁵ After all, "coroners are statutorily empowered to investigate unnatural deaths" and routinely perform autopsies in all types of unnatural deaths, and are not limited to potential homicides.²⁴⁶ The *Maxwell* court noted that, like the statements analyzed in *Bryant*, "[a]utopsy reports are not intended to serve as an 'out-of-court substitute for trial testimony.'"²⁴⁷ It insisted that they are prepared "for the primary purpose of documenting cause of death for public records and public health."²⁴⁸

The court was also concerned about the "unique policy interests" that are at stake when dealing with the admissibility of autopsy reports in contradistinction of other *Crawford*-related hearsay.²⁴⁹ The autopsy pathologist may be deceased or unavailable when a trial begins, and "unlike other forensic tests, a second autopsy may not be possible" because of the passage of time or if the victim's body has been cremated.²⁵⁰

240. *See id.*

241. *Id.*

242. *Id.*

243. *See id.* at 948–49.

244. *Id.* at 952. This conclusion covers the tests articulated by both the *Williams* plurality (accusing a targeted individual) and the *Williams* dissent (prepared for use at a criminal trial). *See supra* Part III.E.

245. *Maxwell*, 9 N.E.3d at 951.

246. *Id.*

247. *Id.* at 950 (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011)).

248. *Id.* (quoting Carolyn Zabrycki, Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CALIF. L. REV. 1093, 1130 (2008)) (internal quotation marks omitted).

249. *Id.* at 951.

250. *Id.*

The vigorous dissent in *Maxwell* would have found that the autopsy report and the surrogate testimony violated the defendant's right of confrontation.²⁵¹ It pointed out that *Melendez-Diaz* "held that the business-and-official-records hearsay exception does not permit an otherwise inadmissible testimonial statement to be admitted into evidence."²⁵² If the autopsy report was prepared "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,"²⁵³ it is testimonial even if there were "other purposes unrelated to its later use at trial."²⁵⁴ The issue of the testimoniality of an autopsy report should be examined on a case-by-case basis—not every autopsy report is testimonial.²⁵⁵ The dissent favored the definition of "primary purpose" that had been advocated in a concurrence in a Second Circuit case: "[A] testimonial statement is one having an evidentiary purpose, declared in a solemn manner, and made under circumstances that would lead a reasonable declarant to understand that it would be available for use prosecutorially."²⁵⁶ The autopsy report in *Maxwell* would be testimonial under that test.

3. Illinois

The Illinois Supreme Court took a similar approach in the post-*Williams* murder case of *People v. Leach*.²⁵⁷ The victim had been strangled by the defendant; the length of time it took for the victim to die was a critical factor in deciding whether the defendant was guilty of first-degree murder

251. *See id.* at 997 (Pfeifer, J., concurring in part and dissenting in part).

In my mind, the "statute of limitations on murder" belies the argument for autopsy reports being nontestimonial. If having no autopsy report available makes a murder conviction impossible, elevating an autopsy to a central role in a murder trial, does that not make it all the more imperative that a defendant have an opportunity to call into doubt the veracity of the report through cross-examination?

Id.

252. *Id.* at 988 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009)).

253. *Id.* (quoting *Melendez-Diaz*, 557 U.S. at 311) (internal quotation marks omitted).

254. *Id.*

255. *See id.*

256. *Id.* at 991 (alteration in original) (citing *United States v. James*, 712 F.3d 79, 108 (2d Cir. 2013) (Eaton, J., concurring)).

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

or involuntary manslaughter.²⁵⁸

Dr. Choi, a member of the Cook County Medical Examiner's office who had performed the autopsy, retired before the time of trial and did not testify.²⁵⁹ Dr. Arangelovich, a member of the same office, testified as to the cause and manner of death.²⁶⁰ Arangelovich had reviewed, *inter alia*, the autopsy report that included Choi's description of "external and internal examinations of the body," along with photographs and toxicological reports.²⁶¹ Based on that information, Arangelovich opined that "the cause of death was strangulation and the manner of death was homicide."²⁶² "The basis for her conclusion included 'marks on the neck,' 'bloody tinged fluid' in the trachea, and 'hemorrhages in both eyes,' which 'means that there was some pressure placed on her neck which stopped her blood flow from going in and out of the brain.'"²⁶³ Arangelovich also testified that it would take between three to six minutes for "irreversible brain death" to occur.²⁶⁴ At the end of her trial testimony, "Dr. Arangelovich reiterated that she did not conduct the autopsy, but that she agreed with Dr. Choi's finding of strangulation."²⁶⁵ The autopsy report was admitted into evidence; the report was signed by Choi but was not certified or sworn.²⁶⁶

The *Leach* court noted the disagreements among the U.S. Supreme Court Justices as to what primary purpose test to apply.²⁶⁷ An autopsy report is prepared in the normal course of operation of the medical examiner's office to determine the cause and manner of any "sudden or violent death" that might have been "suicidal, homicidal, or accidental."²⁶⁸ Moreover, autopsy reports are prepared for a variety of purposes, many unrelated to

258. *Id.* at 595 ("However long it took between the victim's losing consciousness and her death—three minutes, four minutes, five minutes, or six minutes—defendant maintained sufficient pressure with his hands to cause her death. The court concluded that one could not maintain such pressure for such a length of time without knowing that the act could cause death or great bodily harm.").

259. *Id.* at 573.

260. *Id.* at 575–76.

261. *Id.* at 575.

262. *Id.*

263. *Id.*

264. *Id.* at 576 (internal quotation marks omitted).

265. *Id.*

266. *Id.* at 592, 594.

267. *See id.* at 587.

268. *Id.* at 591 (quoting 55 ILL. COMP. STAT. ANN. 5/3-3013(a) (West 2010)) (internal quotation marks omitted).

criminal prosecutions:

A finding of accidental death may eventually lead to claims of product liability, medical malpractice, or other tort. A finding of suicide may become evidence in a lawsuit over proceeds of a life insurance policy. Similarly, a finding of homicide may be used in a subsequent prosecution of the accused killer.²⁶⁹

The *Leach* court concluded that the autopsy report was not testimonial under either the *Williams* plurality's primary purpose test or the *Williams* dissent's primary purpose test: "it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case."²⁷⁰ The fact that the pathologist was aware that the police suspected a specific person of homicide did not make the autopsy report testimonial.²⁷¹ "[H]is examination could have either incriminated or exonerated [the defendant], depending on what the body revealed about the cause of death."²⁷² Therefore, there was no violation of the defendant's right of confrontation when the surrogate pathologist testified or when the autopsy report was admitted into evidence.²⁷³

The lone dissenter in *Leach* would have found that the autopsy report was testimonial and that it was "prepared to obtain evidence for use against [the] defendant"²⁷⁴ because the autopsy pathologist had been informed that police suspected the victim's husband of strangling the victim, the husband was in police custody, and the husband had already confessed to the crime.²⁷⁵

4. Arizona

In 2012, the Arizona Supreme Court addressed the surrogate testimony issue in the death penalty murder case of *State v. Joseph*.²⁷⁶ Dr. Kohlmeier performed the victim's autopsy and prepared the autopsy report, but did not testify at trial.²⁷⁷ The autopsy report was not admitted into

269. *Id.* at 592 (quoting *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012)).

270. *Id.* at 590.

271. *Id.* at 593.

272. *Id.* at 591.

273. *Id.* at 593–94.

274. *Id.* at 597 (Kilbride, C.J., dissenting).

275. *Id.* at 598.

276. *State v. Joseph*, 283 P.3d 27 (Ariz. 2012).

277. *Id.* at 29.

evidence.²⁷⁸ Dr. Keen, the State's medical expert, reviewed Kohlmeier's report and testified to his own independent opinion as to the injuries of the victim and cause of death.²⁷⁹ The *Joseph* court found no violation of the Confrontation Clause.²⁸⁰ The court distinguished *Melendez-Diaz* and *Bullcoming*, finding that this case was different for two reasons: (1) the autopsy report was not admitted into evidence, and (2) the surrogate expert did not testify to any of the autopsy pathologist's conclusions.²⁸¹ The court cited the *Williams* plurality opinion to support its reasoning stating that “[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.”²⁸²

Joseph is a good example of how some lower courts apply the plurality opinion from *Williams* as the holding of that case, even though a majority of five Justices in *Williams* rejected that approach.²⁸³ The Author contends that lower courts adopt this approach as a result of necessity and public policy—specifically, to avoid the injustice of letting the defendant get away with murder. This is discussed in Part V.

