


March 2013

Confronting the Confrontation Clause: Addressing the Unanswered Question of Whether Autopsy Reports are Testimonial Evidence - *People v. Hall*

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Recommended Citation

Ince, Bailey (2013) "Confronting the Confrontation Clause: Addressing the Unanswered Question of Whether Autopsy Reports are Testimonial Evidence - *People v. Hall*," *Touro Law Review*: Vol. 28: No. 3, Article 31.
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v. Hall

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**CONFRONTING THE CONFRONTATION CLAUSE:
ADDRESSING THE UNANSWERED QUESTION OF WHETHER
AUTOPSY REPORTS ARE TESTIMONIAL EVIDENCE**

**SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT**

People v. Hall¹
(decided April 21, 2011)

I. INTRODUCTION

On October 7, 2005, defendant Ralph Hall was convicted of murder in the first and second degrees.² Defendant appealed, alleging that the State violated his Sixth Amendment confrontation rights by admitting an unredacted autopsy report conducted by a non-testifying witness.³ According to defendant, the autopsy report was testimonial in nature, entitling him to the right to cross-examine the medical examiner who performed the autopsy.⁴

The Appellate Division, First Department, affirmed the conviction, holding that the testimony of an expert medical examiner at trial, though not the examiner who created the autopsy report, was non-testimonial in nature and therefore admissible as evidence.⁵ The court found that the surrogate witness, testifying to the factual portions of the autopsy report, sufficiently satisfied defendant's right of confrontation.⁶

Although the Supreme Court has not yet decided whether an

¹ 923 N.Y.S.2d 428 (App. Div. 1st Dep't 2011).

² *Id.* at 433.

³ *Id.* at 429. The Sixth Amendment states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

⁴ *Hall*, 923 N.Y.S.2d at 429.

⁵ *Id.* at 432.

⁶ *Id.* at 432-33.

autopsy report is considered testimonial evidence for purposes of the Confrontation Clause, the New York Court of Appeals has already decided that autopsy reports are not testimonial.⁷ This article will analyze whether the New York approach to autopsy reports is consistent with federal precedent regarding forensic laboratory reports.

II. THE OPINION – *PEOPLE V. HALL*

The opinion of *People v. Hall* reveals little about the criminal activities Hall engaged in; all that is divulged are the crimes for which Hall was convicted after a jury trial in the Supreme Court.⁸ Of the three issues raised on appeal, the salient issue was whether the State violated defendant's constitutional right to confront his accusers by introducing the autopsy report without the testimony of the medical examiner who performed the autopsy.⁹

At trial, Dr. Lara Goldfedder, a medical examiner with the Office of Chief Medical Examiner ("OCME"), testified as to the victim's cause of death.¹⁰ However, a former medical examiner at the OCME, Dr. John Lacy, had performed the autopsy instead of Dr. Goldfedder, but he had moved to a different state by the time of trial and was therefore unavailable to testify.¹¹

Dr. Goldfedder explained to the court how she had reviewed the report and several photographs from the autopsy prepared by Dr. Lacy.¹² Her characterization of her review, along with her "familiari-

⁷ *People v. Freycinet*, 892 N.E.2d 843, 846 (N.Y. 2008) (holding that an autopsy report was non-testimonial and therefore admissible under the business records exception to the hearsay rule).

⁸ In addition to the murder convictions, Hall was found guilty of first-degree attempted murder, first-degree attempted assault, two counts of first-degree robbery, one count of second-degree robbery and criminal possession of a weapon in the second and third degrees. *Hall*, 923 N.Y.S.2d at 433.

⁹ *Id.* at 429, 433. In addition to the constitutional claim, defendant also appealed the trial court's determination that the police lineup was not suggestive and the trial court's discretion to exclude defendant's girlfriend from the courtroom violated his right to a public trial. *Id.* at 433. The trial judge had ruled that despite the age differences between defendant and the other participants in the lineup, the physical appearances of all participants did not reflect such disparities. *Id.* The trial judge also excluded defendant's girlfriend from the courtroom on the ground that she was a potential witness. *Id.* The Appellate Division affirmed both determinations. *Hall*, 923 N.Y.S.2d at 433.

¹⁰ *Id.* at 429.

¹¹ *Id.*

¹² *Id.*

ty of the OCME's practices and procedures, . . . laid the foundation for [admitting] the report and photographs as business records."¹³ Dr. Goldfedder used the factual portions of the report to formulate her own conclusions and opinions as to what caused the victim's death.¹⁴ Based on her own findings and expertise, it was Dr. Goldfedder's opinion that the victim died from a gunshot wound to the head.¹⁵ Dr. Goldfedder stressed throughout her testimony that she reached all of her conclusions independently and did not rely on any of Dr. Lacy's opinions for support.¹⁶

On cross-examination, the defense elicited testimony from Dr. Goldfedder demonstrating how the condition of the victim's remains gave no indication as to the identity of the shooter.¹⁷ Furthermore, Dr. Goldfedder was unable to determine the number of guns that were used, whether the shooter was sitting or standing, or even if another shooter was present.¹⁸ Her testimony was strictly related to what happened to the victim, and she did not provide - nor could she provide - any factual data directly linking the defendant as the perpetrator of the crime.¹⁹ The Appellate Division concluded that the autopsy report was non-testimonial in nature and therefore did not violate defendant's Sixth Amendment confrontation rights.²⁰ The trial court's conviction and sentence were affirmed.²¹

III. THE COURT'S REASONING

In 2004, the Supreme Court's landmark decision in *Crawford v. Washington*²² held that testimonial evidence is inadmissible unless

¹³ *Id.*; see Fed. R. Evid. 803(6) (providing that documents kept in the ordinary course of business and made by a person with knowledge form an exception to the exclusionary rule of hearsay); see also *id.* advisory committee's notes ("A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity . . . [performed by] a person with knowledge . . .").

¹⁴ *Hall*, 923 N.Y.S.2d at 429-30.

¹⁵ *Id.* at 429, 431-32.

¹⁶ *Id.* at 429-30.

¹⁷ *Id.* at 432.

¹⁸ *Id.*

¹⁹ *Hall*, 923 N.Y.S.2d at 432.

²⁰ *Id.* at 432-33.

²¹ *Id.* at 433.

²² 541 U.S. 36 (2004).

the prosecution can prove that the declarant is unavailable to testify and the defense had a prior opportunity to cross-examine that witness.²³ The Court applied this holding five years later in *Melendez-Diaz v. Massachusetts*²⁴ where it held that the sworn affidavits by absent laboratory technicians were testimonial statements under the Confrontation Clause and entitled the defendant to confront those technicians.²⁵

Although Supreme Court precedent is binding on issues involving the federal Constitution,²⁶ the Appellate Division distinguished the then-most recent federal case, *Melendez-Diaz*, with the leading New York Court of Appeals cases.²⁷ The court felt the issues and facts in *Melendez-Diaz* were not determinative of the issue presented before them and followed binding Court of Appeals cases instead.²⁸

New York precedent has established that the admission of an autopsy report into evidence as a business record does not violate a defendant's Sixth Amendment confrontation rights.²⁹ As long as the testifying medical examiner relies on the factual portions of the report

²³ *Id.* at 68; see *Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011) (“[F]or testimonial evidence to be admissible, the Sixth Amendment ‘demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination.’” (quoting *Crawford*, 541 U.S. at 68)).

²⁴ 129 S. Ct. 2527, 2542 (2009) (“This case involves little more than the application of our holding in *Crawford v. Washington*. The Sixth amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against *Melendez-Diaz* was error.”).

²⁵ *Id.* at 2532.

