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Confronting the Dead: The Testimonial Status of Autopsies After Melendez-Dias and Bullcoming

Submitted by gchipev on Sun, 2012-02-12 22:57

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[The Testimonial Status of Autopsies After *Melendez-Dias* and *Bullcoming*](#)

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During the last decade, the Supreme Court actively has been shaping a particular aspect of constitutional criminal law: the Confrontation Clause. Since 2004, when the Court overruled the *Ohio v. Roberts* analysis in *Crawford v. Washington*, the Court has decided four distinct cases within the same line. *Crawford* introduced the determinative question of whether the evidence that the government seeks to introduce is testimonial. If a court decides that evidence is testimonial, the defendant must be given an opportunity to cross-examine the person who created the evidence (or made the statement), or the evidence may not be admitted. This testimonial status inquiry replaced the *Roberts* analysis, which determined Confrontation Clause admissibility on the grounds of “indicia of reliability.”

Since *Crawford*, the Court has struggled to define the contours of what is and is not testimonial. While the initial rationale for the shift was to better adhere to the spirit of the Confrontation Clause’s original meaning, the Court has boiled the practical standard down to whether the evidence in question was created or obtained with a primary purpose for use in a criminal proceeding. In *Melendez-Dias v. Massachusetts* and *Bullcoming v. New Mexico*, the Court’s superficially discussed the primary purpose test. This is not because the test somehow was deemed inapplicable to forensic reports, but instead because the facts of each case made the primary purpose question a very easy one. In *Melendez-Dias*, a laboratory conducted a test and issued a report on seized contraband believed to be illegal drugs, and in *Bullcoming*, a laboratory tested the blood of a suspect believed to have been intoxicated while driving.

The status of one significant type of potential scientific evidence, however, remains open: autopsy reports. Given the development of the law in the courts of appeals regarding autopsy reports, the issue of their admissibility seems destined to follow chemical analysis of seized substances and blood alcohol tests into the Supreme Court. Because not all autopsy reports are created equally, the Court should adopt a flexible rule for when such reports are admissible under the Confrontation Clause about the testimony of the scientist in charge of conducting the autopsy and writing the report. [\[+ \] Feedback](#)

The question of the testimonial status of autopsies became much more pronounced with a recent decision by the Eleventh Circuit. In *United States v. Ignasiak*,^[2] the court held a set of autopsy reports testimonial, but it held so in a manner that implies that it categorically determined that autopsies are testimonial. The autopsies in question were conducted at the discretion of the conducting medical examiner; there is no indication that the reports were influenced by any criminal suspicion. Instead, the autopsies and causes of death were grouped together and became relevant during a government investigation that tried to show that a physician engaged in a pattern of illegitimate conduct regarding all of the decedents. The court first looked to the nature of autopsies as forensic reports and purported to apply *Melendez-Dias* in reasoning that forensic reports are testimonial. It then examined the governing state autopsy statute and cited the required involvement in law enforcement personnel on the board of medical examiners who oversee autopsy procedures to ground its contention that autopsies have a primary purpose of use at a later criminal proceeding.

The Eleventh Circuit’s decision is directly contrary to the First and Second Circuits’ pre-*Melendez-Dias* decisions.^[3] Those circuits looked closely at the status of autopsy reports as official public records—not

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at their forensic status. In so doing, they relied on the non-testimonial status of public records, as established in the Confrontation Clause cases applying the testimonial rule. While it remains to be seen whether the holdings in *Melendez-Dias* and *Bullcoming* will change either circuit's classification of autopsy reports, the reasoning based on business/public records—an area left unaltered by *Melendez-Dias*—makes it unlikely that those circuits will follow the Eleventh Circuit's interpretation in the future.

Between the decisions of the Eleventh Circuit and those of the First and Second lies a recent opinion of the D.C. Circuit, *United States v. Moore*.^[4] In that case, the D.C. Circuit held that the particular autopsies in question were testimonial due to the heavy and direct involvement of law enforcement personnel in the decision to conduct the autopsies, the autopsies themselves, and the drafting of the autopsy reports. The court made clear, however, that it was not creating a categorical rule rendering all autopsies testimonial. In footnoted dicta, it even expressed doubt that a categorical approach would “comport with Supreme Court precedent.”^[5] This approach seems most appealing of any of the appellate decisions to this point.