5. Maine

In 2014, the Supreme Judicial Court of Maine was faced with a similar issue in *State v. Mercier*, a 32-year-old murder case.²⁸⁴ The defendant was charged after a DNA match led to his prosecution more than 30 years after the homicide.²⁸⁵ The State's chief medical examiner, Dr. Greenwald—who had not performed the original autopsy on the victim in 1980—reviewed the autopsy report in preparation for the defendant's trial in 2011.²⁸⁶ Based on that review, Greenwald testified to her independent opinions as to the

278. *Id.*

279. *Id.*

280. *Id.* at 29–30.

281. *Id.* at 30.

282. *Id.* (quoting *Williams v. Illinois*, 132 S. Ct. 2221, 2228 (2012)) (internal quotation marks omitted).

283. See *Williams*, 132 S. Ct. at 2256 (Thomas, J., concurring); *id.* at 2268 (Kagan, J., dissenting); see *supra* Part III.E.

284. *State v. Mercier*, 87 A.3d 700 (Me. 2014).

285. *Id.* at 701–02.

286. *Id.* at 702.

victim's injuries and the cause of death.²⁸⁷ The autopsy report was not admitted into evidence, and the trial court precluded Greenwald "from disclosing any of the details of the factual findings in the autopsy report."²⁸⁸ The autopsy pathologist who performed the original autopsy in 1980 did not testify at the trial.²⁸⁹

After reviewing the *Crawford* progeny, the *Mercier* court held that "the admission of the testimony of a medical examiner who relies in part on information obtained as a result of an autopsy or contained in an autopsy report completed by a non-testifying medical examiner is not a violation of the Confrontation Clause."²⁹⁰ Just like the Arizona Supreme Court in *Joseph*, this court used the *Williams* plurality opinion to support its reasoning: "an expert witness may testify as to her own opinion and the facts on which that opinion is based 'without testifying to the truth of those facts'."²⁹¹ It appears that necessity was the motivation again—and, in this 32-year-old murder case, understandably so.

These last five cases are representative of the approach used by the courts that have found parts of the autopsy report to be nontestimonial, as well as any surrogate testimony based on the original report. Other jurisdictions that have come to the same conclusions include Massachusetts,²⁹² New York,²⁹³ and the Second Circuit.²⁹⁴

Many of the other circuits have been faced with the same issues in the context of writs of habeas corpus and have denied relief on the basis that the U.S. Supreme Court has not clearly established the rule that surrogate

287. *Id.*

288. *Id.* (internal quotation mark omitted).

289. *See id.* The reported case says nothing regarding whether the original autopsy pathologist was available or even alive.

290. *Id.* at 704.

291. *Id.* (quoting *Williams v. Illinois*, 132 S. Ct. 2221, 2228 (2012)); *see also* *State v. Joseph*, 283 P.3d 27, 30 (Ariz. 2012).

292. *See Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009) (finding that an expert's *opinion* testimony regarding interpretation of reports he or she did not personally prepare "does not offend the Confrontation Clause").

293. *See People v. Freycinet*, 892 N.E.2d 843, 844–46 (N.Y. 2008) (citing *People v. Rawlins*, 884 N.E.2d 1019 (N.Y. 2008)) (using a multifactor approach to deem an autopsy report nontestimonial and permitting its admission despite the autopsy pathologist's unavailability).

294. *See United States v. James*, 712 F.3d 79, 99 (2d Cir. 2013) ("In short, the autopsy report was not testimonial because it was not prepared primarily to create a record for use at a criminal trial.").

autopsy expert testimony or autopsy reports are testimonial.²⁹⁵ Those decisions were not made on the merits of the testimonial or nontestimonial issue.

B. Examples of Courts That Have Concluded That Surrogate Autopsy Expert Testimony Is Testimonial

1. Washington

In 2014, the Washington Supreme Court, faced with facts very similar to the *Dungo* case, came to the opposite conclusion in *State v. Lui*.²⁹⁶ In 2007, the defendant was charged with second-degree murder for strangling his girlfriend in 2000.²⁹⁷ The autopsy was performed by associate medical examiner, Dr. Raven, who also wrote the autopsy report.²⁹⁸ Raven did not testify at trial in 2008.²⁹⁹ Instead, Chief Medical Examiner Dr. Harruff testified that he had reviewed the report and the associated photographs and had formed an independent opinion that the victim was killed by strangulation.³⁰⁰ Harruff referred to some of the observations of the victim's condition that were in the report; however, the report itself was not introduced into evidence, nor was there any testimony about Raven's conclusions.³⁰¹

After noting the "absence of binding Supreme Court precedent for a rule,"³⁰² the Washington court proposed a working test for testimoniality: "If the declarant makes a factual statement to the tribunal, then he or she is a witness. If the witness's statements help to identify or inculpate the defendant, then the witness is a 'witness against' the defendant."³⁰³ Applying this test, the court found that Harruff's references to the condition of the victim necessarily involved her testimonial statements; as such, this part of

295. See, e.g., *Mitchell v. Kelly*, 520 F. App'x 329, 331 (6th Cir. 2013); *McNeiece v. Lattimore*, 501 F. App'x 634, 636 (9th Cir. 2012); see also *Anderson v. Warden*, Civil Action No. 10-cv-0529, 2013 WL 1405423, at *5 (W.D. La. Mar. 19, 2013) (report and recommendation), adopted, 2013 WL 1405365 (W.D. La. Apr. 5, 2013).

296. *State v. Lui*, 315 P.3d 493, 496–97 (Wash. 2014); see *People v. Dungo*, 286 P.3d 442, 444–45 (Cal. 2012).

297. *Lui*, 315 P.3d at 496.

298. *Id.*

299. *See id.*

300. *Id.*

301. *Id.* at 496–97.

302. *Id.* at 503.

303. *Id.* at 505.

Harruff's testimony violated the Confrontation Clause.³⁰⁴ Interestingly, the *Lui* court came to the opposite conclusion regarding surrogate expert testimony about a DNA match based on a DNA readout produced by another analyst and found no violation of the Confrontation Clause.³⁰⁵

The dissent in *Liu* did not agree with the majority's proposed testimonial test but would instead find that the autopsy report qualified as testimonial under any test.³⁰⁶ In the dissent's view, the factual observations contained in both the autopsy reports and the DNA forensics reports were testimonial under the *Melendez-Diaz* primary purpose test, the *Williams* plurality's narrower test, or the *Lui* majority's new "witness against" test.³⁰⁷

2. New Mexico

In 2013, the New Mexico Supreme Court unanimously held in *State v. Navarette* that autopsy reports are testimonial.³⁰⁸ Navarette was charged with first-degree murder.³⁰⁹ "The disputed issue was who shot Reynaldo—the driver, who was closest to Reynaldo, or Navarette, who was several feet away from Reynaldo."³¹⁰ Reynaldo's autopsy had been performed by Dr. Dudley, who had moved to Missouri by the time of the trial; Dudley wrote the autopsy report, but did not testify at trial.³¹¹ Instead, Dr. Zumwalt, the chief medical investigator for New Mexico, reviewed the autopsy report and testified to the manner and cause of Reynaldo's death.³¹² The absence of soot

304. *Id.* at 510–11.

305. *Id.* at 508 ("Accordingly, the only 'witness against' the defendant in the course of the DNA testing process is the final analyst who examines the machine-generated data, creates a DNA profile, and makes a determination that the defendant's profile matches some other profile."). The expert "was an experienced supervisor . . . and was well informed about the procedures used and observations made. She reviewed the results of the control samples, she reviewed the testing procedures, and she reviewed her subordinate analysts' results at each step in the process. She was 'a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.'" *Id.* at 509 (quoting *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring)).

306. *Id.* at 513 (Stephens, J., dissenting).

307. *Id.* at 516–18.

308. See *State v. Navarette*, 294 P.3d 435, 442–43 (N.M. 2013).

309. *Id.* at 436.

310. *Id.* at 437.

311. *Id.* at 436.