²⁶ *People v. Kin Kan*, 574 N.E.2d 1042, 1045 (N.Y. 1991) (“All courts are, of course, bound by the United States Supreme Court’s interpretations of Federal statutes and the Federal Constitution.”).

²⁷ *Hall*, 923 N.Y.S.2d at 430-31.

²⁸ *Id.* at 429-32. The issue in *Melendez-Diaz* concerned the testimoniality of certificates of analysis prepared by non-testifying laboratory analysts, whereas in *Hall* the issue was whether the prosecution could introduce a forensic lab report created by a non-testifying technician through the testimony of another witness, even though that second witness took no part in the actual autopsy or preparing the subsequent report. Compare *Melendez-Diaz*, 129 S. Ct. at 2530 (“The question presented is whether those affidavits are ‘testimonial,’ rendering the affiants ‘witnesses’ subject to the defendant’s right of confrontation under the Sixth Amendment.”), with *Hall*, 923 N.Y.S.2d at 429-31 (deciding whether the admission of an unredacted autopsy report, prepared by a non-testifying witness but introduced through a surrogate expert witness, violated defendant’s Sixth Amendment rights).

²⁹ See, e.g., *Freycinet*, 892 N.E.2d at 846 (holding that an autopsy report was non-testimonial and its admission did not violate the Confrontation Clause).

to formulate his or her own opinion, such evidence does not violate the Confrontation Clause.³⁰ This principle has been extended to other forensic reports such as DNA analyses as well.³¹

The court referenced various indicia of reliability that the Court of Appeals previously set out in *People v. Rawlins*,³² which include:

[T]he extent to which the entity conducting the procedure is an arm of law enforcement; whether the contents of the report are a contemporaneous record of objective facts, or reflect the exercise of fallible human judgment; the question—closely related to the previous two—of whether a pro-law-enforcement bias is likely to influence the contents of the report; and whether the report’s contents are directly accusatory in the sense that they explicitly link the defendant to the crime.³³

The court in *Hall* recognized that the OCME is an impartial agency and is independent from other law enforcement agencies, including prosecutors³⁴; the OCME’s mandate is “to provide an impartial determination of the cause of death.”³⁵ Conducting autopsies and creating reports under such guidelines led the court to believe no pro-law enforcement bias existed.³⁶ Moreover, the court’s recognition of the “factual portions of the autopsy report consisting primarily of

³⁰ See *id.* at 845-46 (admitting the factual portions of the autopsy report was permissible and did not violate defendant’s confrontation rights).

³¹ See *People v. Brown*, 918 N.E.2d 927, 931-32 (N.Y. 2009) (holding admission of a DNA report without producing the technician who performed the testing did not violate defendant’s rights under the confrontation clause).

³² 884 N.E.2d 1019 (N.Y. 2008).

³³ *Hall*, 923 N.Y.S.2d at 430; *Rawlins*, 884 N.E.2d at 1030-31.

³⁴ See *Hall*, 923 N.Y.S.2d at 431 (“The OCME is not a law enforcement agency and is by law, independent of and not subject to the control of the prosecutor.” (quoting *Freycinet*, 892 N.E.2d at 846 (internal quotations omitted))).

³⁵ *Id.* at 431 (quoting *People v. Washington*, 654 N.E.2d 967, 969 (N.Y. 1995)). The court also pointed out that while the OCME conducts autopsies where the death is suspected to be criminal in nature, it also performs autopsies arising from “accident[s], suicide, suddenly when in apparent health, [or] when unattended by a physician.” See *id.* at 431 (citing NEW YORK CITY CHARTER § 557(f)(1)).

³⁶ *Id.* at 431; see also *Washington*, 654 N.E.2d at 969 (“The People have no power to dictate the contents or practices within OCME. Moreover, Medical Examiners have no authority to gather evidence with an eye toward prosecuting a perpetrator.”).

contemporaneous observations and measurements” satisfies the criterion of contemporaneous objective facts under the above test.³⁷

The court held that the remaining factor, “whether the report’s contents are ‘directly accusatory’ in the sense that they explicitly link the defendant to the crime,” also was not established.³⁸ The court explicitly mentioned how the report only documented what happened to the victim.³⁹ The shooter’s identity, height, weight, along with the number of guns used, or even the number of shooters, could not be determined from the report.⁴⁰ Thus, “the factual portions of the autopsy report . . . did not directly link defendant to the crime.”⁴¹ Using the criteria set forth in *Rawlins*, the Appellate Division’s ruling in *Hall* was consistent with previous Court of Appeals cases in this area.⁴² Thus, under this approach, the court in *Hall* correctly determined that the autopsy report was non-testimonial and did in violate defendant’s rights under the Confrontation Clause.

IV. THE FEDERAL APPROACH

Understanding the current framework of the Confrontation Clause necessarily begins with a brief analysis of its origins. In *Crawford v. Washington*, the Supreme Court focused repeatedly on “the historical background of the Clause to understand its meaning.”⁴³

³⁷ *Hall*, 923 N.Y.S.2d at 432; see *Freycinet*, 892 N.E.2d at 845 (providing that evidence is testimonial where “the contents of the report are a contemporaneous record of objective facts, or reflect the exercise of ‘fallible human judgment’”) (citing *Rawlins*, 884 N.E.2d at 1030-31).

³⁸ *Hall*, 923 N.Y.S.2d at 432; *Freycinet*, 892 N.E.2d at 846 (citing *Rawlins*, 884 N.E.2d at 1033, 1035).

³⁹ *Hall*, 923 N.Y.S.2d at 432.

⁴⁰ *Id.* at 431-32.

⁴¹ *Id.* at 432; *Freycinet*, 892 N.E.2d at 846.

⁴² See *Brown*, 918 N.E.2d at 931-32 (holding admission of a DNA report without the testimony of the technician who prepared the report did not violate defendant’s confrontation rights); *Freycinet*, 892 N.E.2d at 846 (holding that admission of the factual portions of an autopsy report was non-testimonial and thus admissible without implicating the Confrontation Clause).

⁴³

[T]he 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. It was these practices that the Crown deployed in notorious treason cases like Raleigh’s;

In *Crawford*, the defendant stabbed a man who purportedly attempted to rape his wife.⁴⁴ The police interviewed and recorded the wife's account of the incident, and the prosecution sought to introduce this recording "as evidence that the stabbing was not in self-defense."⁴⁵ The Washington Supreme Court affirmed the trial court's admission of the recording after deeming it bore "particularized guarantees of trustworthiness."⁴⁶ The Supreme Court, however, reversed the decision, finding the recording to be "testimonial" and therefore in violation of defendant's Sixth Amendment right to confront his accuser.⁴⁷ Under *Crawford*, evidence deemed "testimonial" is inadmissible unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant.⁴⁸

Although the Supreme Court has ruled on several Confrontation Clause cases, the Court has yet to formulate a definition of what

that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Crawford, 541 U.S. at 50. Sir Walter Raleigh's case was discussed extensively in *Crawford*. *Id.* at 44-45, 50, 52-53, 62. In seventeenth century England, government investigators recorded witness statements in lieu of in-court testimony. *Id.* at 43. One of these witnesses, Lord Cobham, an alleged conspirator against the crown, implicated Raleigh during an investigation and examination. *Id.* Believing Cobham would recant, Raleigh demanded to confront "my accuser before my face." *Id.* at 44. The court refused to oblige, and Raleigh was found guilty and executed. *Crawford*, 541 U.S. at 44. The Supreme Court had Sir Walter Raleigh's case in mind when attempting to rectify past abuses and questions left by former Confrontation Clause precedent. *Id.* at 44-45.

⁴⁴ *Id.* at 38.

⁴⁵ *Id.* at 40-41.

