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THE CONFRONTATION CLAUSE AND EXPERT TESTIMONY: RECENT DEVELOPMENTS IN THE SUPREME COURT AND THE NEW YORK STATE COURT OF APPEALS

*Andrew C. Fine**

INTRODUCTION

*Crawford v. Washington*¹ promised an entirely new approach to the Confrontation Clause.² Under the regime of *Ohio v. Roberts*,³ the scope of the Clause was essentially coterminous with the rule against hearsay. A nontestifying declarant's out-of-court statements, including her written reports, were generally admissible in New York because of the state's expansive view of the exceptions to the hearsay rule. *Crawford*, however, overruled *Roberts* and seemed to signal transformative change, because it explicitly severed the link between the Clause and the scope of the prohibition against hearsay. The decisive inquiry became whether an out-of-court hearsay statement is testimonial in character, rather than whether it is reliable. If a statement is testimonial, and is offered for its truth, its introduction is prohibited in the absence of an opportunity to cross-examine the declarant, regardless of its evidentiary admissibility.

In deciding to abandon the *Roberts* approach, Justice Scalia's opinion in *Crawford* condemned the *Roberts* Court's willingness to "leave the Sixth Amendment's protection to the vagaries of

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¹ *Crawford v. Washington*, 541 U.S. 36 (2004).

² U.S. CONST. amend. VI.

³ *Ohio v. Roberts*, 448 U.S. 56 (1980).

the rules of evidence,”⁴ and to “allow[] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.”⁵ “Dispensing with confrontation because testimony is obviously reliable,” the opinion declares, “is akin to dispensing with jury trial because a defendant is obviously guilty.”⁶ Accordingly, a hearsay statement’s reliability, as measured by whether a judge concludes that it fits under a hearsay exception or believes that it is otherwise “trustworthy,” has become irrelevant under the Confrontation Clause. If the declarant does not testify and the statement is testimonial within the meaning of the Clause, its admission violates the Clause, regardless of its reliability. Out-of-court statements from a nontestifying declarant that are not offered for their truth, however, do not run afoul of the Clause.⁷

In *Crawford*’s aftermath, important questions have arisen regarding its applicability to an expert’s “basis” testimony that either incorporates or relies upon out-of-court statements by nontestifying declarants. In addition, courts have addressed the constitutional admissibility of lab reports based on tests conducted by nontestifying analysts, and whether the Confrontation Clause problem can be finessed by offering the reports through the testimony of experts who were not involved in the testing process. This piece will address the manner in which the New York State court of appeals has grappled with *Crawford* and its progeny in the area of expert testimony and lab reports.

Since *Crawford*, New York’s high court has, unlike most appellate courts, recognized the hearsay character of an expert’s “basis” testimony that incorporates the statements of nontestifying declarants. If those statements are testimonial in character, their introduction through the expert violates the Confrontation Clause. However, the court of appeals has simply refused to recognize that the Supreme Court’s post-*Crawford*

⁴ 541 U.S. at 61.

⁵ *Id.* at 62.

⁶ *Id.*

⁷ *Id.* at 59.

decision in *Melendez-Diaz v. Massachusetts*,⁸ subsequently reinforced by *Bullcoming v. New Mexico*,⁹ squarely held that the introduction of laboratory reports prepared by nontestifying declarants, and any expert testimony based on them, is prohibited by the Clause. Supreme Court precedent contradicts the court of appeals' rulings upholding the admission of such evidence.

I. EXPERT "BASIS" TESTIMONY RELYING ON STATEMENTS MADE BY NONTESTIFYING DECLARANTS: *PEOPLE V. GOLDSTEIN*¹⁰

Prior to *Crawford*, most courts viewed an expert witness' "basis" testimony as nonhearsay. In such jurisdictions, the documents, lab reports, or other information upon which the expert relied were ostensibly not being offered for their truth, but rather only to assist the jury in evaluating the validity of the expert's opinion.¹¹ The federal courts that have followed this approach have relied on Federal Rule of Evidence 703, which allows an expert to base an opinion on "facts or data in the case that the expert has been made aware of or personally observed," and further declares that such facts "need not be admissible for the opinion to be admitted." Moreover, even if such facts "would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury," if their probative value "substantially outweighs their prejudicial effect."

Since the federal approach is premised on the view that "basis" testimony is not hearsay, such testimony seemed to be immune from *Crawford* scrutiny when offered in cases tried in federal courts, and in states with similar evidentiary rules. Indeed, that is how most federal courts have treated this subject since *Crawford*,¹² and a number of state courts have relied on

⁸ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

⁹ *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).

¹⁰ *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005).

¹¹ *E.g.*, *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993); *Boone v. Moore*, 980 F.2d 539, 542 (8th Cir. 1992); *People v. Nieves*, 739 N.E.2d 1277, 1284 (Ill. 2000).

¹² *See, e.g.*, *United States v. Augustin*, 661 F.3d 1105, 1128–29 (11th Cir. 2011); *United States v. Pablo*, 625 F.3d 1285, 1292 (10th Cir. 2010).

similar provisions in their evidence codes to reach the same result.