312. *Id.*

or stippling was an important fact contained in the autopsy report.³¹³ Zumwalt opined, based on the observations recorded in the autopsy report, that the gun was not fired from less than two feet away.³¹⁴ Zumwalt neither participated in nor observed the autopsy.³¹⁵ In closing arguments, the prosecution emphasized that the shooter could not have been the driver based on Zumwalt's testimony. The autopsy report itself was never offered into evidence.³¹⁶

The *Navarette* court rejected the critical distinction in *Dungo* between observations and conclusions in the autopsy report, stressing that "when determining whether an out-of-court statement is testimonial, there is no meaningful distinction between factual observations and conclusions requiring skill and judgment."³¹⁷ This principle was articulated by the majority in *Bullcoming*. The court discussed *Williams* and concluded that, in light of Justice Thomas's statement in his concurrence,³¹⁸ "at least five justices" agreed that "a statement can only be testimonial if the declarant made the statement primarily intending to establish some fact with the understanding that the statement may be used in a criminal prosecution."³¹⁹ With that in mind, the court concluded:

[T]here was a Confrontation Clause violation because (1) the autopsy report contained statements that were made with the primary intention of establishing facts that the declarant understood might be used in a criminal prosecution, (2) the statements in the autopsy report were

313. *Id.*

314. *Id.* at 437.

315. *Id.* at 436.

316. *Id.* at 437.

317. *Id.* at 438 (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714–15 (2011)); *contra People v. Dungo*, 286 P.3d 442, 444 (Cal. 2012).

318. *Navarette*, 294 P.3d at 438 (citing *Williams v. Illinois*, 132 S. Ct. 2221, 2261 (2012) (Thomas, J., concurring)). The *Navarette* court cited this passage from Justice Thomas's concurrence in *Williams*: "I agree that, for a statement to be testimonial within the meaning of the Confrontation Clause, the declarant must primarily intend to establish some fact with the understanding that his statement may be used in a criminal prosecution." *Williams*, 132 S. Ct. at 2261. However, it seems incorrect to conclude that this language means that Justice Thomas supports a primary purpose test when he emphatically and expressly stated in *Williams*, *Bryant*, and *Davis* that he objects to its continued use. See *id.*; *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring); *Davis v. Washington*, 547 U.S. 813, 836–37 (2006) (Thomas, J., concurring in part and dissenting in part).

319. *Navarette*, 294 P.3d at 438.

related to the jury as the basis for the pathologist's opinions and were therefore offered to prove the truth of the matters asserted, and (3) the pathologist who recorded her subjective observations in the report did not testify at trial and [the defendant] did not have a prior opportunity to cross-examine her.³²⁰

The court also pointed out that "two of the investigating officers attended the autopsy" as part of their ongoing criminal investigation.³²¹

3. Oklahoma

In 2010, the Oklahoma Court of Criminal Appeals was faced with issues similar to those presented in *Dungo* in the death penalty murder case of *Cuesta-Rodriguez v. State*.³²² Dr. Jordan, who had performed the victim's autopsy and prepared the autopsy report, had retired by the time of trial.³²³ The full autopsy report was not admitted into evidence.³²⁴ However, the autopsy report contained a series of "hand-annotated diagrams" that recorded Dr. Jordan's contemporaneous observations; those diagrams were introduced as evidence and shown to the jury.³²⁵ Dr. Gofton, the chief medical examiner, reviewed the autopsy report and testified to some of the "observations as recorded in the autopsy report" and to his own independent opinion as to the cause and manner of death.³²⁶

The court first concluded that the autopsy report itself was testimonial under *Crawford* and *Melendez-Diaz* given the Oklahoma statutory framework, because when investigating a "violent or suspicious death," the autopsy pathologist should reasonably expect that his or her recorded notes will be used in a criminal prosecution.³²⁷ The *Cuesta-Rodriguez* court then

320. *Id.* at 436.

321. *Id.*

322. *Cuesta-Rodriguez v. State*, 241 P.3d 214, 226 (Okla. Crim. App. 2010); *see Dungo*, 286 P.3d at 444. Although this was a pre-*Williams* case, its holding was reaffirmed in a subsequent decision after *Williams* was decided. *See Miller v. State*, 313 P.3d 934, 969–71 (Okla. Crim. App. 2013).

323. *Cuesta-Rodriguez*, 241 P.3d at 226.

324. *See id.* at 226–27.

325. *Id.* at 229.

326. *Id.* at 226–27.

327. *Id.* at 228. The *Cuesta-Rodriguez* court summarized the relevant statutory framework as follows:

In Oklahoma, a medical examiner is required by law to investigate deaths under a variety of circumstances including violent deaths and deaths under

decided that Gofton's surrogate testimony that disclosed the observations of the autopsy pathologist in the report was a violation of the defendant's right of confrontation.³²⁸ The defendant should have had the opportunity to confront the autopsy pathologist "in order to test his competence and the accuracy of his findings contained in the hand-annotated diagrams and the autopsy report whose contents Dr. Gofton disclosed to the jury."³²⁹

4. Eleventh Circuit

The Eleventh Circuit came to the same conclusion about surrogate testimony in the murder case of *United States v. Ignasiak*.³³⁰ Ignasiak, a medical doctor, was convicted of dispensing controlled substances that resulted in the death of two patients.³³¹ At trial, "the government introduced the autopsy reports of five of Ignasiak's former patients in which the cause of death was determined to be, at least in part, intoxication from controlled substances."³³² In each instance, the chief medical examiner, Dr. Minyard, testified to the cause of death based on her review of the autopsy reports.³³³ Minyard had not performed any of the autopsies.³³⁴

The *Ignasiak* court looked at the statutory scheme that established the Florida Medical Examiner's Office³³⁵ and concluded that the reports were

suspicious circumstances. 63 O.S.2001, § 938(A). The medical examiner must promptly turn over to the district attorney copies of all records relating to a death for which the medical examiner believes further investigation is advisable. 63 O.S.Supp.2004, § 949(A)(2). On completion of his investigation, a medical examiner must send copies of his reports to investigating agencies with an official interest in the case. 63 O.S.2001, § 942. Further, "[a]ny district attorney or other law enforcement official may, upon request, obtain copies of such records or other information deemed necessary to the performance of such district attorney's or other law enforcement official's official duties." 63 O.S.2001, § 938(A)(2).

Cuesta-Rodriguez, 241 P.3d at 228 (alteration in original).

328. *Id.* at 229.

329. *Id.* at 229.

330. *United States v. Ignasiak*, 667 F.3d 1217, 1231–33 (11th Cir. 2012).

331. *Id.* at 1219.

332. *Id.* at 1229.

333. *Id.*

334. *Id.*

335. *Id.* at 1231.

Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Further, the Medical Examiners

testimonial because 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.”³³⁶ The court drew a parallel between Minyard’s testimony and the *Bullcoming* surrogate’s testimony and concluded that both violated the Confrontation Clause.³³⁷

These last four cases are representative of the approach used by courts that have found entire autopsy reports to be testimonial, as well as any surrogate testimony that is based on any parts of those reports. Other jurisdictions that have come to the same conclusion include Texas,³³⁸ Tennessee,³³⁹ North Carolina,³⁴⁰ West Virginia,³⁴¹ and the D.C. Circuit.³⁴²

Without a clearly established rule, scholars and courts have not only struggled with the testimonial issue but have proposed different solutions. Part V analyzes each one of those proposals, identifies one proposed solution as the best option, and argues that the U.S. Supreme Court should

Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members.

Id. (citation omitted) (citing FLA. STAT. § 406.02 (2002)).

336. *Id.* at 1232 (quoting *United States v. Baker*, 432 F.3d 1189, 1203 (11th Cir. 2005)) (internal quotation marks omitted).

337. *Id.* at 1233.

338. *See Lee v. State*, 418 S.W.3d 892, 896 (Tex. App. 2013) (“While we need not decide whether autopsy reports will always be testimonial, we agree with the parties that, in this case, an objective medical examiner would reasonably believe that her report would be used in a later prosecution.”).

339. *See State v. Todd*, No. W2010-02640-CCA-R3-CD, 2012 WL 2150859, at *28 (Tenn. Crim. App. June 14, 2012) (“We conclude that the autopsy report contained testimonial hearsay based on the immediate suspicion that the victims were murdered.”).