⁴⁶ *Id.* at 41. The Washington Supreme Court relied on *Ohio v. Roberts*, 448 U.S. 56 (1980), abrogated by *Crawford*, 541 U.S. 36, which held that testimony against a witness can be admitted if it bears "adequate indicia of reliability," a test which can be satisfied if the evidence bears "particularized guarantees of trustworthiness" or falls within a firmly rooted hearsay exception. *Crawford*, 541 U.S. at 66. This standard, however, departed from the Framers' intentions because *ex parte* testimony could still be admitted against the accused, "untested by the adversary process based on a mere judicial determination of reliability." *Id.* at 62.

⁴⁷ *Id.* at 68-69.

⁴⁸ *Id.* at 68. In *Crawford*, the defendant's wife was unavailable to testify because Washington has a marital privilege which allows the testimony of one spouse only with the other spouse's consent. *Id.* at 40. *Crawford*'s wife's statement was recorded during police interrogation, and *Crawford* had no opportunity to cross-examine his wife at that time. *Crawford*, 541 U.S. at 40.

constitutes testimonial.⁴⁹ Under *Crawford*, “testimonial” hearsay is “a specific type of out-of-court statement” that triggers the Confrontation Clause because the hearsay “consists of *ex parte* testimony.”⁵⁰ The Court pointed out that testimonial statements are “typically [] solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.”⁵¹ The Court added that the term “testimonial . . . applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”⁵² Testimonial evidence can also consist of affidavits, depositions, confessions, past trials, or hearings, but the Court gave no indication as to whether autopsy reports fall into this category.⁵³

Each of the above has several key elements in common: each is an in-court statement, made under oath, with a high degree of formality and is given to a government officer. The Court in *Crawford* discussed how the Confrontation Clause applies to “witnesses” against the accused, that is, those who bear testimony.⁵⁴ According to the Court, “[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.”⁵⁵ It follows that the

⁴⁹ See, e.g., *Bryant*, 131 S. Ct. at 1164 (expanding the scope of the term “emergency” to cover a threat to police officers and the public in general); see also *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that statements “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”).

⁵⁰ *Crawford*, 541 U.S. at 51, 60.

⁵¹ *Id.* at 51.

⁵² *Id.* at 68.

⁵³

Various formulations of this core class of testimonial statements exist: *ex 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.

Id. at 51-52 (internal citations and quotations omitted).

⁵⁴ *Id.* at 51.

⁵⁵ *Crawford*, 541 U.S. at 51.

Court was wary of government involvement in the “production of testimonial evidence” because it poses the same risk of violating the Confrontation Clause as the investigatory practices of seventeenth century England.⁵⁶

Another proposition the Court in *Crawford* extrapolated from the historical record was the Framers’ intent to prohibit “testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”⁵⁷ This proposition is firmly rooted in Supreme Court precedent, dating as far back as 1895 when *Mattox v. United States*⁵⁸ was decided. In *Mattox*, the testimony of a then-deceased witness was admitted because the defendant had an adequate opportunity to cross-examine the witness at the first trial.⁵⁹ Later cases have affirmed this position⁶⁰ while simultaneously, and axiomatically, affirming the opposite.⁶¹

The Court in *Crawford* observed that where non-testimonial

⁵⁶ *Id.* at 53. It is apparent that the Supreme Court was troubled by the use at trial of *ex parte* statements given to government officers. The Court in *Crawford* discussed at length that government involvement in eliciting the testimonial statement bears the “closest kinship to the abuses at which the Confrontation Clause was directed.” *Id.* at 68. “An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rule, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.” *Id.* at 51.

⁵⁷ *Id.* at 53-54.

⁵⁸ 156 U.S. 237, 244 (1895) (“The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . .”).

⁵⁹ *Id.* at 244.

⁶⁰ See *California v. Green*, 399 U.S. 149, 168 (1970) (“The subsequent opportunity for cross-examination at trial with respect to both present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned”); *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (“Under this Court’s prior decisions, the Sixth Amendment’s guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case.”).

⁶¹ See *Bruton v. United States*, 391 U.S. 123, 137 (1968) (holding where there was no opportunity for cross-examination, the accomplice confessions were excluded). Even with recently decided cases, the Supreme Court has remained faithful to past precedent and the Framers’ intentions: the Court in *Lilly v. Virginia*, 527 U.S. 116, 139 (1999), excluded testimonial evidence because the defendant had no opportunity for cross-examination; in *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987), statements made to an FBI informant were admitted even though the Court applied a more general standard that did not mandate prior cross-examination; in *Ohio v. Roberts*, 448 U.S. at 67-69, the Court allowed testimony given at a preliminary hearing where defendant had the opportunity to examine the witness.

hearsay is at issue, States retain the flexibility to formulate hearsay laws at their discretion.⁶² However, if testimonial hearsay is at issue, the Sixth Amendment demands a showing of unavailability and a prior opportunity for cross-examination before admitting the statements.⁶³ The reliability of evidence is assessed not substantively by a judge, but procedurally through the “crucible of cross-examination.”⁶⁴ Besides providing that prior testimony and police interrogations constitute testimonial evidence, the Court in *Crawford* left “for another day any effort to spell out a comprehensive definition of [the term].”⁶⁵

As a helpful tool, *Crawford* identified non-testimonial types of hearsay which would not implicate confrontation concerns.⁶⁶ *Crawford* specifically stated that evidence covered by the majority of hearsay exceptions, such as business records and co-conspirators statements, are not testimonial by their very nature.⁶⁷ Furthermore, *Crawford* emphasized the importance of the statement being made to a police officer or being produced by another government official.⁶⁸

Several years later, the Supreme Court addressed some of the ambiguities regarding “testimonial” evidence in *Melendez-Diaz v. Massachusetts*. In *Melendez-Diaz*, the defendant was arrested and charged with trafficking and distributing cocaine.⁶⁹ During trial, the prosecution sought to admit into evidence three certificates of analysis showing the results of forensic analyses performed on a seized substance.⁷⁰ The certificates recorded the weight of the bags of a

⁶² *Crawford*, 541 U.S. at 68.

⁶³ *Id.* After all, Raleigh was free to confront the witness reading Cobham’s confession, yet his trial was a “paradigmatic confrontation violation.” *Id.* at 52.

⁶⁴ *Id.* at 61 (“[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

⁶⁵ *Id.* at 68.

⁶⁶ *Crawford*, 541 U.S. at 56.

⁶⁷ *Id.* Chief Justice Rehnquist’s concurring opinion added spontaneous declarations “and countless other hearsay exceptions.” *Id.* at 74 (Rehnquist, C.J., concurring).

⁶⁸ *See id.* at 51-53 (“An 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.”); *see, e.g., White v. Illinois*, 502 U.S. 346, 356-58 (1992) (holding that the child’s statements to police officers were testimonial but failing to even discuss the possibility of the child’s statements to her mother, babysitter, nurse and doctor as remotely testimonial).

⁶⁹ *Melendez-Diaz*, 129 S. Ct. at 2530.

⁷⁰ *Id.* at 2530-31. “The certificates were sworn before a notary public by analysts at the

substance that was confiscated and the time of arrest, and the examination resulted in indentifying the substance as cocaine.⁷¹

The trial court admitted the certificates and the jury ultimately found Melendez-Diaz guilty.⁷² The Supreme Court granted certiorari to determine whether these certificates of analysis, characterized as affidavits, were testimonial, thereby invoking defendant's rights under the Confrontation Clause.⁷³ In a 5-4 decision, the Supreme Court held that admitting the affidavits without the opportunity for defendant to confront the analysts who prepared them violated his Sixth Amendment rights.⁷⁴ To the Court in *Melendez-Diaz*, there was "little doubt" that the certificates were "quite plainly affidavits" and therefore fell within the core class of testimonial statements described in *Crawford*.⁷⁵ The certificates were the functional equivalent to "live, in-court testimony, doing precisely what a witness does on direct examination."⁷⁶

The Court rejected respondent's argument that the affirmations here, being the result of neutral testing procedures, are different than testimony recalling historical facts "which is prone to distortion or manipulation."⁷⁷ The Court pointed out how the precise testing procedures used by the analysts were unknown, but noted how the methodology that was followed "requires the exercise of judgment and presents a risk of error that might be explored on cross-

State Laboratory Institute of the Massachusetts Department of Public Health as required under Massachusetts law." *Id.*

⁷¹ *Id.* at 2530.