However, New York has no evidence code or written rules, and the New York court of appeals—unlike most jurisdictions—has long considered an expert witness’ “basis” testimony to be a form of hearsay that could run afoul of the Confrontation Clause. In *People v. Sugden*, the court recognized that the Clause is potentially implicated when a prosecution expert “base[s] his opinion on material not in evidence,”¹³ and in *People v. Stone*,¹⁴ the court acknowledged the “legally hearsay” character of expert testimony reliant upon out-of-court statements.¹⁵ But, anticipating the rationale that the Supreme Court would thereafter adopt in *Ohio v. Roberts*, the court, in essence, created a reliability-based hearsay exception. The court stated that a prosecution expert “may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion.”¹⁶ Post-*Crawford*, the *Sugden/Stone* approach retains validity as an evidentiary matter, but the hearsay exception set forth in those decisions can no longer justify the introduction of such expert testimony by the prosecution without calling the declarant, if the statements on which it is based are testimonial in character.

The New York court of appeals recognized this in *People v. Goldstein*. In that case, which involved an insanity defense, a private psychiatrist hired by the prosecution relied on her out-of-court interviews with nontestifying witnesses regarding the defendant’s alleged prior conduct to support her opinion that Goldstein was not insane, and recited the contents of those interviews before the jury.

The court of appeals rejected defendant’s evidentiary challenge to the professional reliability of the interviews under

But cf. United States v. Mejia, 545 F.3d 179, 197–99 (2d Cir. 2008) (finding it improper to permit expert police officer to communicate out-of-court testimonial statements of nontestifying confidential informants and cooperating witnesses directly to the jury as the basis for his expert opinion).

¹³ *People v. Sugden*, 323 N.E.2d 169, 172 (N.Y. 1974).

¹⁴ *People v. Stone*, 315 N.E.2d 787, 791 (N.Y. 1974).

¹⁵ *Id.*

¹⁶ *Sugden*, 323 N.E.2d at 173.

Sugden and *Stone*.¹⁷ However, it ruled that the contents of the interviews constituted testimonial hearsay and hence were inadmissible under the Confrontation Clause as interpreted by *Crawford*. The prosecution argued that their psychiatrist's recitation of the contents of her interviews with nontestifying declarants was not hearsay because it was admitted merely to assist the jury in evaluating the psychiatrist's opinion. In dismissing this claim, the court declared, "[w]e do not see how the jury could use the statements of the [nontestifying] interviewees to evaluate [the prosecution psychiatrist's] opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress [the psychiatrist's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true."¹⁸ Accordingly, the statements "were offered for their truth, and are hearsay."¹⁹

The *Goldstein* court then ruled that the hearsay statements relied on by the psychiatrist were testimonial as well, and therefore that their introduction in the declarants' absence violated the Confrontation Clause under *Crawford*. It reasoned that the interviewees had to have known that the prosecution had retained

¹⁷ Even though it approved the admission of the expert's reliance on the civilians' statements as an evidentiary matter, the *Goldstein* Court was troubled by the notion that an expert may "repeat to the jury all the hearsay information on which [her opinion] was based." *People v. Goldstein*, 843 N.E.2d 727, 731 (N.Y. 2005). It recognized that "it can be argued that there should be at least some limit on the right of the proponent of an expert's opinion to put before the factfinder all the information, not otherwise admissible, on which the opinion is based. Otherwise, a party might effectively nullify the hearsay rule by making that party's expert a 'conduit for hearsay.'" *Id.* (quoting *Hutchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991)).

¹⁸ *Id.* at 732.

¹⁹ *Id.* at 733; accord *People v. Dungo*, 98 Cal. Rptr. 3d 702, 711-14 (Ct. App. 2009), review granted, 220 P.3d 240 (Cal. Dec. 2, 2009); see *People v. Archuleta*, 134 Cal. Rptr. 3d 727, 731 (Ct. App. 2011); *People v. Hill*, 120 Cal. Rptr. 3d 251, 270-79 (Ct. App. 2011). The Supreme Court may well resolve the expert basis hearsay issue for Sixth Amendment purposes in *Williams v. Illinois*, 939 N.E.2d 268 (Ill. 2010), cert. granted, 131 S. Ct. 3090 (argued Dec. 6, 2011) (No. 10-8505).

the psychiatrist to testify against Goldstein. Accordingly, “all of them should reasonably have expected their statements ‘to be used prosecutorially’ or ‘to be available for use at a later trial.’”²⁰

The admissibility of the expert’s opinion itself was not at issue in *Goldstein*, but since the opinion was based in part on the inadmissible statements made to the psychiatrist, it was dependent on testimonial hearsay and hence suffered from the same constitutional defect. The expert’s opinion could not be fairly evaluated in the absence of an opportunity for cross-examination of the declarants who provided the necessary foundation.²¹ Nor would the problem be solved by not revealing on the stand the testimonial hearsay on which the expert relied. Camouflaging the sources of the opinion puts the cross-examiner “in an untenable position: expose the inadmissible hearsay or forego effective cross-examination.”²²

In view of the court of appeals’ prior treatment of expert “basis” testimony as hearsay, the outcome in *Goldstein* was not surprising, though it represents a minority view nationally. But it is difficult to deny its underlying logic: if acceptance of an expert’s opinion is dependent on another person’s statement, the opinion is worthless unless the statement is true.²³

²⁰ *Goldstein*, 843 N.E.2d at 733 (quoting *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004)). The court further held that the statements were sufficiently “formal” to qualify as testimonial, noting that *Crawford* itself did not require strict formality, and found a statement to be testimonial that “was unsworn and used colloquial phrasing.” *Id.* It also determined that although the psychiatrist was not a “government officer . . . the Confrontation Clause would offer too little protection if it could be avoided by assigning the job of interviewing witnesses to an independent contractor rather than an employee.” *Id.* at 733–34.