340. *See State v. Locklear*, 681 S.E.2d 293, 304–05 (N.C. 2009) (concluding that “the trial court erred in admitting opinion testimony by nontestifying witnesses as to the cause of [the victim’s] death and the identity of her remains”).

341. *See State v. Kennedy*, 735 S.E.2d 905, 917 (W. Va. 2012) (holding that, as a universal rule “in criminal prosecutions, autopsy reports are under all circumstances testimonial”).

342. *See United States v. Moore*, 651 F.3d 30, 72–73 (D.C. Cir. 2011) (concluding that law enforcement involvement during the autopsies, “combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are ‘circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial’” (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009))).

adopt it as a bright-line rule.

V. LOOKING AHEAD: A BRIGHT-LINE SOLUTION

A. *The Intent of the Framers of the Confrontation Clause*

Looking ahead to what the U.S. Supreme Court might do to solve this issue, one should start with the intent of the Framers of the Confrontation Clause, since that was the driving force behind the *Crawford* revolution.³⁴³ It has been stated that there is “virtually no evidence of what the drafters of the Confrontation Clause intended it to mean.”³⁴⁴ In addition, despite the frequently asserted claim that there is no exception to the right of confrontation, that is not the case. The *Crawford* Court suggested, without deciding, that the previous exceptions to the common law confrontation right that existed before the Sixth Amendment was adopted would continue to exist as exceptions to the Confrontation Clause.³⁴⁵ For example, a dying declaration was a long-recognized exception at common law.³⁴⁶ As Justice Scalia has insisted in other cases, the Court should follow what the Framers of the Bill of Rights intended in deciding the meaning of each amendment.³⁴⁷

That brings us back to the foundational question: What would the Framers of the Confrontation Clause have intended the right of confrontation to mean in a murder case where the only way to prove the cause or manner of death is through reliance on the report of an autopsy pathologist who is now deceased? Would they have intended that the murderer go free even though there was reliable proof of the cause of death, or would they have wanted to create an exception as a matter of public policy in such a situation? Would they consider the adverse consequences and necessity before making their choice of action? Or would they be totally inflexible and apply the confrontation rule rigidly with no exception?

343. See *Crawford v. Washington*, 541 U.S. 36, 50–56 (2004).

344. *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring).

345. See *Crawford*, 541 U.S. at 56.

346. *Id.* at 56 n.6 (citations omitted). The *Crawford* Court left that decision for another day, indicating that it did not need to decide “whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.” *Id.*

347. See, e.g., *United States v. Jones*, 132 S. Ct. 945, 950 n.5 (2012) (noting that for the Court to resolve questions of the scope of the Fourth Amendment, “our task, at a minimum, is to decide whether the action in question would have constituted a ‘search’ within the original meaning of the Fourth Amendment”).

If Justice Thomas is correct when he asserts that there is “virtually no evidence of what the drafters of the Confrontation Clause intended it to mean,”³⁴⁸ history will not help answer these questions. It seems that only a psychic would know the answers and that the better approach is not to try to speculate as to that intent but rather to consider what should be the public policy of society in today’s world. As will be discussed in the next Part, that process is consistent with what the Court has done in resolving other constitutional issues.

B. Should Public Policy and Practical Considerations Be Considered?

Since *Crawford*, the discussion of public policy based on practical considerations has been raised by more than one judicial officer. Justice Breyer foresaw that issue in his concurrence in *Williams v. Illinois*:

[T]o bar admission of the out-of-court records at issue here could undermine, not fortify, the accuracy of factfinding at a criminal trial. Such a precedent could bar the admission of other reliable case-specific technical information such as, say, autopsy reports. Autopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial. Autopsies are typically conducted soon after death. And when, say, a victim’s body has decomposed, repetition of the autopsy may not be possible. What is to happen if the medical examiner dies before trial?³⁴⁹

Justice Ming Chin of the California Supreme Court was also equally concerned about the adverse consequences on society in *Dungo*:

A holding that everything in autopsy reports is testimonial—and, accordingly, that only the pathologist who prepared the report may testify about it—would have serious adverse consequences.

Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the autopsy report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be

348. *White*, 502 U.S. at 359 (Thomas, J., concurring).

349. *Williams v. Illinois*, 132 S. Ct. 2221, 2251 (2012) (Breyer, J., concurring).

replicated by another pathologist. Certainly it would be *against society's interests* to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

Much harm would be done to the criminal justice system, with little accompanying benefit to criminal defendants, if all reliance on autopsy reports were banned.³⁵⁰

As discussed above, the Ohio Supreme Court raised the same concern in *Maxwell*.³⁵¹ It seems that lower courts that have held that at least part of an autopsy report is nontestimonial did so by considering public policy considerations.

That process is consistent with what the U.S. Supreme Court has done in other constitutional interpretations. For example, some of the Court's decisions in the Fourth Amendment realm have referenced public policy in deciding what is "reasonable" in the second prong of the *Katz* "reasonable expectation of privacy" (REP) test: whether a specific expectation of privacy is "one that society is prepared to recognize as 'reasonable.'"³⁵² Over the years, the Court has significantly altered its jurisprudence when it has considered what society was willing to accept as reasonable in the area of privacy. Consider *Riley v. California*, a recent case in which the Court decided to depart from the previously declared broad police license to search a person (and any container on him) incident to arrest by creating an exception dealing with the information contained on the arrestee's cell phone.³⁵³ Similarly, the Court took into consideration the possibility of a "Big Brother" scenario of police drone surveillance of citizens on public

350. *People v. Dungo*, 286 P.3d 442, 457 (Cal. 2012) (Chin, J., concurring) (emphasis added) (citation omitted) (quoting *People v. Duiro*, 794 N.Y.S.2d 8639, 8639 (N.Y. Sup. Ct. 2005)).

351. *State v. Maxwell*, 9 N.E.3d 930, 951 (Ohio 2014); *see supra* Part IV.A.2.

352. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The two-prong test that Justice John Marshall Harlan suggested in his concurrence has been used over time to determine the reasonableness of a Fourth Amendment search and has become known as the *Katz* REP test, even though it was not applied by the majority in that decision. *See generally id.* The *Katz* decision was a major departure from the Court's previous search and seizure jurisprudence, which required physical intrusion to establish a Fourth Amendment violation. *Id.* at 360–61. Arguably, *Katz* itself was an example of public policy considerations motivating the Court to depart from precedent to deal with the advancement of eavesdropping technology.

353. *Riley v. California*, 134 S. Ct. 2473, 2485–86, 2490 (2014).

highways—when it outlawed warrantless GPS surveillance on public highways in *United States v. Jones*.³⁵⁴

Yet, the *Melendez-Diaz* majority outright dismissed the public policy concerns raised by the dissent, indicating that despite the dissent’s “dire predictions” of these adverse consequences, the sky was not falling.³⁵⁵ While that may have been arguably true at that time, it does take time for the unintended consequences to accumulate, and the Court has not faced a case where an autopsy pathologist whose findings would be critically important in the outcome of a case had died. That time is coming soon. There may be an indication that some of the Justices who joined the *Bullcoming* majority may be willing to consider public policy in the future; in *Bullcoming*, Justice Scalia was the sole justice who joined Part IV, which minimized the serious burden that *Melendez-Diaz* had imposed on the prosecution.³⁵⁶

It is inconceivable that the Court would not consider public policy when the adverse consequences become severe enough—all it would take is one of the *Bullcoming* majority Justices to reconsider his or her position on this issue. As Justice Alito observed in *Williams*, “Experience might yet show that the holdings in [post-*Crawford*] cases should be reconsidered.”³⁵⁷

C. Proposed Solutions to the Definition of “Testimonial”

The cleanest bright-line rule would be either declare all autopsy reports as testimonial or nontestimonial. However, as discussed below, each one of these bright-line rules would be too broad, too inflexible, would not take into account all the circumstances surrounding individual autopsies, and would not be in society’s best interests.

1. Justice Breyer’s Rebuttable Presumption of Nontestimoniality

In *Williams*, Justice Breyer proposed a rebuttable presumption of nontestimoniality as applied to forensic laboratory reports.³⁵⁸ The rationale

354. See *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring) (agreeing with Justice Alito’s point, raised in his concurrence, that “the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations”).

355. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325–26 (2009).

356. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709, 2717–19 (2011).

357. *Williams v. Illinois*, 132 S. Ct. 2221, 2242 n.13 (2012).