⁷² *Id.* at 2531. Melendez-Diaz appealed but the Appeals Court affirmed the admission. *Melendez-Diaz*, 129 S. Ct. at 2531. Defendant appealed once again to the Supreme Judicial Court but was denied review. *Id.*

⁷³ *Id.* at 2530.

⁷⁴ *Id.* at 2532.

⁷⁵ *Id.*

⁷⁶ *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Davis*, 547 U.S. at 830) (internal quotations omitted). Moreover, the affidavits "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* (quoting *Crawford*, 541 U.S. at 51-52) (internal quotations omitted). The Court assumed that the analysts were cognizant of the evidentiary purpose of the affidavits because their purpose was reprinted on the affidavits themselves. *Id.* The affidavits were deemed testimonial evidence and, as such, "[a]bsent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, [the defendant] was entitled to be confronted with the analysts at trial." *Id.* (citing *Crawford*, 541 U.S. at 53-54) (internal quotations omitted).

⁷⁷ *Id.* at 2536.

examination.”⁷⁸ The Court further explained how “types of forensic evidence commonly used in criminal prosecutions,” including autopsy reports, are prone to factors that suggest inaccurate results can occur and be exposed on cross-examination.⁷⁹

A similar issue was addressed by the Supreme Court in *Bullcoming v. New Mexico*.⁸⁰ In *Bullcoming*, the defendant was arrested for driving while intoxicated.⁸¹ Defendant refused a breathalyzer test after failing a field sobriety test, so a warrant was issued to draw his blood to determine his blood alcohol concentration (“BAC”).⁸² The report indicated Bullcoming had a BAC of .21, a level high enough to prosecute him for the more serious crime of aggravated DWI.⁸³ The report also confirmed that the seal was intact when it reached the laboratory, the analyst’s statements are correct, and the examiner had followed correct procedure.⁸⁴

At trial, the prosecution announced it would not call the analyst who had performed the tests because he had been placed on unpaid leave, but instead would call another analyst from the same office.”⁸⁵ The defense objected, claiming admission of the report without the opportunity to cross-examine the analyst who tested Bullcoming’s blood would violate his Sixth Amendment confrontation rights.⁸⁶ The trial court overruled the objection, allowing the results of the test to be admitted as business records.⁸⁷ Bullcoming was found guilty of aggravated DWI and the New Mexico Court of Appeals affirmed the conviction.⁸⁸

⁷⁸ *Melendez-Diaz*, 129 S. Ct. at 2537 (“Like expert witnesses generally, and analyst’s lack of proper training or deficiency in judgment may be disclosed in cross-examination.”).

⁷⁹ *Id.* at 2536-38 (providing the example of “[a] forensic analyst . . . feel[ing] pressure-or hav[ing] an incentive-to alter the evidence in a manner favorable to the prosecution” or even “sometimes fac[ing] pressure to sacrifice appropriate methodology for the sake of expediency”); see also *Freycinet*, 892 N.E.2d at 846 (“Admittedly, a report of a doctor’s findings at an autopsy may reflect more exercise of judgment than the report of a DNA technician[.]”).

⁸⁰ 131 S. Ct. 2705 (2011).

⁸¹ *Id.* at 2709.

⁸² *Id.* at 2710. Pursuant to laboratory practices, the forensic analyst conducting the BAC test is aware of the individual’s identity and certifies all findings. *Id.*

⁸³ *Id.* at 2711.

⁸⁴ *Bullcoming*, 131 S. Ct. at 2710.

⁸⁵ *Id.* at 2711-12.

⁸⁶ *Id.* at 2712.

⁸⁷ *Id.*

⁸⁸ *Id.*

The New Mexico Supreme Court, citing *Melendez-Diaz*, acknowledged that while the BAC was “testimonial evidence,” its admission into evidence did not violate defendant’s right to confront his accuser, despite the fact that the forensic analyst who performed the test was unavailable.⁸⁹ The Supreme Court reversed the decision, holding that where “an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.”⁹⁰

The Court discussed how the examiner’s report contained “more than a machine-generated number”⁹¹; the analyst certified to “receiv[ing defendant’s] blood sample intact with the seal unbroken, checked to make sure that the forensic report number and the sample number correspond[ed], and that he performed a particular test on Bullcoming’s sample, adhering to a precise protocol.”⁹² The Court stated that “[t]hese representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination.”⁹³ The surrogate testimony failed to convey what the examiner knew or observed regarding his certification, *i.e.*, “the particular test and testing process he employed.”⁹⁴ In short, the forensic examiner who tested Bullcoming’s blood became a “witness” for Sixth amendment purposes who should have been available for confrontation.⁹⁵

Although states are required to apply Supreme Court precedent to federal Constitutional questions, the Appellate Division distinguished the then-most recent federal case, *Melendez-Diaz*, with the leading Court of Appeals cases.⁹⁶ The court determined that the

⁸⁹ *Bullcoming*, 131 S. Ct. at 2712-13.

⁹⁰ *Id.* at 2713.

⁹¹ *Id.* at 2714.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Bullcoming*, 131 S. Ct. at 2715.

⁹⁵ *Id.* at 2715-16; *see also Melendez-Diaz*, 129 S. Ct. at 2545 (Kennedy, J., dissenting) (stating that the Court’s holding means “the . . . analyst who must testify is the person who signed the certificate”).

⁹⁶ *Kin Kan*, 574 N.E.2d at 1045 (“All courts are, of course, bound by the United States Supreme Court’s interpretations of Federal statutes and the Federal Constitution.”). It must be noted that at the time *People v. Hall* was decided, *Melendez-Diaz v. Massachusetts* was the most recent case pertaining to the issue of confrontation. *Bullcoming v. New Mexico* was

issues in *Melendez-Diaz* and *Hall* were distinct enough to sufficiently establish the inapplicability of federal precedent.⁹⁷ Instead, the court looked to binding Court of Appeals cases which were “directly on point.”⁹⁸

In order to distinguish *Melendez-Diaz* from *Hall*, the court emphasized the distinctions between the procedures used and surrounding circumstances that created the evidence. First, the court in *Hall* concluded that the holding in *Melendez-Diaz* did not definitively characterize autopsy reports as “testimonial evidence.”⁹⁹ The affidavits in *Melendez-Diaz* were “prepared specifically for use at petitioner’s trial,” whereas autopsy reports may eventually be used for litigation purposes but are not prepared exclusively for trial.¹⁰⁰ Moreover, there was no indication that Dr. Goldfedder was aware of the autopsy report’s evidentiary purpose, unlike the analysts from *Melendez-Diaz*.¹⁰¹ Therefore, the court determined that the autopsy report, unlike the affidavits, did not fall within “the core class of testimonial statements” expressed in *Crawford*.¹⁰²

Second, the Court in *Melendez-Diaz* did not address the issue presented here, where another witness testified and was cross-examined after introducing a report the witness did not personally create.¹⁰³ Under *Melendez-Diaz*, the Supreme Court decided the is-

decided approximately two months after *Hall*.

⁹⁷ *Hall*, 923 N.Y.S.2d at 429-32.