²¹ See Richard D. Friedman, *Initial Thoughts on Williams*, CONFRONTATION BLOG (July 9, 2011), <http://confrontationright.blogspot.com/2011/07/initial-thoughts-on-williams.html>; see also Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 879 (2008).

²² Paul Shechtman, *People v. Goldstein and Rule 703*, N.Y. L.J., Jan. 13, 2006, at 4, col. 4; accord Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL’Y 791, 856–57 (2007); Seaman, *supra* note 21, at 879.

²³ See Mnookin, *supra* note 22.

II. NEW YORK'S INITIAL POST-CRAWFORD TREATMENT OF
SCIENTIFIC REPORTS ADMITTED IN THE ANALYST'S ABSENCE:
PEOPLE V. RAWLINS, *PEOPLE V. MEEKINS*, AND *PEOPLE V.*
FREYCINET

The next cases before the court of appeals regarding the applicability of *Crawford* to expert testimony about scientific procedures were *People v. Rawlins* and *People v. Meekins* (decided jointly).²⁴ In *Rawlins*, a police detective, who did not testify, examined latent fingerprints that had been lifted from two burglary sites. The detective's report, introduced at trial in the detective's absence over the defendant's Confrontation Clause objection, concluded that those prints matched the defendant's right thumbprint. By a vote of six to one, the court held in *Rawlins* that the fingerprint comparison report constituted testimonial hearsay under *Crawford*, and thus its admission at trial in the absence of the specialist's testimony violated Rawlins' Confrontation Clause rights.²⁵ In *Meekins*, however, the court unanimously upheld the introduction of a DNA testing report through the testimony of experts who did not participate in the testing, even though the experts who conducted the tests were not called to the stand. The report, based on tests conducted by a private laboratory at the behest of police, did not include a comparison of that DNA with the defendant's.²⁶ The majority opinion discussed the circumstances under which business records prepared by or at the behest of law enforcement should be deemed to constitute testimonial hearsay under *Crawford*.

Ultimately, the court concluded that the most critical issue is whether a law enforcement "business record" directly accuses

²⁴ *People v. Rawlins*, 884 N.E.2d 1019 (N.Y. 2008).

²⁵ *Id.* at 1033. A second detective who also offered this report testified to his independent assessment of the sets of prints, concluding that they matched the defendant's prints. A third detective testified to the match as well, as a defense witness. Relying on their testimony, the court of appeals held that the erroneous introduction of the report by the nontestifying detective, in violation of the Confrontation Clause, constituted harmless error. *Id.* at 1022-24, 1033-34.

²⁶ *Id.* at 1034-36.

the defendant of a crime. Thus, the court stated, “[O]ur task in each case must be to evaluate whether a statement is properly viewed as a surrogate for accusatory in-court testimony.”²⁷ Such reports, the court suggested, will likely be viewed as testimonial, but even more clearly, the court indicated that few others would be. Adopting a pinched view of *Crawford*, the court rejected as “too broad” a test that depends on the declarant’s reasonable expectation that a statement will be used prosecutorially.²⁸ It determined that the result in *Davis v. Washington*,²⁹ allowing the introduction of a nontestifying domestic-violence complainant’s accusations against her former boyfriend in a 911 call, would have been different had this standard been determinative, since the complainant could well have expected her statements to be used against Davis at trial.³⁰

The court also considered the proper practice for lab reports that memorialize results of scientific tests, relying heavily on the “insights” and “reasoning” underlying three pro-prosecution state high court decisions, *State v. Crager*,³¹ *People v. Geier*,³² and *Commonwealth v. Verde*,³³ which it found to be “instructive.”³⁴ The court adopted the Massachusetts supreme judicial court’s reasoning in *Verde* that the drug-test certificates at issue did not “concern the exercise of fallible human judgment,” but “merely [recorded, contemporaneously, the procedures taken and] state[d] the results of a well-recognized scientific test determining the composition and quantity of the substance.”³⁵ Such “contemporaneous recordation of scientific

²⁷ *Id.* at 1029.

²⁸ *Id.*

²⁹ *Davis v. Washington*, 547 U.S. 813 (2006).

³⁰ *Rawlins*, 884 N.E.2d at 1029.

³¹ *State v. Crager*, 116 Ohio St. 3d 369, 2007-Ohio-6840, 879 N.E.2d 745, *cert. granted, vacated mem.*, 129 S. Ct. 2856 (June 29, 2009) (No. 07-10191).

³² *People v. Geier*, 161 P.3d 104 (Cal. 2007).