358. *Id.* at 2248–52 (Breyer, J., concurring).

for the rule would be equally applicable to autopsy reports.³⁵⁹ Justice Breyer argued for an “outer limit” of the testimonial concept.³⁶⁰ “Were there significant reason to question a laboratory’s technical competence or its neutrality, the presumptive exception would disappear, thereby requiring the prosecution to produce any relevant technical witnesses. Such an exception would lie outside *Crawford*’s constitutional limits.”³⁶¹ A defendant could rebut the presumption by making a showing of incompetence, dishonesty, or unreliability.³⁶²

The factors that Justice Breyer focused on included the laboratory accreditation,³⁶³ the demanding laboratory standards that must be maintained,³⁶⁴ the “veil of ignorance” of the analyst as to the criminal investigation,³⁶⁵ and the adverse consequences to the criminal justice system if the reports were excluded.³⁶⁶

The parallel to autopsy reports is obvious: an autopsy pathologist must be a medical doctor with appropriate training, education, and experience, and all autopsy pathologists are duty-bound to follow the NAME Forensic

359. *See id.* at 2249.

360. *Id.* at 2248.

361. *Id.*

362. *Id.* at 2252.

363. *See id.* at 2249.

364. *See id.* at 2249–50.

For example, forensic DNA testing laboratories permitted to access the FBI’s Combined DNA Index System must adhere to standards governing, among other things, the organization and management of the laboratory; education, training, and experience requirements for laboratory personnel; the laboratory’s physical facilities and security measures; control of physical evidence; validation of testing methodologies; procedures for analyzing samples, including the reagents and controls that are used in the testing process; equipment calibration and maintenance; documentation of the process used to test each sample handled by the laboratory; technical and administrative review of every case file; proficiency testing of laboratory personnel; corrective action that addresses any discrepancies in proficiency tests and casework analysis; internal and external audits of the laboratory; environmental health and safety; and outsourcing of testing to vendor laboratories.

Id.

365. *Id.* at 2250.

366. *Id.* at 2251 (“An interpretation of the Clause that risks greater prosecution reliance upon less reliable evidence cannot be sound.”).

Autopsy Performance Standards.³⁶⁷ While it is true that forensic pathologists do not operate under a veil of ignorance as far as the criminal investigation,³⁶⁸ that factor should not be fatal. This requires a fact-finding hearing, but the defense should be required to make an appropriate offer of proof based on known facts before the trial court allows any testimony on the issue; this would prevent fishing expeditions by the defense.³⁶⁹

Applying this rebuttable presumption to the *Dungo* and *Maxwell* cases, discussed above, leads to different results. In the *Dungo* case, the presumption would disappear and the entire autopsy report would be testimonial.³⁷⁰ There were some serious issues raised as to Dr. Bolduc's competence and credibility: (1) he had been fired from the Kern County Coroner's Office; (2) he had based his conclusion in one case on a police report instead of on medical evidence; (3) he had left the Orange County Coroner's Office "under a cloud"; and (4) prosecutors in several counties refused to use him as an expert witness in homicides.³⁷¹ The conclusion—that the defendant had a right to cross-examine Bolduc about the autopsy

367. See NAME, PERFORMANCE STANDARDS (2014), available at <https://netforum.avectra.com/temp/ClientImages/NAME/3c58b363-0fa6-42cc-9f71-d2c5c0790cb1.pdf>.

368. It would indeed be foolish for any treating or forensic doctor not to acquire as much information as possible as to the circumstances of the injury or death before beginning an examination of the person. This allows the doctor to focus the inquiry on observations and anatomical features that are either consistent or inconsistent with the related facts. In an autopsy, knowledge of related criminal investigations may be critical because observations of the body's condition may in some cases help *exonerate* suspects; for example, the physical condition of the body may be consistent with a self-defense claim, may show that someone other than a suspect was the killer because of the relative position of the suspect or because of the absence of stippling on a gunshot wound, or may show that the death was a suicide because of the observation of a fatal contact wound. Of course, it may also help *inculpate* suspects; but an autopsy pathologist can never be expected to form an accurate theory about cause of death or evaluate competing theories without, at a minimum, all information already known or suspected about the events that preceded death. See NAME, PERFORMANCE STANDARDS, *supra* note 365, at std. B5, p. 10 ("Interpretations and opinions must be formulated only after consideration of available information and only after all necessary information has been obtained.").

369. In any case in which real reliability concerns are present, the defense would be able to make such a showing—the criminal discovery process normally provides such information to defense counsel pursuant to the prosecution's duty to provide any potentially exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Giglio v. United States*, 405 U.S. 150, 153–54 (1972).

370. See *People v. Dungo*, 286 P.3d 442, 445–46 (Cal. 2012); *supra* Part IV.A.1.

371. See *Dungo*, 286 P.3d at 444–45 & n.2.

findings because concerns about unreliability dispelled the presumption of nontestimoniality—would be contrary to the conclusion that the California Supreme Court reached in that case.³⁷² On the other hand, the nontestimoniality presumption would remain in *Maxwell* and the conclusion would be the same as the holding the Ohio Supreme Court reached in the case.³⁷³

*2. Professor Capra's Rebuttable Presumption of Nontestimoniality: The Degree of Police Involvement in Creating the Autopsy Report*³⁷⁴

Professor Capra advocates the use of a “primary motive” test.³⁷⁵ He concludes that at least 90 percent of autopsy reports do not have a primary purpose to provide evidence for a criminal prosecution.³⁷⁶ He finds that the predominant primary purpose of modern autopsies is public health.³⁷⁷ Professor Capra further indicates that, even in cases that eventually culminate in a prosecution, autopsy reports should be presumed nontestimonial because “they are written independently by neutral doctors concerned with accuracy, not police officers seeking conviction.”³⁷⁸ He proposes the following test for rebutting the presumption:

Has [there] been specific and pervasive involvement by law enforcement in the preparation of the autopsy report, such as to change the basic character of the document from one serving pathological purposes to one serving prosecutorial purposes?³⁷⁹

The presumption would not be overcome by the mere fact that the pathologist and the police are “administratively conjoined.”³⁸⁰ However, the “record of contacts” pathologists keep as part of their autopsy reports could be used to rebut the presumption.³⁸¹

372. *See id.* at 450.

373. *See State v. Maxwell*, 9 N.E.3d 940, 952 (Ohio 2014); *supra* Part IV.A.2.

374. *See Daniel J. Capra & Joseph Tartakovsky, Autopsy Reports and the Confrontation Clause: A Presumption of Admissibility*, 2 VA. J. CRIM. L. 62, 114 (2014).

375. *Id.*

376. *Id.* at 81.

377. *Id.* at 78–81.

378. *Id.* at 114.

379. *Id.* (italics removed).

380. *Id.* As Professors Capra and Tartakovsky point out, the modern pathologist is often “administratively connected” to law enforcement for fiscal reasons. *Id.* at 105.

381. *Id.* at 114–15.

Professor Capra realistically and correctly recognizes that it is important that pathologists receive all available factual information from the police before the autopsy.³⁸² This can mean receiving police reports, paramedics' reports, and medical histories and records.³⁸³ However, Professor Capra advocates that autopsy pathologists receive only the "basic facts and no specifics about the identity of possible perpetrators" to assure that the autopsy report does not become an accusation targeted at a particular individual.³⁸⁴

This proposal is interesting in that it provides sufficient flexibility and is adaptable to all sorts of different circumstances. The problem would be in its implementation. It requires a fact-finding hearing by the trial court; this could become a protracted hearing with the pathologist and any police officer that had contact with the pathologist being called as witnesses by the defense. The hearing could go on for days. In addition, there is no way in which the extent of the involvement of the police could be developed based only on the record of contacts with the pathologist; the details of the contacts would have to be explored to decide if the police were pervasively involved in the preparation of the report.³⁸⁵ In addition, in many jurisdictions, the police detective assigned to the case will be present during the autopsy and will provide factual background for the pathologist before the autopsy.³⁸⁶ In some cases, more than one officer may be present during the autopsy.³⁸⁷ All of these officials who participated in the investigation or prosecution and interacted with the autopsy pathologist would also have to testify at the hearing.³⁸⁸ The hearing on this presumption would be much more time consuming and protracted than the reliability inquiry involved in Justice Breyer's proposal.