⁹⁸ *Id.* at 430.

⁹⁹ *Id.*

¹⁰⁰ Compare *Melendez-Diaz*, 129 S. Ct. at 2540 (“[T]he analysts’ statements here-prepared specifically for use at petitioner’s trial-were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.”), with *Hall*, 923 N.Y.S.2d at 431 (conceding that while autopsy report may be used for trial, autopsy reports are usually not prepared specifically for litigation purposes, contrasting with the affidavits in *Melendez-Diaz*). The court in *Hall* pointed out that while the OCME conducts autopsies where the death is suspected to be criminal in nature, it also performs autopsies arising from “accident[s], suicide, suddenly when in apparent health, [or] when unattended by a physician.” See *id.* (citing NEW YORK CITY CHARTER § 557(f)(1)).

¹⁰¹ *Melendez-Diaz*, 129 S. Ct. at 2532.

¹⁰² *Hall*, 923 N.Y.S.2d at 431.

¹⁰³ Compare *Melendez-Diaz*, 129 S. Ct. at 2530 (“The question presented is whether those affidavits are ‘testimonial,’ rendering the affiants ‘witnesses’ subject to the defendant’s right of confrontation under the Sixth Amendment.”), with *Hall*, 923 N.Y.S.2d at 429-31 (deciding whether the admission of an unredacted autopsy report, prepared by a non-testifying witness but introduced through a surrogate expert witness, violated defendant’s Sixth Amendment rights).

sue of whether the admission of certificates of analysis, sworn under oath by analysts at a government laboratory, required in-court testimony by those analysts, the answer to which was “yes.”¹⁰⁴ In *Hall*, there *was* in-court testimony by a surrogate medical examiner from the OCME, the office where another examiner conducted the autopsy.¹⁰⁵ Based on these considerations, the court found that *Melendez-Diaz* was not applicable and decided to follow New York precedent which it felt was determinative of the issue.¹⁰⁶

V. THE NEW YORK APPROACH

The New York Constitution, resembling the federal Constitution, states, in relevant part, that “[i]n any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him or her.”¹⁰⁷ Prior to *Bullcoming*, the New York approach towards confrontation issues is largely similar to that of the federal approach.

In *Hall*, after its brief recitation of the federal law, the Appellate Division introduced the leading New York cases concerning the Confrontation Clause, and recognized that objective, factual data is admissible and does not implicate confrontation concerns.¹⁰⁸ In 2008, the Court of Appeals decided *People v. Rawlins* and its companion case, *People v. Meekins*.¹⁰⁹ In *Meekins*, the defendant was convicted and charged with sodomy in the first degree and sexual abuse in the first degree.¹¹⁰ At trial, the prosecutor introduced the results of a DNA test comparing DNA from the victim’s rape kit to that of defendant.¹¹¹ The prosecutor called two expert witnesses to the stand, neither of whom observed or conducted the actual analysis.¹¹² Each analyst testified that their opinions were derived from the results of

¹⁰⁴ *Melendez-Diaz*, 129 S. Ct. at 2542.

¹⁰⁵ *Hall*, 923 N.Y.S.2d at 429-32.

¹⁰⁶ *Id.* at 429.

¹⁰⁷ N.Y. CONST. art. I, § 6.

¹⁰⁸ *Hall*, 923 N.Y.S.2d at 430, 432.

¹⁰⁹ 884 N.E.2d 1019 (N.Y. 2008).

¹¹⁰ *Id.* at 1024.

¹¹¹ *Id.*

¹¹² *Id.*

the DNA test and were solely their own.¹¹³ The Court of Appeals held that the defendant's right to confront the expert who actually performed the analysis was not violated because the report was not "testimonial."¹¹⁴ "The graphical DNA test results, standing alone, shed no light on the guilt of the accused in the absence of an expert's opinion that the results genetically match[ed] a known sample."¹¹⁵

However, in *Rawlins*, the Court of Appeals considered a fingerprint comparison to be "testimonial" evidence.¹¹⁶ At trial, the results of a fingerprint comparison between fingerprints lifted from the scenes of six burglarized commercial establishments and defendant's fingerprints were introduced at trial.¹¹⁷ Although two police officers conducted the test, only one appeared at trial.¹¹⁸ The Court of Appeals held that the defendant was entitled to confront the missing officer because the fingerprint reports "were clearly testimonial."¹¹⁹ According to the court, the reports were testimonial because the officers "prepared [the] reports solely for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish [the] defendant's identity."¹²⁰

At first glance it appears that *Meekins* and *Rawlins* share similar issues with similar fact patterns yet result in different outcomes. The court focused on "various indicia of testimoniality" to aid its decisions.¹²¹ Such indicia include:

- (1) the extent to which the entity conducting the procedure is "an 'arm' of law enforcement";
- (2) whether the contents of the report are a contemporaneous record of objective facts, or reflect the exercise of "fallible human judgment";
- (3) the question—closely related to the previous two—of whether a pro-law-enforcement bias is likely to influence the contents of the report; and
- (4) whether the report's contents are

¹¹³ *Id.* at 1024-25.

¹¹⁴ *Meekins*, 884 N.E.2d at 1035.

¹¹⁵ *Id.*

¹¹⁶ *Rawlins*, 884 N.E.2d at 1033.

¹¹⁷ *Id.* at 1022-23.

¹¹⁸ *Id.* at 1023.

¹¹⁹ *Id.* at 1033.

¹²⁰ *Id.*

¹²¹ *Rawlins*, 884 N.E.2d at 1029-31.

“directly accusatory” in the sense that they explicitly link the defendant to the crime.¹²²

In *Meekins*, the DNA report was created by analysts from a private laboratory, showed no indication of pro-law enforcement bias, and consisted of data that did not directly link the defendant to the crime without the assistance and testimony of an expert.¹²³ In *Rawlins*, however, the fingerprints lifted from the crime scene matched the defendant’s, thereby directly linking him to the crime and invoking his right to confrontation.¹²⁴ The Court of Appeals applied these factors once again in *People v. Freycinet*.¹²⁵

In *Freycinet*, the trial court admitted a redacted autopsy report which excluded the “opinions as to the cause and manner of the victim’s death.”¹²⁶ The report was redacted so another examiner from the same office could testify rather than the examiner that performed the autopsy.¹²⁷ “[G]iving opinions based on the facts in . . . the report,” this examiner testified that the cause of death was bleeding from stab wounds and that the attacker was likely right-handed.¹²⁸ But this testimony, however, could not directly link the defendant to the crime. Defendant appealed his conviction of second-degree manslaughter, to which both the Appellate Division and Court of Appeals affirmed.¹²⁹

The Court of Appeals held that the unredacted portions of the autopsy report, *i.e.*, the factual portions, were “clearly not testimonial.”¹³⁰ The court further held that the autopsy report constituted a business record, so its admission provided no basis for a Confrontation Clause violation.¹³¹ Recalling *Meekins*, the court in *Freycinet* emphasized how an agency independent of law enforcement performed the autopsy and the factual portions did not directly link the

¹²² *Freycinet*, 892 N.E.2d at 845-46 (quoting *Rawlins*, 884 N.E.2d at 1030-31 (internal citations and quotations omitted)).

¹²³ *Meekins*, 884 N.E.2d at 1034-35.

¹²⁴ *Rawlins*, 884 N.E.2d at 1033.

¹²⁵ 892 N.E.2d 843 (N.Y. 2008).

¹²⁶ *Id.* at 844.

¹²⁷ *Id.* at 844-45.

¹²⁸ *Id.* at 845.

¹²⁹ *Id.*

¹³⁰ *Freycinet*, 892 N.E.2d at 846.