³³ *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), *abrogated by Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

³⁴ *Rawlins*, 884 N.E.2d at 1030–32.

³⁵ *Id.* at 1031 (alterations in original) (internal quotation marks omitted) (quoting *Verde*, 827 N.E.2d at 705).

protocol,” the court reasoned, “must be undertaken independent of any possible use at trial, for the independent purpose of ensuring that the test was properly administered.”³⁶

Discussing the Ohio supreme court’s decision in *Crager*, which involved a DNA report, the court of appeals noted that the technicians “could have reasonably expected that the . . . reports would be used in a later prosecution,” but that the Ohio court determined that any concern that the reports could be “prejudicial is allayed . . . because such notes ‘represented the contemporaneous recordation’ of the . . . results ‘as [they were] actually performing those tasks’ pursuant to industry protocols.”³⁷ Accordingly, “police or prosecutorial involvement in a case like *Crager* becomes a nonissue, and the focus shifts to declarant.”³⁸ Adapting the “primary purpose” test used by *Davis v. Washington*³⁹ to evaluate whether statements made in response to police interrogation are testimonial, the court of appeals concluded that a technician’s motivation and purpose are to “simply record[], contemporaneously, the administration of scientific protocol to reveal what is hidden from the naked eye”; the technician “ordinarily has no subjective interest in the test’s outcome.”⁴⁰ The court also cited, with approval, the Ohio court’s reasoning that the lab, although its mission was to “aid law enforcement,” was “not itself an ‘arm’ of law enforcement in the sense that . . . [its] purpose [was] to obtain incriminating results.”⁴¹

Judge Jones’ opinion for the court approvingly noted that in *Geier*, another DNA case, the California supreme court had similarly relied upon the “contemporaneous recordation” rationale; the DNA analysis, the court of appeals reasoned, was based on observations similar to those of a *Davis*-style declarant

³⁶ *Id.*

³⁷ *Id.* at 1030–31 (quoting *State v. Crager*, 116 Ohio St. 3d 369, 2007-Ohio-6840, 879 N.E.2d 745, *cert. granted, vacated mem.*, 129 S. Ct. 2856 (June 29, 2009) (No. 07-10191)).

³⁸ *Id.* at 1031.

³⁹ *Davis v. Washington*, 547 U.S. 813, 822 (2006).

⁴⁰ *Rawlins*, 884 N.E.2d at 1031.

⁴¹ *Id.* at 1030 (quoting *Crager*, 879 N.E.2d at 753).

who is reporting an emergency.⁴² “[T]he . . . raw data were not ‘accusatory’ (. . . in a Sixth Amendment sense) and the analyst did not ‘bear witness’ against defendant.”⁴³ Rather, she generated the report “for the purpose of adhering to ‘standardized scientific protocol.’”⁴⁴

Though the courts emphasized the “objectivity of the scientific procedures at issue” in these three cases, none of the reports that were held admissible were “directly accusatory, in the sense that they explicitly linked the defendants to the crimes.”⁴⁵ The court of appeals viewed this to be critical. It was “particularly noticeable in *Geier*” that although the laboratory analysis was conducted by nontestifying technicians, “the comparison to defendant’s DNA was made by a testifying witness.”⁴⁶ Though this distinction “is not an infallible touchstone,” the court wrote, “[i]n close cases, . . . the directness with which a particular statement points to the defendant as the offender is a factor to be considered.”⁴⁷ However, the court also said that “statements can often be testimonial where their tendency to inculcate the defendant is only indirect.”⁴⁸

Summarizing its overall approach, the court stated that “[t]he question of testimoniality requires consideration of multiple factors, not all of equal import in every case.”⁴⁹ Two of these, however, “play an especially important role in this determination: first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses the defendant of criminal wrongdoing.”⁵⁰ These “interrelated touchstones” are informed by “the purpose of making or generating the statement, and the declarant’s motive for doing so”⁵¹

⁴² *Id.* at 1032.

⁴³ *Id.* (quoting *People v. Geier*, 161 P.3d 104, 140 (Cal. 2007)).

⁴⁴ *Id.* (quoting *Geier*, 161 P.3d at 140).

⁴⁵ *Id.* at 1033.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

Applying these principles to *Rawlins*, the court concluded that the fingerprint reports at issue were testimonial because their maker, “a police detective, prepared his reports solely for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish defendant’s identity.”⁵² Comparing latent prints recovered from a crime scene with fingerprints from a known individual “fit the classic definition of ‘a weaker substitute for live testimony’ at trial.”⁵³ The technician was “‘testifying’ through his reports that, in his opinion, defendant is the same person who committed the burglaries,” and his only purpose was “to ultimately apprehend a perpetrator”⁵⁴ Rebutting the argument that the report was business related, rather than an effort “to nail down the truth about past criminal events,” the court noted that “it was the business of [the police technician] to establish (if possible) who committed the crime.”⁵⁵ Though his conclusions could have exculpated Rawlins, the direct involvement of this law enforcement officer “‘presents unique *potential*’ for abuse.”⁵⁶

The court ruled in *Meekins*, however, that the DNA reports at issue were nontestimonial.⁵⁷ That the testers “did not determine whether the data [they] collected matched [defendant] or any other suspect” was critical to this outcome.⁵⁸ The DNA test results, “standing alone,” without any “‘comparisons of the results’ to any known DNA profiles,” “shed no light on the guilt of the accused in the absence of an expert’s opinion that the results genetically match a known sample.”⁵⁹ Only the Medical Examiner’s office determined a match with defendant, and defendant did not challenge the “Medical Examiner’s role.”⁶⁰ The testing procedures were “neither discretionary nor based on opinion,” and the testers “only contemporaneously recorded the

⁵² *Id.*

⁵³ *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 828 (2006)).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1033 n.14.