382. *Id.* at 106. Professors Capra and Tartakovsky give an example in which a preautopsy conference with the police helped a pathologist find a very subtle "tiny pink spot" on the victim's left buttock that marked a needle's point of entry, used to inject a "nearly undetectable muscle relaxant" that killed the victim. *Id.* at 106–07 (quoting MILTON HELPERN & BERNARD KNIGHT, AUTOPSY: THE MEMOIRS OF THE MILTON HELPERN, THE WORLD'S GREATEST MEDICAL DETECTIVE 66–71, 175–76 (1977)) (internal quotation marks omitted).

383. *Id.* at 106.

384. *Id.* at 109. "Reports should be non-accusatory and devoid of legal conclusions." *Id.*

385. See *id.* at 96 (citing Michigan v. Bryant, 131 S. Ct. 1143, 1162 (2011)).

386. See *id.* at 106–08.

387. See, e.g., State v. Navarette, 294 P.3d 435, 436 (N.M. 2013).

388. See Capra & Tartakovsky, *supra* note 374, at 114–15.

Oddly, in the *Dungo* case, this presumption would not be rebutted despite all of the issues raised about the autopsy pathologist, Dr. Bolduc.³⁸⁹ Those issues would not be relevant to the degree of involvement of the police in creating the autopsy report. The presence of a detective at the autopsy would not be enough to rebut the presumption, nor would the fact that the pathologist was told by the police that someone confessed to the crime. That result would be disturbing.

3. Professor Friedman's Proposal for Preservation of the Pathologist's Testimony

After the fractured *Williams* decision, Professor Friedman suggested that taking depositions ahead of trial may solve the problem of the unavailable laboratory analyst.³⁹⁰ If the analyst became unavailable at the time of trial, the deposition could then be admitted into evidence.³⁹¹ Professor Friedman suggested that this process could also be applied to the autopsy pathologist setting.³⁹² In cases in which the killer was not apprehended or identified, he proposed that the trial court appoint counsel to represent the killer's interests and then hold a deposition to preserve testimony.³⁹³

389. See *People v. Dungo*, 286 P.3d 442, 445–46 & n.2 (Cal. 2012).

390. See Richard D. Friedman, *The Sky Is Still Not Falling*, 20 J.L. & POL'Y 427, 441–42 (2012).

391. *Id.* at 441. Professor Friedman also sees an advantage in that “a deposition may be scheduled to suit the convenience of the witnesses and the parties.” *Id.* In reality, that scenario is more complicated than is suggested. There are thousands of criminal cases involving laboratory analyses that are filed every month in some jurisdictions. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 341–42 (2009) (Kennedy, J., dissenting). Which ones would appointed counsel select for depositions? Would counsel have to check with each analyst to see if they plan to move away from the jurisdiction or if they are having health problems? Or just take depositions in every case? The Author—who spent years in the trenches of the California criminal justice system—recognizes the logistical nightmares involved in getting defense attorneys, prosecutors, and analysts together for depositions on a multitude of cases. All in all, this proposal likely represents an enormous waste of time and resources.

392. See Petition for Writ of Certiorari at 16–17, *Craig v. Ohio*, No. 06-8490 (U.S. Dec. 19, 2006), *cert. denied*, 549 U.S. 1255 (2007), available at <http://www-personal.umich.edu/~rdfrdman/craigpetition.pdf>. Although this petition preceded *Melendez-Diaz* and *Williams*, Professor Friedman proposed the same principle after *Williams* with respect to laboratory analysts’ reports. See Friedman, *supra* note 390.

393. Petition for Writ of Certiorari, *supra* note 392, at 17 n.15 (“In a case in which, so long as a crucial witness is available, the eventual accused cannot yet be apprehended, it may still [be] possible to preserve the witness’s testimony by appointing counsel to

It is doubtful that ad hoc appointed counsel could effectively cross-examine the autopsy pathologist without knowing who the client is or what possible defenses could later be asserted by the client. Unlike a drug analysis, an autopsy can reveal not just the cause of death but also the manner of death; the details of the latter may be consistent or inconsistent with an eventual defense that is unknown to appointed counsel at the time of the deposition. For example, in a shooting death, the angle of the projectiles may be critical one way or another for a self-defense argument. How can an appointed attorney anticipate the relative physical positions of the victim and the unknown suspect who will later claim self-defense in a stabbing death?³⁹⁴ As the *Mercier* case illustrates, the defendant in some of the cold-hit homicides may not be identified and charged until more than 30 years after the autopsy.³⁹⁵ And the defendant, once apprehended, certainly would have an arguably meritorious claim that appointed counsel could not have effectively represented his or her interest in a deposition without adequate information from the defendant.³⁹⁶ And what about the defendant's Due Process right to be present during the deposition?³⁹⁷ And how would this process help protect the innocent defendant who is subsequently charged?³⁹⁸

There are also practical problems that would be involved similar to those noted with the laboratory analysts, discussed in the note above.³⁹⁹ Would the trial court appoint counsel on every unsolved homicide case right after it occurred? Who would alert the trial court that a homicide occurred and that no suspect was arrested? After all, no trial court is aware of the occurrence of a homicide until a case is filed, and prosecutors do not file charges on a homicide case until it is solved. Which case would this appointed counsel select for preemptive depositions? All of them? Or would

represent the accused's interests and then holding a deposition for preservation of testimony. Perhaps a similar procedure would be possible in some cases even if the suspect had not yet been identified.").

394. *See, e.g.*, State v. Navarette, 294 P.3d 435, 442–43 (N.M. 2013) (prohibiting the use of unkonfronted surrogate autopsy expert testimony to show that the victim was killed by "a distant range shooting" and to disprove the defense witnesses' conflicting account of events).

395. *See* State v. Mercier, 87 A.3d 700, 701–02 (Me. 2014); *supra* Part IV.A.5.

396. *See* Friedman, *supra* note 390, at 441–42. Professor Friedman notes such a case dealing with a lab witness in *People v. Torres*, 962 N.E.2d 919 (West 2012).

397. *See, e.g.*, CAL. PENAL CODE § 1340 (2004).

398. *See* Friedman, *supra* note 390, at 442 n.28 (citing *People v. Torres*, 962 N.E.2d 919 (Ill. 2012)).

399. *See* discussion *supra* note 391.

counsel have to keep checking with pathologists to see if they may be moving away from the jurisdiction, retiring, or having health problems.⁴⁰⁰ Or just take depositions in every case? In addition, in some jurisdictions,⁴⁰¹ pretrial depositions are not permitted as part of increasing the efficiency of the criminal justice system and precluding fishing expeditions; this would turn the criminal process closer to the lengthy time consuming civil cases. And what would you do in the case where the pathologist suddenly died before any deposition could be taken? With the courts presently suffering from significant budget problems, paying for appointed counsel would exacerbate that fiscal crisis.

4. Professor Mnookin's Necessity-Based Exception to the Crawford Approach

Professor Mnookin argues that all autopsy reports in criminal cases are testimonial.⁴⁰² However, she proposes a narrowly drawn exception to the *Crawford* confrontation approach based on necessity.⁴⁰³ As applied to autopsies, the following three conditions would have to be met: (1) the original autopsy pathologist would have to be "legitimately unavailable"; (2) the autopsy report must be in a form that another qualified pathologist "can reasonably understand and interpret"; and (3) conducting another autopsy must not be feasible.⁴⁰⁴ If all these conditions are met, the court should permit a qualified substitute pathologist to disclose and interpret the original autopsy results for the jury.⁴⁰⁵ As Professor Mnookin correctly points out, "[t]his solution appropriately balances the defendant's constitutional

400. This would be necessary in California; California criminal law permits pretrial depositions—referred to as a conditional examination—only in cases in which a material witness is “about to leave the state” or “so sick or infirm as to afford reasonable grounds for apprehending that he or she will not be able to attend the trial.” CAL. PENAL CODE § 1337(4) (2014).

401. The defendant has a right to notice of the application for such an examination and has a right to be present during the examination of the witness. California Penal Code sections 1335–45

402. Jennifer Mnookin, *Expert Evidence and the Confrontation Clause after Crawford v. Washington*, 15 J. L. & POL’Y 791, 849 (2007).

403. *Id.* at 860.