¹³¹ *Id.* at 845.

defendant to the crime.¹³²

The Court of Appeals addressed a similar situation in *People v. Brown*¹³³ when it had to determine whether a DNA report, introduced through the testimony of a medical technician from a different forensic laboratory, violated defendant's confrontation rights.¹³⁴ The People attempted to introduce the DNA report as a business record, to which the defense objected claiming the report was testimonial, triggering defendant's rights under the Confrontation Clause.¹³⁵ The prosecution responded by stating the report "contained merely raw data" and was therefore non-testimonial.¹³⁶

The court ultimately held that the report was non-testimonial and therefore did not constitute a Confrontation Clause violation.¹³⁷ The court noted that it was the testifying witness, relying on the factual portions of the report, and not the "machine-generated graphs, charts, and numerical data" of the DNA report, that "made the critical determination linking [the] defendant to [the] crime."¹³⁸

Most recently, the First Department addressed another Confrontation Clause issue in an alternative holding in *People v. Encarnacion*.¹³⁹ Dr. Coye, a medical examiner from the OCME, was called by the prosecution to testify at trial.¹⁴⁰ Her testimony revealed that she had personally conducted DNA testing on various items and had positively matched defendant's DNA to those items.¹⁴¹ However, Dr. Coye also testified as to the results of DNA testing on a pair of jeans which she did not personally test, but that test positively matched de-

¹³² *Meekins*, 884 N.E.2d at 1034-35.

¹³³ 918 N.E.2d 927 (N.Y. 2009).

¹³⁴ *Id.* at 928.

¹³⁵ *Id.* at 929.

¹³⁶ *Id.* at 929-30. The prosecution cited *People v. Cratsley*, 653 N.E.2d 1162 (N.Y. 1995) and *People v. Kennedy*, 503 N.E.2d 501 (N.Y. 1986), which provided "that a business record can be introduced by a person who is not a custodian of records, provided that the other criteria for the business record exception are established." *Id.* at 930.

¹³⁷ *Brown*, 918 N.E.2d at 928.

¹³⁸ *Id.* at 931.

¹³⁹ 926 N.Y.S.2d 446 (App. Div. 1st Dep't 2011). The court declined to review the confrontation issue in the interest of justice because defendant failed to preserve this issue for review. *Id.* at 454-55. Nonetheless, the court discussed the issue as an alternative holding. *Id.*

¹⁴⁰ *Id.* at 456.

¹⁴¹ *Id.*

defendant's DNA as well.¹⁴²

The court held in an alternative decision that the admission into evidence of a forensic analyst's testimony concerning the results of a DNA test linking defendant to the crime, even though the analyst did not perform the test personally, did not violate defendant's Sixth Amendment rights.¹⁴³ The court discussed *Brown*, *Rawlins*, and *People v. Thompson*¹⁴⁴ in general terms, noting how the reports in each case were "not accusatory and merely contain[ed] non-identifying raw data in the form of a DNA profile and thus, standing alone, and in the absence of expert opinion linking the results to the defendant, shed no light on the guilt of the accused."¹⁴⁵ The court followed these three cases, referring to how the reports evincing the findings of DNA testing, when testified to as admitted evidence, "[did] not invoke the Confrontation Clause and thus [could] be used against a defendant without production of the analyst who performed the DNA testing."¹⁴⁶

VI. WAS THE NEW YORK COURT OF APPEALS CORRECT TO RENDER *MELENDEZ-DIAZ* INAPPLICABLE?

Coincidentally, both *Bullcoming* and *Encarnacion* were decided on the same date, though appear to rule differently despite a similar fact pattern. Although the federal and New York State Confrontation Clauses contain similar language, the two approaches seem to conflict in some respects.

One could argue that the Appellate Division committed clear error by holding *Melendez-Diaz* inapplicable. One of the reasons for dispensing with *Melendez-Diaz*, the Appellate Division claimed, was the fact that the Supreme Court's decision failed to explicitly mention

¹⁴² *Encarnacion*, 926 N.Y.S.2d at 456.

¹⁴³ *Id.*

¹⁴⁴ 895 N.Y.S.2d 148, 149 (App. Div. 2d Dep't 2010) (holding the admission of the DNA reports did not violate defendant's Sixth Amendment rights and the state was not required to present testimony of analysts who actually conducted the tests).

¹⁴⁵ *Encarnacion*, 926 N.Y.S.2d at 456 (citing *Brown*, 918 N.E.2d at 931; *Meekins*, 884 N.E.2d at 1034-35; *Thompson*, 895 N.Y.S.2d at 149).

¹⁴⁶ *Encarnacion*, 926 N.Y.S.2d at 456. By comparing this DNA evidence to the evidence from *Brown*, *Rawlins*, and *Thompson*, the court found it to be the "same kind [of evidence] that our courts have found do not violate the Confrontation Clause, namely DNA testing performed by the non-testifying analyst yielding non-accusatory raw data." *Id.* at 456.

autopsy reports as testimonial.¹⁴⁷ However, the failure of the Supreme Court in *Melendez-Diaz* to specifically hold an autopsy report testimonial is not dispositive of a statement's testimoniality.

Next, the Appellate Division emphasized how the certifications in *Melendez-Diaz* were "prepared specifically for trial" and the analysts were unquestionably aware of the affidavits' evidentiary purpose," contrasting with the situation in *Hall*.¹⁴⁸ This demonstrates that, by failing to adhere to these factors, the court in *Hall* departed from aspects of the federal approach.¹⁴⁹ As the Court in *Bullcoming* interpreted it, certifications "prepared in connection with a criminal investigation or prosecution . . . [are] 'testimonial,' and therefore within the compass of the Confrontation Clause."¹⁵⁰ In the end, the autopsy report in *Hall*, just like the affidavits in *Melendez-Diaz*, was used by the People in connection with their criminal prosecution against Hall, suggesting that the report could be construed as testimonial.

In addition, *Crawford* makes clear that statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be *available* for use at a later trial" falls within the "core class of testimonial statements."¹⁵¹ An autopsy report of a victim who sustained two gunshot wounds should lead an objective witness to reasonably believe the report would be used in a criminal proceeding. Furthermore, the report constituted "[a] solemn declaration or affirmation made for the purpose of estab-

¹⁴⁷ *Hall*, 923 N.Y.S.2d at 430. However, this is, at the very least, not inconsistent with *Crawford* and its progeny because those cases provide more of a description of "testimonial" rather than an all-encompassing definition. See *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"). Moreover, the *Crawford* decision makes no mention of limiting a statement's testimoniality to specific genres of evidentiary sources. It is only by mere coincidence that the majority of cases previously discussed deal with the admissibility of "DNA" or other "forensic" evidence.

¹⁴⁸ *Hall*, 923 N.Y.S.2d at 431; *Melendez-Diaz*, 129 S. Ct. at 2532, 2540.

¹⁴⁹ See *Hall*, 923 N.Y.S.2d at 431 (pointing out that while the OCME conducts autopsies where the death is suspected to be criminal in nature, it also performs autopsies arising from "accident[s], suicide, suddenly when in apparent health, [or] when unattended by a physician" (citing NEW YORK CITY CHARTER § 557(f)(1))).

¹⁵⁰ *Bullcoming*, 131 S. Ct. at 2713-14; see *Davis*, 547 U.S. at 822 (holding that a testimonial statement is one having a "primary purpose" of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution").