⁵⁶ *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 57 n.6 (2004)).

⁵⁷ *Id.* at 1034.

⁵⁸ *Id.* at 1035.

⁵⁹ *Id.*

⁶⁰ *Id.*

procedures employed and ‘state[d] the results of a well-recognized scientific test.’”⁶¹ Thus, the report “is not the kind of ex parte testimony the Confrontation Clause was designed to protect against.”⁶² Though the technicians “knew or had every reason to know . . . that their findings could generate results that could later be used at trial,” law enforcement’s involvement was nevertheless “inconsequential” because it could not have influenced the outcome of the tests.⁶³ Moreover, the prosecution called a supervising witness from the lab who, though not involved in the tests at issue, was available for cross-examination regarding whether the lab’s testing protocol was followed.⁶⁴

Finally, “the documents . . . were not directly accusatory; none of them compared the DNA profile they generated to defendant’s.”⁶⁵ In this regard, the court noted that the document prepared by the Division of Criminal Justice Services notifying the Medical Examiner’s office that there was a DNA match was not a business record, and, because it “comes close to a direct accusation that defendant committed the crime, . . . is less clearly nontestimonial hearsay than the other documents at issue.”⁶⁶ But “any error” in admitting that document was harmless.⁶⁷

In *People v. Freycinet*,⁶⁸ the court addressed a defendant’s Confrontation Clause challenge to the introduction of an autopsy report, in the absence of testimony from the doctor who performed the autopsy and prepared the report. The report was “redacted to eliminate [the doctor’s] opinions as to the cause and manner of the victim’s death.”⁶⁹ Another doctor in the medical examiner’s office, who did not participate in the autopsy,

⁶¹ *Id.* (alteration in original) (quoting *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (2005)).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 1035–36.

⁶⁷ *Id.* at 1036.

⁶⁸ *People v. Freycinet*, 892 N.E.2d 843 (N.Y. 2008).

⁶⁹ *Id.* at 844.

testified to her opinions based on the facts in the absent pathologist's report. The court applied the rationale of *Meekins* to unanimously reject the defendant's claim.

First, the court noted its prior holding in *People v. Washington*.⁷⁰ In *Washington*, the court held that autopsy reports, prepared by physicians associated with the office of New York City's Medical Examiner, were not discoverable under state law; that the Medical Examiner's office is "not a law enforcement agency"; and that the duties of the office are "independent of and not subject to the control of the office of the prosecutor."⁷¹ The report was "very largely a contemporaneous, objective account of observable facts."⁷² Though the doctor's finding characterizing the victim's injury as a "stab wound" was the product of an exercise of professional judgment, its significance to the case "derives almost entirely from [the absent doctor's] precise recording of his observations and measurements as they occurred."⁷³ Thus, it was "hard to imagine" that the report, as redacted, "could have been significantly affected by a pro-law-enforcement bias."⁷⁴ The opinion ends by relying on the report not "directly link[ing] the defendant to the crime," since it was concerned with "what

⁷⁰ *People v. Washington*, 654 N.E.2d 967 (N.Y. 1995).

⁷¹ *Freycinet*, 892 N.E.2d at 846. The court of appeals' focus in *Freycinet* on whether the medical examiner's office is an arm of the prosecution, and its approving reference in *Rawlins* to the *Crager* court's focus on the DNA lab not being an "arm of law enforcement," are difficult to reconcile with the court's treatment of a similar *Crawford*-related issue in *Goldstein*. In *Goldstein*, the prosecution hired a private psychiatrist to rebut defendant's insanity defense. The Court held that the psychiatrist's recitation of out-of-court statements by nontestifying declarants, which she relied on in support of her opinion, violated Goldstein's Confrontation Clause rights. *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005). In rejecting the prosecution's reliance on the psychiatrist not being a "government officer," the court reasoned that "[t]he Confrontation Clause would offer too little protection if it could be avoided by assigning the job of interviewing witnesses to an independent contractor rather than an employee." *Id.* at 733-34; *see also* sources cited *supra* note 21.

⁷² *Freycinet*, 892 N.E.2d at 846.