404. *See id.*

405. *See id.* at 861 (“[I]n the expert context, a substitute witness with adequate training will typically be able to use her expertise usefully to interpret the results documented by the original expert—perhaps not quite as well as the original creator of the report, but well enough that we should permit it when necessary.”).

interest in confrontation with the public interest in accurate adjudication.”⁴⁰⁶

This necessity proposal would be very simple to apply and would not be too time-consuming. The only significant issue would be the preliminary fact determination of the “legitimate unavailability” of the autopsy pathologist, an issue that trial courts already decide as required for many hearsay exceptions. If the U.S. Supreme Court were to adopt this proposal, the Court could also define “legitimately unavailable.” Obviously, if the autopsy pathologist died, he or she would be legitimately unavailable. But, what if he or she retired and moved to another jurisdiction and refused to return to testify? Otherwise, unavailability could be tested just as it is now under Federal Rule of Evidence 804(a).⁴⁰⁷

If one were to apply this necessity exception to California’s *Dungo* case, the autopsy pathologist, Dr. Buldoc, would not be unavailable and the substitute pathologist could not testify without violating the Confrontation Clause.⁴⁰⁸ As to the pathologists in Ohio’s *Maxwell* case and Illinois’s *Leach* case, the substitute pathologist would not be allowed to testify unless the prosecution would make the appropriate showing of unavailability; simply retiring or moving to a different state is not enough to make a witness unavailable.⁴⁰⁹

Another issue that would have to be resolved is the possibility of another autopsy. If the body was cremated, this would be a nonissue; but what about a body that has already been interred? This may have occurred pursuant to cultural or religious traditions and the exhumation could cause serious emotional trauma to the victim’s family. And, as the length of time

406. *Id.*

407. See FED. R. EVID. 804(a). “Unavailability as a witness” includes situations in which the declarant (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his or her statement; (2) persists in refusing to testify concerning the subject matter of his or her statement despite an order of the court to do so; (3) testifies to a lack of memory of the subject matter of his or her statement; (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity; or (5) is absent from the trial or hearing and the proponent of the declarant’s statement has been unable to procure his or her attendance by process or through other reasonable means. *See id.*

408. See *People v. Dungo*, 286 P.3d 442, 445 (2012) (“The prosecution did not indicate that Dr. Bolduc was unavailable to testify.”).

409. *State v. Maxwell*, 9 N.E.3d 940, 945 (Ohio 2014) (allowing surrogate autopsy expert testimony when the original autopsy pathologist had moved to Texas); *People v. Leach*, 980 N.E.2d 570, 573 (Ill. 2012) (allowing surrogate autopsy expert testimony when the original autopsy pathologist had retired).

after interment increases, the body's decomposition would not allow for a thorough second autopsy. As discussed below, the Author proposes that a hearing be held where the trial court balances the various interests involved starting with a rebuttable presumption against permitting a second autopsy.

5. Judge Eaton's "Serious Nature" Test

In his concurrence in *United States v. James*, Judge Richard Eaton indicated that the majority, like other lower courts, had placed "too much emphasis on future use in a criminal trial being the primary purpose for the creation of a testimonial statement."⁴¹⁰ Instead, he would define a testimonial statement as "one having an evidentiary purpose, declared in a solemn manner, and made under circumstances that would lead a reasonable declarant to understand that it would be available for use prosecutorially."⁴¹¹ The solemnity requirement would not require a "formal written document"; rather, a statement would be sufficient if "the circumstances surrounding its utterance [were] such that a reasonable declarant would be aware of the serious nature of his or her declaration."⁴¹² Every autopsy report in a criminal case would be deemed testimonial under this proposed test. It does not allow any flexibility at all in cases in which the autopsy pathologist has died.

6. Washington Supreme Court's "Identify or Inculpate" Test

The Washington Supreme Court proposed the following testimonial test: "If the witness's statements help to identify or inculpate the defendant, then the witness is a 'witness against' the defendant."⁴¹³ Applying this test, all autopsy reports in criminal cases would be deemed testimonial because they help inculpate the defendant.⁴¹⁴ Like the previous proposal, this test would not allow any flexibility at all in cases in which the autopsy pathologist has died.

410. *United States v. James*, 712 F.3d 79, 108 (2d Cir. 2013) (Eaton, J., concurring).

411. *Id.*

412. *Id.* at 109 (citing *Davis v. Washington*, 547 U.S. 813, 826 (2006)).

413. *State v. Lui*, 315 P.3d 493, 504–05 (Wash. 2014).

414. *Id.* at 506 n.9.

7. Professor Ginsberg's Bright-Line: All Forensic Autopsies Are Testimonial

Professor Ginsberg concludes that, under *Melendez-Diaz-Bullcoming*, all forensic autopsy reports are testimonial.⁴¹⁵ Briefly summarizing his rationale: Forensic pathologists have a duty to perform autopsies in “criminally caused deaths.”⁴¹⁶ The reports are “formal, legal documents” prepared pursuant to an established protocol.⁴¹⁷ Because of the suspected criminal nature, every forensic pathologist is well aware that “their autopsy reports will be evidentiary and that the testimony of a forensic pathologist will be sought at trial.”⁴¹⁸ The report includes the pathologist’s medical decisions, judgments, opinions, and conclusions, even in the observations noted.⁴¹⁹ The defendant cannot cross-examine the pathologist as to those judgments if the autopsy pathologist does not testify.⁴²⁰ Professor Ginsberg concludes that excluding the autopsy report and any surrogate pathologist testimony “is the correct price to pay in order to preserve the protection of the Confrontation Clause.”⁴²¹

It is doubtful that this result is what the Framers of the Sixth Amendment intended or would have chosen when faced with the situation of the deceased pathologist. While this approach creates a bright-line rule, it seems to be an extreme price to pay for society and bad public policy—letting a killer walk free because the autopsy pathologist died, despite the presence of reliable evidence of the cause of death of the victim. In addition, this rule could place the lives of pathologists in danger.⁴²²

415. See Ginsberg, *supra* note 20, at 166–70.

416. See *id.* at 171.

417. See *id.*

418. *Id.*

419. See *id.* at 168–69.

420. See *id.* at 170 (“The only vehicle by which a criminal defendant may explore the subjectivity involved in the performance of the forensic autopsy—to question the judgment of the examining forensic pathologist—is cross-examination. The in-court testimony of the surrogate forensic pathologist who examines the autopsy report prepared by the examining pathologist is an inadequate substitute.”).

421. *Id.* at 171.

422. Although it is unlikely that this would occur frequently, an aware murder defendant could have the pathologist killed thereby eliminating admissible proof of the cause of death. The forfeiture by wrongdoing standard that the Supreme Court has set out in *Giles v. California*, 554 U.S. 353 (2008) is almost impossible to prove: One would have to connect the death of the pathologist directly to this defendant and prove that the defendant intended to prevent the pathologist from testifying at his trial. In large counties, a forensic pathologist may perform hundreds of autopsies per year; in Los

8. *The Williams Plurality's "Targeted Individual" Test*

One should consider the two other proposals of the *Williams*' plurality testimonial test: (1) the primary purpose of the report was not to accuse a targeted individual⁴²³ and (2) the contents of the report that the expert relied on were not offered for the truth of the matter asserted.⁴²⁴ However, a majority of five Justices already rejected both of those ideas and did so with such force that it is not foreseeable that any of them will change their position.

Competing reasons exist as to why autopsy reports should be held to be testimonial or not subject to the Confrontation Clause. The primary reason for finding testimoniality is the protection of the defendant from biases, incompetence, errors in judgment, negligence, and intentional falsification. As has been stated numerous times, the *only* way these can be uncovered is through the "crucible of cross-examination."⁴²⁵ On the other hand, it would indeed be too steep a price to pay for society if a murderer was allowed to go free just because the autopsy pathologist had died or was otherwise unavailable. The latter would be very bad public policy that today's society should not, and would not, be prepared to accept. A proper balance must be struck.