¹⁵¹ *Crawford*, 541 U.S. at 52 (emphasis added); see *Melendez-Diaz*, 129 S. Ct. at 2532 (holding forensic analyses available for trial are considered "testimonial statements" and the analyst becomes a "witness" for Sixth Amendment purposes).

lishing or proving some fact.”¹⁵² The autopsy report was used at Hall’s trial to prove a past fact: the cause of the victim’s death.¹⁵³

Unlike the Appellate Division in *Hall*, the Court in *Melendez-Diaz* clearly rejected the argument that there is a difference between testimony reciting past facts, and testimony which is the “result of neutral, scientific testing.”¹⁵⁴ The Supreme Court held in *Melendez-Diaz* that the defendant was entitled to confront the analysts who prepared the reports, noting that “neutral and scientific testing” is not always as “neutral or reliable as respondent suggests.”¹⁵⁵

Despite the Appellate Court recognizing the concession of the court in *Freycinet* that autopsies may contain aspects of judgment, both courts nonetheless held the autopsy reports to be non-testimonial. This conflicts with *Melendez-Diaz*, where the Supreme Court’s ruling would mandate the use of confrontation to expose any deficienc[ies] in judgment.¹⁵⁶ For this reason, and those given above, it is arguable that the Appellate Court erred in *Hall* by rendering *Melendez-Diaz* inapplicable, and that the autopsy report was in fact testimonial for Confrontation Clause purposes, entitling Hall to confront Dr. Lacy.

¹⁵² *Crawford*, 541 U.S. at 51 (internal quotation marks and citations omitted).

¹⁵³ *Hall*, 923 U.S. at 431-32.

¹⁵⁴ *Melendez-Diaz*, 129 S. Ct. at 2536. This, the Court explained, would only open an invitation to return to the standard prescribed by *Ohio v. Roberts* where the admissibility of evidence is measured by particularized guarantees of trustworthiness, circumventing the Confrontation Clause. *Id.*

¹⁵⁵ *Id.* The Court went on to discuss how outside pressures can sometimes force forensic scientists to “sacrifice appropriate methodology for the sake of expediency,” which would alter the outcomes of such neutral and scientific tests. *See id.* (“A forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution.”). “Confrontation is one means of assuring accurate forensic analysis,” and is also a way to expose fraudulent or incompetent analysts as well. *Id.* at 2537. Any presence of fabrication, any lack of proper training, or any deficiency in judgment may be revealed during cross-examination. *Id.* The *Bullcoming* decision reinforces the idea that “neutral and scientific testing” does not produce raw, objective data. Instead, according to the Supreme Court, various aspects of the testing may have adverse impacts on the results of the tests and can be revealed through confrontation. *Bullcoming*, 131 S. Ct. at 2714-15.

¹⁵⁶ *Melendez-Diaz*, 129 S. Ct. at 2536.

VII. HAS THE NEW YORK COURT OF APPEALS' INTERPRETATION OF THE CONFRONTATION CLAUSE RUN AFOUL OF THE CONSTITUTION?

If the *Hall* decision appears before the Court of Appeals, the court will have the opportunity to review whether or not the Appellate Division erroneously applied New York precedent instead of *Melendez-Diaz*. Whereas the court in *Hall* distinguished between the issue before it and the issue before the Supreme Court in *Melendez-Diaz*, *Bullcoming* displays a parallel situation to *Hall*.¹⁵⁷ *Bullcoming*'s holding brings into question whether or not the Court of Appeals' interpretation of the federal Constitution's Confrontation Clause has been accurate over the decades. While it is true the Appellate Division may have correctly analyzed the testimonial nature of the autopsy report in *Hall* under the *Rawlins* criteria, this approach may be erroneous in itself.

The federal and New York approaches diverge where it is evident the analysts know their finding could be used at trial.¹⁵⁸ The Court in *Melendez-Diaz* discussed how preparing a report to be used in the aid of a police investigation or criminal proceeding is a key factor for determining testimoniality,¹⁵⁹ whereas in *Meekins* the reports were held to be non-testimonial even though the analysts knew their findings could be used at a later trial.¹⁶⁰ Along this same line, another distinguishing factor is the fact that Dr. Lacy may never have known Ralph Hall's name, whereas the analysts in both *Melendez-*

¹⁵⁷ A forensic laboratory report created by a non-testifying witness but admitted through the testimony of an analyst who did not perform or observe the examination violates a defendant's rights under the Confrontation Clause. Compare *Melendez-Diaz*, 129 S. Ct. at 2530 ("The question presented is whether those affidavits are "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment"), with *Bullcoming*, 131 S. Ct. at 2710 ("The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification . . . through the in-court testimony of a scientist who did not sign[,] perform or observe the test reported in the certification."), and *Hall*, 923 N.Y.S.2d at 429 (whether the admission of an unredacted autopsy report, prepared by a non-testifying witness but introduced through a surrogate expert witness, violated defendant's Sixth Amendment rights).

¹⁵⁸ *Melendez-Diaz*, 129 S. Ct. at 2532; *Meekins*, 884 N.E.2d at 1034.

¹⁵⁹ *Bullcoming*, 131 S. Ct. at 2717 (citing *Melendez-Diaz*, 129 S. Ct. at 2532 (holding forensic reports available for use at trial are "testimonial statements" and certifying analyst is a "witness" for purposes of the Sixth Amendment)).

¹⁶⁰ *Meekins*, 884 N.E.2d at 1034.

Diaz and *Bullcoming* were aware of the individual's identity.¹⁶¹ This information would be relevant because it would establish a connection between the autopsy report and a criminal prosecution.¹⁶² Nonetheless, when the Court in *Bullcoming* discussed the "material" details of the case, the analyst's knowledge of defendant's name was left unmentioned.¹⁶³

An additional difference that seemed relevant to the court's decision in *Hall* was that the autopsy report was unsworn and hence could not "fairly be viewed as testimonial material."¹⁶⁴ However, under *Crawford*, "the absence of [an] oath [is] not dispositive" in determining the testimonial nature of a statement.¹⁶⁵ Just as the autopsy report in *Hall* was unsworn, so too was the BAC report in *Bullcoming*.¹⁶⁶ While the formalities of the report in *Bullcoming* were "more than adequate to qualify [the analyst's] assertions as testimonial,"¹⁶⁷ the autopsy report in *Hall* somehow failed to satisfy the requisite formalities to qualify as testimonial.¹⁶⁸

The most significant difference, however, concerns the admission of objective data. In *Bullcoming* and *Hall*, the analysts prepared a report in order to prove some past fact: the BAC of defendant in *Bullcoming* and the cause of death of the victim in *Hall*.¹⁶⁹ Significant portions of the results of the BAC test, if not all, were generated

¹⁶¹ *Bullcoming*, 131 S. Ct. at 2710; *Melendez-Diaz*, 129 S. Ct. at 2532.

¹⁶² See *Davis*, 547 U.S. at 822.

¹⁶³ See *Bullcoming*, 131 S. Ct. at 2717-18.

¹⁶⁴ *Hall*, 923 N.Y.S.2d at 431 (internal quotations omitted). The Appellate Division used this as another factor distinguishing the holding in *Melendez-Diaz* in determining its inapplicability. See *id.* ("Thus, any holding in *Melendez-Diaz*, at least insofar as scientific forensic reports are concerned, is arguably limited to the 'formalized testimonial materials' to which Justice Thomas referred. Here, the autopsy report, which was unsworn, cannot fairly be viewed as 'formalized testimonial material[.]' " (citing *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring))).

¹⁶⁵ *Crawford*, 541 U.S. at 52; see *Bullcoming*, 131 S. Ct. at 2717 ("Indeed, in *Crawford*, this Court rejected as untenable any construction of the Confrontation Clause that would render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn statements 'perfectly OK.' " (quoting *Crawford*, 541 U.S. at 52-53, n.3)); see also *Bryant*, 131 S. Ct. at 1160 (noting that informality "does not necessarily indicate . . . lack of testimonial intent").

¹⁶⁶ *Bullcoming*, 131 S. Ct. at 2717; *Hall*, 923 N.Y.S.2d at 431.