⁷³ *Id.*

⁷⁴ *Id.*

happened to the victim, not with who killed her.”⁷⁵ Thus, “[the absent doctor] was not defendant’s ‘accuser’ in any but the most attenuated sense.”⁷⁶

III. THE NEW YORK COURT OF APPEALS’ REFUSAL TO FOLLOW *MELENDEZ-DIAZ V. MASSACHUSETTS*

The Supreme Court repudiated every essential aspect of the New York court of appeals’ approach to this issue in *Melendez-Diaz v. Massachusetts*.⁷⁷ Police searched a car in which Luis Melendez-Diaz was riding. They found a plastic bag containing nineteen smaller bags hidden in the partition between the front and back seats, and ultimately charged Melendez-Diaz with selling cocaine.⁷⁸ The only proof that the bags recovered by police contained cocaine consisted of three sworn “certificates of analysis” showing the results of forensic testing performed on the seized substances.⁷⁹ Neither the analyst nor any other expert was called to testify. Without detailing the nature of the testing, the certificates merely reported the weight of the bags and asserted that they contained cocaine.⁸⁰ The certificates were sworn to by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health,⁸¹ which is not a law enforcement agency.⁸² This practice of admitting a sworn “certificate of analysis” was authorized by statute, and the certificate constituted “prima facie evidence of the composition, quality, and the net weight” of the substance.⁸³ Melendez-Diaz’s Confrontation Clause objection was overruled.

On appeal, the Massachusetts appeals court rejected the defendant’s Confrontation Clause claim, on the authority of the Massachusetts supreme judicial court’s decision in

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

⁷⁸ *Id.* at 2530.

⁷⁹ *Id.* at 2531.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 2552 (Kennedy, J., dissenting).

⁸³ *Id.* at 2531 (majority opinion).

Commonwealth v. Verde, which had held such certificates to be nontestimonial, and that the makers of such certificates are accordingly not subject to confrontation.⁸⁴ The Supreme Court reversed, holding, by a vote of five to four, that the certificates were testimonial and inadmissible under the Confrontation Clause, since the defendant had been given no opportunity to cross-examine the nontestifying analysts. Justice Scalia wrote the Court's opinion, joined by Justices Stevens, Souter, Ginsburg, and Thomas. Justice Thomas joined in the opinion but also filed a concurrence, adhering to his previously announced view that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."⁸⁵ He concluded that the sworn certificates at issue in *Melendez-Diaz* were clearly affidavits, and thus "fall within the core class of testimonial statements' governed by the Confrontation Clause."⁸⁶

Justice Scalia's opinion begins by quoting the three potential formulations of "testimonial" statements set forth in *Crawford*.⁸⁷ He noted that these categories "mention[] affidavits twice,"⁸⁸ and then continues,

The documents at issue here, while denominated by

⁸⁴ *Id.* (citing *Commonwealth v. Melendez-Diaz*, No. 05-P-1213, 2007 WL 2189152, at *4 n.3 (Mass. App. Ct. July 31, 2007)).

⁸⁵ *Id.* at 2543 (Thomas, J., concurring).

⁸⁶ *Id.* (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

⁸⁷ *Id.* at 2531 (majority opinion).

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. (quoting *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004)) (internal quotation marks omitted).

⁸⁸ *Id.* at 2532.

Massachusetts law “certificates,” are quite plainly affidavits: “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.”⁸⁹ They are incontrovertibly a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁹⁰

The majority concluded that the certificates were testimonial because (1) they qualified as affidavits, (2) they contained “the precise testimony the analysts would be expected to provide if called at trial,” and (3) 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” (quoting from the broadest formulation of “testimonial” in *Crawford*).⁹¹

Perhaps most significantly as one considers New York practice, the Supreme Court explicitly rejected the major premise of *Meekins/Freycinet*: that whether a statement is “accusatory” in that it directly implicates the defendant in wrongdoing is vital to a resolution of its testimonial status. Instead, relying on the language of the Clause, the Court determined that the relevant issue is whether the statement relates to facts necessary for a conviction.⁹²

⁸⁹ *Id.* (quoting BLACK’S LAW DICTIONARY 62 (8th ed. 2004)).

⁹⁰ *Id.* (quoting *Crawford*, 541 U.S. at 51).

⁹¹ *Id.* at 2531–32.

⁹² Respondent first argues that the analysts are not subject to confrontation because they are not ‘accusatory’ witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband . . . This finds no support in the text of the Sixth Amendment or in our case law.

The Sixth Amendment guarantees a defendant the right ‘to be confronted with the witnesses *against him*.’ To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses ‘against him,’ the Compulsory Process Clause guarantees a defendant the right to call witnesses ‘in

Regarding “business records” and “public records,” the Court made it clear that when such records are prepared for litigation purposes, they did not qualify under the “business records” exception as it had originally been recognized under the common law.⁹³ The opinion specifically notes that “the results of a coroner’s inquest”—i.e., an autopsy report—were not exempt from confrontation under early American common law.⁹⁴ Of course, this suggests strongly that autopsy reports are testimonial and hence inadmissible without the testimony of the examining pathologist⁹⁵—a view that had been almost uniformly rejected by lower courts after *Crawford*.

Relatedly, *Melendez-Diaz* roundly rejects the notion that reporting the results of a forensic test is somehow less testimonial because such testing is “neutral” and “scientific,” in contrast with “testimony recounting historical events, which is ‘prone to distortion or manipulation’”⁹⁶ The Court explained that “[t]his argument is little more than an invitation to return to our overruled decision in *Roberts*,”⁹⁷ which focused on a statement’s reliability rather than its testimonial character.