Lower courts and commentators have considered other counterbalancing factors in deciding the testimonial issue. Some of these factors are double-edged swords: the fact that the pathologist performs the autopsy pursuant to a statutory duty has been used as a factor in favor of finding testimoniality by some courts, while other courts have used that factor to conclude the opposite. Some other factors that have been discussed in resolving this issue include the following (1) whether the pathologist was aware that this was a criminal case before performing the autopsy or had otherwise been informed by the police of the facts in the case (including some cases in which autopsy pathologists were told that someone had confessed to the killing); (2) whether the report was prepared pursuant to the NAME standards or prepared at the request of the police; (3) whether

Angeles County in 2010, there were 8,371 autopsies performed with 689 determined to be homicides and 352 with an undetermined cause of death. *See* L. A. CNTY. CORONER, 2010 ANNUAL REPORT, available at <http://coroner.co.la.ca.us/Docs/2010%20Annual%20Report.pdf>

423. *Williams v. Illinois*, 132 S. Ct. 2221, 2243–44 (2012).

424. *Id.* at 2235.

425. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004)).

there is a duty of the pathologist to perform autopsies on all unattended deaths; (4) whether the autopsy report is based on medical standards as opposed to legal standards; (5) whether the pathologist is a neutral medical doctor concerned with accuracy; (6) whether the pathologist was operating under pressure from law enforcement; (7) whether the pathologist fact-findings may exonerate or inculpate the suspect; and (8) whether there is a meaningful difference between the observations of a trained medical doctor and their conclusions.

Ultimately, this is—and should be—a public policy decision, one that involves balancing the defendant’s constitutional protections against society’s interest in the administration of justice and the protection of society. Justice Breyer’s rebuttable presumption could serve those interests and be very efficient and effective. On the other hand, it does not take necessity into account, as Professor Mnookin’s solution does so elegantly.

9. The Author’s Proposal: A Double Presumptions Approach

The Author proposes a modified version of Justice Breyer’s presumption combined with a necessity factor as a solution that the Court should adopt. The defense would have an opportunity to rebut the presumption of admissibility, and the prosecution would have the opportunity to prove the necessity of using a surrogate witness. This presumption-shifting would proceed through the following steps:

- 1) There would be a rebuttable presumption of nontestimoniality that applies to the autopsy pathologist’s observations (but not the conclusions) contained in the autopsy report.
- 2) “Were there significant reason to question [the autopsy pathologist’s] technical competence or its neutrality, the presumptive exception would disappear, thereby requiring the prosecution to produce [the autopsy pathologist].”⁴²⁶
- 3) If the presumption of nontestimoniality was not rebutted by the defense, the surrogate witness’s testimony as to the observations of the original autopsy pathologist would be allowed, along with the surrogate’s independent opinions based on the report. The conclusions of the original autopsy pathologist would not be referred to or admitted into evidence.

426. *Williams*, 132 S. Ct. at 2248 (Breyer, J., concurring).

- 4) If the presumption is rebutted, then the observations of the autopsy pathologist and the surrogate testimony would not be allowed into evidence unless the prosecution established the necessity of using the surrogate testimony by satisfying a modified version of Professor Mnookin's necessity test:
 - a) the autopsy pathologist is legitimately unavailable, and
 - b) the report is in such form that a reasonable, trained pathologist can understand and interpret it.⁴²⁷
- 5) If the conditions in step four are met, the defense would have the opportunity to convince the trial court that a second thorough autopsy was feasible; there would be a rebuttable presumption in favor of ruling out a second autopsy that the defense would have to rebut. Factors to be considered include the passage of time since the body was interred and the emotional impact that an exhumation and second autopsy would have on the victim's surviving family. If the body had been cremated, step five is skipped.
- 6) The autopsy report itself would not be admitted into evidence.

VI. POSTMORTEM OF *CRAWFORD* AND *WILLIAMS*

With all the uncertainty and disagreements among the Justices of the U.S. Supreme Court, it is impossible to predict whether the Court will decide that autopsy reports are testimonial or not. All it would take for the Court's holding to change is a one-vote swing; if Justice Thomas were to decide that autopsy reports are formal and solemn enough to trigger the Confrontation Clause, then the majority would find an autopsy report testimonial. On the other hand, Justice Thomas could decide that the reports are not sufficiently formal, which would most likely lead to a majority holding that the report is nontestimonial. As decried by the *Williams* dissent, this would put form over substance.⁴²⁸ In addition, as discussed above, if the consequence of finding testimoniality is to allow a murderer to go free, there is a hint that perhaps one or more Justices in the *Bullcoming* majority may be willing to consider this unintended consequence on public policy and reconsider his or her position and either find the report nontestimonial or allow the surrogate autopsy pathologist's testimony as an exception.

As Justice Alito correctly observed, "Experience might yet show that

427. Mnookin, *supra* note 400, at 860.

428. See *Williams*, 132 S. Ct. at 2276–77 (Kagan, J., dissenting).

the holdings in those [post-*Crawford*] cases should be reconsidered.”⁴²⁹ After *Williams*, the uncertainty surrounding what is testimonial has grown even larger. As even the *Williams* dissent conceded, *Melendez-Diaz* and *Bullcoming* “apparently no longer mean all that they say.”⁴³⁰ Eleven years after *Crawford*, the Court has failed to provide a bright-line rule; lower courts have been left to formulate their own interpretations of the outer limits of testimoniality and to forge their own rules for applying those limits to autopsy reports and testimony by surrogate experts when the autopsy pathologist is unavailable. Predictably, lower courts have taken various approaches on these issues.

What is particularly frustrating is that this protracted odyssey has led to an unnecessary waste of resources in the criminal justice system and will continue to do so until the Court resolves the issue.⁴³¹

Trial judges in both federal and state courts apply and interpret hearsay rules as part of their daily trial work. The trial of criminal cases makes up a large portion of that work. . . . Obviously, judges, prosecutors, and defense lawyers have to know, in as definitive a form as possible, what the Constitution requires so that they can try their cases accordingly.⁴³²

Unfortunately, the Court turned down three opportunities to resolve this issue last year—one as recently as October 6, 2014.⁴³³ The issue is over-

429. *Id.* at 2242 n.13 (plurality opinion).

430. *Id.* at 2277 (Kagan, J., dissenting).

431. This uncertainty has created waste by placing an undue burden on the prosecution to subpoena all of the analysts involved or risk losing the case. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2728 (2012) (Kennedy, J., dissenting). It has also created waste by unnecessarily creating avenues for appeals and inevitable reversals that will continue unabated until the Court provides a clear interpretation of “testimonial.” *Id.*

432. *Williams*, 132 S. Ct. at 2248 (Breyer, J., concurring).

433. *See State v. Medina*, 306 P.3d 48 (Ariz. 2013), *cert. denied*, 134 S. Ct. 1309 (Feb. 24, 2014); *People v. Edwards*, 306 P.3d 1049 (Cal. 2013), *cert. denied*, 134 S. Ct. 2662 (May 27, 2014); *People v. Alger*, No. A126581, 2013 WL 5287305 (Cal. Ct. App. Sept. 19, 2013), *cert. denied*, 135 S. Ct. 49 (Oct. 6, 2014). The petition for certiorari in *Alger* framed the issues as follows:

Where [the] state fails to call an available medical [examiner] who had not previously been cross-examined to testify in a murder trial and instead calls a medical examiner as a percipient scientific witness who was not involved in the autopsy and enters the autopsy report into evidence where the main issue in the case is manner of death, was Petitioner’s Confrontation Clause right violated?

ripe, and the “time has come today” for the U.S. Supreme Court to resolve it, one way or another.⁴³⁴

When an autopsy report is entered into evidence and the person who drafted the report is available, but not called and was not previously cross-examined, is the autopsy testimonial and its admission into evidence therefore violates Petitioner’s Confrontation Clause rights?

Petition for Writ of Certiorari at i, *Alger*, 135 S. Ct. 49 (No. 13-1102); *see* Petition for Writ of Certiorari at i, *Medina*, 134 S. Ct. 1309 (No. 13-735) (stating that the question presented is “[w]hether an autopsy report created as part of a homicide investigation, and asserting that the death was indeed caused by homicide, is ‘testimonial’ under the Confrontation Clause framework established in *Crawford v. Washington*”); *see also* discussion *supra* note 190 (discussing issues presented in *People v. Edwards*).

434. As best stated in the Chambers Brothers 1968 hit song during that tumultuous era of social and political awareness. *See CHAMBERS BROTHERS, Time Has Come Today* (Columbia Records 1967), available at https://www.youtube.com/watch?v=_zfgojzOCgg.