¹⁶⁷ *Bullcoming*, 131 S. Ct. at 2717.

¹⁶⁸ *Hall*, 923 N.Y.S.2d at 429, 431.

¹⁶⁹ *Bullcoming*, 131 S. Ct. at 2710; *Hall*, 923 N.Y.S.2d at 429.

by a gas chromatograph machine.¹⁷⁰ Despite using instruments that generate objective data, the human element behind the final report is relevant to the criminal proceeding, and the defendant was entitled to question the report's reliability.¹⁷¹ In other words, the apparently objective data did not completely remove elements of subjectivity concerning methodology and competency when conducting these forensic analyses; the past events and human aspects of the testing, apart from the actual results, could be exposed through cross-examination.¹⁷² This is consistent with the holding in *Melendez-Diaz* where the Court discussed how facts and otherwise neutral data can be susceptible to human judgment, incompetency and fraudulent behavior.¹⁷³

In *Freycinet*, however, the Court of Appeals found the factual portions of the autopsy report to be "clearly not testimonial" and therefore admissible, despite conceding that a "doctor's findings at an autopsy may reflect [an] exercise of judgment."¹⁷⁴ Likewise, in *Brown*, the Court of Appeals observed how the machine-generated data did not link the defendant to the crime and was therefore considered non-testimonial.¹⁷⁵ The Court of Appeals in *Rawlins*' companion case, *People v. Meekins*, also held that the DNA comparison report was non-testimonial.¹⁷⁶

In light of *Bullcoming*'s narrow holding concerning forensic

¹⁷⁰ *Bullcoming*, 131 S. Ct. at 2710-11. Even though the New Mexico Supreme Court described the analyst as a "mere scrivener," recording only data the machine produced, the Supreme Court noted there is more to just a "raw, machine-generated" report. *Id.* at 2715. See *Melendez-Diaz*, 129 S. Ct. at 2542 (holding if an out-of-court statement seeks to prove a past fact essential to the case the Confrontation Clause is triggered); see also *Davis*, 547 U.S. at 822 (holding that a statement is testimonial if its primary purpose is to "establish or prove past events potentially relevant to later criminal prosecution").

¹⁷¹ *Bullcoming*, 131 S. Ct. at 2715-16.

¹⁷² *Id.* at 2714. With the analyst that performed the test on the stand, a defense attorney would have the opportunity to ask questions that reveal any incompetence or deceit. See *id.* at 2715 ("With Caylor on the stand, Bullcoming's counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty . . .").

¹⁷³ See *Melendez-Diaz*, 129 S. Ct. at 2537 ("Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination."); see also *Bullcoming*, 131 S. Ct. at 2715 n.8 (noting how the testifying witness "acknowledged that you don't know unless you actually observe the analysis that someone else conducts, whether they followed th[e] protocol in every instance").

¹⁷⁴ *Freycinet*, 892 N.E.2d at 846.

¹⁷⁵ *Brown*, 918 N.E.2d at 931.

¹⁷⁶ *Meekins*, 884 N.E.2d at 1034-35.

laboratory reports, the decision in *Hall* may turn out to run afoul of the United States Constitution. The crux of the analysis is that the issues in *Bullcoming* and *Hall* are very nearly a mirror image of one another, yet the holdings come out opposite each other.¹⁷⁷ The federal approach under *Bullcoming*, unlike the New York approach, requires that the creators of scientific forensic reports be available to testify as to their findings, regardless of whether the prosecution seeks only to admit factual portions or machine-generated data.¹⁷⁸ If these witnesses are unavailable to testify, the Constitution demands a prior opportunity for cross-examination, or else such evidence violates a defendant's Sixth Amendment confrontation rights.¹⁷⁹

On the contrary, the New York Court of Appeals has continuously held that the admission of the factual portions of such reports does not violate the defendant's rights under the Confrontation Clause, even where the originator is unavailable to testify.¹⁸⁰ The factual portions of the autopsy report that Dr. Goldfedder testified to did not shed light on the methods used by Dr. Lacy when performing the autopsy.¹⁸¹ Like the defendant in *Bullcoming*, *Hall* should have had the right to confront Dr. Lacy to explore his competence and the testing processes he employed.

Even after reanalyzing the application of *Melendez-Diaz* to *Hall*, and in light of *Bullcoming*, the answer of whether the Appellate Court's decision is erroneous is still not clear. The Court of Appeals, if given the opportunity to review *Hall*, can clarify the precedential value of *Rawlins* and its progeny, or overrule the Appellate Court's decision to comply with the federal Constitution. However, the Su-

¹⁷⁷ *Bullcoming*, 131 S. Ct. at 2715 (holding that admitting objective, factual data from a forensic laboratory test through the testimony of a surrogate expert violates the Confrontation Clause). *But see Hall*, 923 N.Y.S.2d at 431-32 (holding that admitting the factual portions of an autopsy report through the testimony of a surrogate expert witness does not violate the Confrontation Clause).

¹⁷⁸ *Bullcoming*, 131 S. Ct. at 2717.

¹⁷⁹ *Id.* at 2716-17.

¹⁸⁰ *See Brown*, 918 N.E.2d at 931-32 (holding admission of a DNA report without the testimony of the technician who prepared the report did not violate defendant's confrontation rights); *Freycinet*, 892 N.E.2d at 846 (holding that admission of the factual portions of an autopsy report was non-testimonial and thus admissible without implicating the Confrontation Clause); *Meekins*, 884 N.E.2d at 1034-35 (holding that the DNA comparison report, containing non-identifying graphical information, was not testimonial and therefore its admission did not violate defendant's rights under the confrontation clause).

¹⁸¹ *Hall*, 923 N.Y.S.2d at 432.

preme Court may get its chance to clarify its position sooner in *Williams v. Illinois*,¹⁸² a case which can have ramifications for several New York Court of Appeals cases. The issue presented in the petition for certiorari is: “Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.”¹⁸³

This issue is arguably identical to that in *Bullcoming* and *Hall*. The *Williams* decision has the ability to either call into question or affirm New York’s approach to the Constitution’s meaning of the Confrontation Clause.¹⁸⁴ As foretold by Justice Kennedy’s dissent in *Bullcoming*, there are no definite projections as to where the Supreme Court will take the Confrontation Clause.¹⁸⁵

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¹⁸² 939 N.E.2d 268 (Ill. 2010), cert. granted, 131 S. Ct. 3090 (2011). In *Williams*, defendant was convicted, *inter alia*, of sexual assault after defendant’s DNA profile matched the DNA profile from the victim’s rape kit. *Id.* at 269, 271. The DNA report was introduced at trial by a forensic analyst who had not conducted the test herself. *Id.* at 271-72. The Illinois Supreme Court held that admitting the test results did not implicate defendant’s Sixth Amendment right to confront his accuser. *Id.* at 282.

¹⁸³ *Williams v. Illinois*, Petition for Writ of Cert, i.

¹⁸⁴ *Williams* concerns a DNA report, as did *Encarnacion*, *Brown* and *Meekins*. In addition, the issue in *Williams*, where the court permitted the introduction of forensic evidence without testimony from the analyst who performed the tests, is similar to that in *Freycinet* and *Brown*.

¹⁸⁵

This Court’s prior decisions leave trial judges to “guess what future rules this Court will distill from the sparse constitutional text,” or to struggle to apply an “amorphous, if not entirely subjective,” “highly context-dependent inquiry” involving “open-ended balancing.” The persistent ambiguities in the Court’s approach are symptomatic of a rule not amenable to sensible applications.

Bullcoming, 131 S. Ct. at 2725-26 (Kennedy, J., dissenting) (internal citations omitted).

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