The Supreme Court majority peremptorily rejected the dissent’s view that its opinion “sweeps away an accepted rule governing the admission of scientific evidence” that “has been established for at least 90 years,”⁹⁸ pointing out that nearly all of those decisions either relied on, or were decided under the same

his favor.’ U.S. CONST., amend. VI. The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

Id. at 2533–34 (footnote omitted).

⁹³ *Id.* at 2538–40.

⁹⁴ *Id.* at 2538.

⁹⁵ Accord Harry Sandick & Justin Mendelsohn, *Divided Supreme Court Extends Reach of Confrontation Clause*, N.Y. L.J., July 20, 2009, at 4, col. 1.

⁹⁶ *Melendez-Diaz*, 129 S. Ct. at 2536.

⁹⁷ *Id.*

⁹⁸ *Id.* at 2543 (Kennedy, J., dissenting).

standard as, *Ohio v. Roberts*, which was overruled by *Crawford*.⁹⁹

It also seems clear that under *Melendez-Diaz*, a forensic lab report prepared for prosecution need not have been generated by a law enforcement official or agency in order to qualify as testimonial. Although the reports at issue were not prepared by a law enforcement agency,¹⁰⁰ the Court emphasized that the 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,”¹⁰¹ not the identity of the analyst’s employer. The dissenters, in contrast, would not require confrontation of declarants who could not qualify as “adversarial government officials responsible for investigating and prosecuting crime.”¹⁰²

In addition, the Court, in dicta, took issue with the notion that “‘neutral scientific *testing*’ is as neutral or as reliable” as the prosecution suggested.¹⁰³ The opinion cites studies critical of police laboratory techniques, refers to “documented cases of fraud and error involving the use of forensic evidence,” and points out that “[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.”¹⁰⁴ It notes reliability problems that have been uncovered regarding “common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms

⁹⁹ *Id.* at 2533 (majority opinion).

¹⁰⁰ *See id.* at 2531; *id.* at 2552 (Kennedy, J., dissenting). Justice Kennedy noted that “[t]here is no indication that the analysts here—who work for the State Laboratory Institute, a division of the Massachusetts Department of Public Health—were adversarial to petitioner. Nor is there any evidence that adversarial officials played a role in formulating the analysts’ certificates.” *Id.*

¹⁰¹ *Id.* at 2532 (majority opinion) (quoting *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004)).

¹⁰² *Id.* at 2552 (Kennedy, J., dissenting) (quoting Carolyn Zabrycki, *Toward a Definition of “Testimonial”: How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CALIF. L. REV. 1093, 1118 (2008)).

¹⁰³ *Id.* at 2536 (majority opinion) (emphasis added).

¹⁰⁴ *Id.* at 2537.

analysis.”¹⁰⁵ And it further declares that there may be no viable alternative to cross-examination as a means of challenging autopsies and breathalyzer test results.¹⁰⁶ This, of course, strongly suggests that such reports are testimonial. In *Melendez-Diaz*, moreover, the certificates merely contained the test result (cocaine was found), but not what tests were performed or “whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed.”¹⁰⁷

Finally, the Court declined to “relax the requirements of the Confrontation Clause to accommodate the ‘necessities of trial and the adversary process’”:

It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.¹⁰⁸

The Court also disputed the premise that this requirement will be onerous, concluding that most defendants who go to trial will not insist on producing the analyst, particularly in drug cases, and that “there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst’s appearance at trial.”¹⁰⁹ *Melendez-Diaz* rejected virtually all of the arguments that were relied upon by the court of appeals in *Meekins* and *Freycinet* to justify its viewpoint that many types of forensic lab reports and other scientific reports, including ones generated in anticipation of prosecution, are nontestimonial. Indeed, the

¹⁰⁵ *Id.* at 2538. Though these types of police and scientific reports were discussed in dicta, they likely reflect the Court’s viewpoint that all of these documents are testimonial, as long as they contain evidence relevant to proving an element of a crime and are made in anticipation of prosecutorial use.

¹⁰⁶ *Id.* at 2536 & n.5.

¹⁰⁷ *Id.* at 2537.

¹⁰⁸ *Id.* at 2540.

¹⁰⁹ *Id.* at 2540–42.

Supreme Court has rejected, either directly or indirectly, all three of the out-of-state decisions relied on so heavily by the court of appeals. *Commonwealth v. Verde* provided the basis for the Massachusetts intermediate appellate court's now-reversed disposition of the *Melendez-Diaz* case itself.¹¹⁰ In *Barba v. California*,¹¹¹ the Supreme Court vacated an unpublished California intermediate appellate court decision directly applying *People v. Geier* to an identical DNA fact pattern, and remanded for reconsideration in light of *Melendez-Diaz*.¹¹² The Supreme Court similarly vacated and remanded the Ohio supreme court's decision in *State v. Crager*.¹¹³

The centerpiece of the court of appeals' analysis in *Meekins* and *Freycinet* is its premise that perhaps the most critical determinant of a statement's "testimonial" is whether it is "accusatory," in that it directly implicates the defendant in wrongdoing. In *Melendez-Diaz*, the Supreme Court held such reasoning to be antithetical to the very language of the Confrontation Clause, which guarantees an accused's right to be confronted with the witnesses "against" him.¹¹⁴ Any witness who

¹¹⁰ See *Commonwealth v. Melendez-Diaz*, No. 05-P-1213, 2007 WL 2189152, at *4 n.3 (Mass. App. Ct. July 31, 2007), *rev'd*, 129 S. Ct. 2527 (2009).