A broad categorical rule that autopsies are testimonial for Confrontation Clause purposes paints in too broad a brush. If the primary purpose test is to be applied properly beyond the circumstances of police questioning, it seems guaranteed that a categorical rule rendering autopsies testimonial would be incorrect. As is widely understood, autopsies are conducted for many reasons beyond the criminal—most notably to determine questions of public health. While autopsies may be properly characterized as “forensic reports,” they are markedly distinct from the reports addressed by the Supreme Court to this point. Most notably, the blood alcohol test and chemical analysis occurred—and, indeed, seem only ever to occur—after law enforcement had become formally involved in a proceeding. When law enforcement seizes a substance from a suspect, it is clear that the testing of that substance (blood, contraband, etc.) will be carried out to gain evidence with which to prosecute the suspect. Autopsies, on the other hand, are carried out in many diverse circumstances. In the former case there is an adversarial posture, while in the latter, such a posture does not exist.^[6]

Beyond the differences between autopsies and the reports directly dealt with thus far, viewing autopsies as “forensic reports” and thus automatically deeming them testimonial would misunderstand the Court's reasoning and ultimate holding in *Melendez-Dias*. That case does not hold that anything determined to be a forensic report will be considered testimonial for Confrontation Clause purposes. Instead, the case simply rejects the opposite argument; the Court made clear that forensic/scientific procedures were not insulated from being testimonial. As such, the forensic or scientific nature of a procedure used to create potential evidence is irrelevant, and the only and determinative question is whether the evidence was produced with the primary purpose of use at a later criminal proceeding. Reading *Melendez-Dias* carefully and placing it in its proper historical context, it is clear that the Court's main concern was to prevent backsliding into an “indicia of reliability” test.

To be sure, the official and formalized nature of autopsy reports aligns with the reports addressed in *Melendez-Dias* and *Bullcoming*. This aspect of both of those tests proved important to the Court as the Justices in the majority looked to the original understanding of the Confrontation Clause, which was concerned in large part with affidavits used in a manner made infamous by the trial of Sir Walter Raleigh. Formality, however, is like forensic/scientific nature in that it does not alone render a variety of evidence testimonial. Instead, the formality of autopsies arguably owes much more to a public records theory, which cuts against classifying autopsies as testimonial.

Since *Crawford*, the Court has made clear that business records and official public records are largely exempt from testimonial status for similar reasons to their exemption under traditional hearsay exceptions. Much like the treatment of forensic reports, however, the initial superficial classification is not determinative. Instead, even in cases involving what seems to be classic business or public records, the Court insists that the primary purpose test be undertaken. The principal foundation for the First and Second Circuit's decisions was that business records are non-testimonial. The D.C. Circuit case, however, exposes the flaws in a categorical determination that all autopsies are non-testimonial.

Ultimately, because autopsies generally—as a category of scientific test—do not have a singular or primary purpose, strict application of the Court's primary purpose test will require a much more searching and case-by-case inquiry. A categorical rule one way or another is untenable because it would be too damaging to one of the parties and would do too much violence to the purpose of the Confrontation Clause.

A rule like the First and Second Circuits' would deprive the defendant of a right to confront the creator of an autopsy report even where law enforcement ordered the commission of the autopsy and played a substantial role in creating the report. This would leave defendants vulnerable to exactly the kind of adversarial evidence that *Melendez-Dias* and *Bullcoming* sought to suppress in the absence of testimony by the creator of the report.

On the other hand, a rule like the Eleventh Circuit's arguably has even more damaging effects. First, it seems commonsensical that a great many autopsies, if not a majority, are conducted without the initial involvement of law enforcement. These autopsies are conducted to understand disease, public health risks, and mortality generally. For those autopsies that are introduced at criminal proceedings, requiring the conducting medical examiner to testify poses far too great a risk of suppression. This is so because, unlike other scientific sources of evidence (e.g. the blood alcohol test and chemical substance analysis), autopsies will often be used in homicide trials that take longer to develop and be tried. This extended time period allows more time for the requirement of the report-writer's testimony to become logistically difficult to procure due to relocation, or impossible due to the death of the scientist who performed the autopsy. Also, unlike other types of reports, autopsies cannot be rerun in order to qualify another, more logistically convenient or possible scientist to testify.

Because of the vast diversity of autopsy procedures and rationales, the heightened importance of autopsy evidence, and the unique logistical problems that would arise from requiring testimony to fully comport with the Confrontation Clause, when the Supreme Court likely addresses the issue within the next decade, the Justices should refuse to adopt a categorical approach rendering all autopsies testimonial and should instead require a strict, case-by-case primary purpose analysis.

[1]While this is clearly not what Confrontation Clause questions surrounding autopsies are about, it makes for a pithy title.

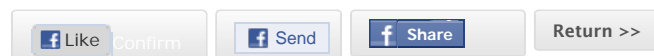
[2]2012 WL 149314 (11th Cir. Jan. 19, 2012).

[3]See *United States v. De La Cruz*, 514 F.3d 121 (1st Cir. 2008); *United States v. Feliz*, 467 F.3d 227 (2nd Cir. 2006).

[4]See *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011).

[5]See *id.* at 73 n.16.

[6]See generally Carolyn Zabrycki, Note: *Toward a Definition of Testimonial: How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Cal. L. Rev. 1093 (2008) (arguing persuasively that the adversarial difference is a determinative rationale that should render autopsies non-testimonial).



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