¹¹¹ *Barba v. California*, 129 S. Ct. 2857 (2009).

¹¹² See *People v. Barba*, No. B185940, 2007 WL 4125230 (Cal. Ct. App. Nov. 21, 2007), *cert. granted, vacated mem.*, 129 S. Ct. 2857 (2009). The Supreme Court denied certiorari in *Geier* itself. *Geier v. California*, 129 S. Ct. 2856 (June 29, 2009) (No. 07-7770). In *Geier*, however, the California supreme court decided alternatively that even if the introduction of the DNA report violated the Confrontation Clause, any error was harmless beyond a reasonable doubt. *People v. Geier*, 161 P.3d 104, 140-41 (Cal. 2007). That would have made any United States Supreme Court decision irrelevant to the outcome of the case, and likely explains the certiorari denial.

¹¹³ *Crager v. Ohio*, 129 S. Ct. 2856 (2009).

¹¹⁴ *Melendez-Diaz*, 129 S. Ct. at 2534; see also Paul Shechtman, *Not Many Fireworks During a Workmanlike Term*, N.Y. L.J., Aug. 31, 2009, at S12-S13 ("The analysis in *Melendez-Diaz* calls into question the thoughtful opinions of the Court of Appeals in *Freycinet* and *Rawlins* . . . [which] relied principally on the fact that the analysts whose forensic reports were received into evidence were not 'accusatory' witnesses. But in *Melendez-Diaz*, Justice Antonin Scalia rejected the notion that the Confrontation Clause distinguishes between accusatory and nonaccusatory witnesses.").

provides facts helpful to the prosecution in proving an element of the crime, the Court ruled, is a witness “against” him under the Clause.¹¹⁵

Moreover, in flatly rejecting the viewpoint that an analyst is somehow immunized from confrontation because she is making “near-contemporaneous observations,”¹¹⁶ the Supreme Court nullified another major underpinning of the analytical foundation of *Meekins* and *Freycinet*. In both decisions, the court of appeals relied on the virtually contemporaneous observations of the technicians, both in its discussion of the out-of-state authority it deemed persuasive,¹¹⁷ and in its analysis of the facts of the cases before it.¹¹⁸

Nevertheless, in *People v. Brown*,¹¹⁹ the court of appeals, after *Melendez-Diaz*, reaffirmed the holding and analysis in *Meekins*, and held that a DNA report processed by a laboratory working as a subcontractor to the medical examiner’s office was not testimonial. Given the rationale of *Melendez-Diaz*, the decision of the court of appeals to confirm the analysis of *Meekins* in the *Brown* case is baffling, and analytically insupportable. Indeed, the opinion simply ignores the most pertinent aspects of the analysis in *Melendez-Diaz*, which are incompatible with *Meekins*.

In *Brown*, as in *Meekins*, the prosecution was permitted to introduce a DNA report containing the results of a genetic test of a male specimen taken from the victim’s rape kit, performed by a laboratory (Bode) that acted as a subcontractor for the New York City Medical Examiner’s office. No analyst from Bode

¹¹⁵ See *supra* p. 472 and note 92.

¹¹⁶ *Melendez-Diaz*, 129 S. Ct. at 2535.

¹¹⁷ *E.g.*, *People v. Rawlins*, 884 N.E.2d 1019, 1030–31 (N.Y. 2008) (stating that the DNA report in *Crager* “‘represented the contemporaneous recordation’ of the . . . results ‘as [they were] actually performing those tasks’ pursuant to industry protocols.” (alteration in original) (quoting *State v. Crager*, 116 Ohio St. 3d 369, 2007-Ohio-6840, 879 N.E.2d 745, 756)).

¹¹⁸ *E.g.*, *Id.* at 1035 (stating that the technicians “only contemporaneously recorded the procedures employed”); see also *People v. Freycinet*, 892 N.E.2d 843, 846 (N.Y. 2008) (stating that the autopsy report was “very largely a contemporaneous, objective account of observable facts”).

¹¹⁹ *People v. Brown*, 918 N.E.2d 927 (N.Y. 2009).

was called to testify. The only expert called was a forensic biologist/criminalist from the Medical Examiner's office, who compared the genetic profile of male DNA found in the rape kit analyzed by Bode with a specimen of the defendant's DNA, and determined there to be a match.

The court of appeals rejected the defendant's Confrontation Clause challenge to the introduction of the rape kit DNA testing report. *Melendez-Diaz* notwithstanding, the court restated the *Meekins* analytical framework as asserting the governing standard, and applied it to hold that the report was not testimonial and hence that its admission did not violate the Clause. In so doing, it relied upon the nonaccusatory nature of the report,¹²⁰ its conclusion that the report was not testimonial because it "consisted of merely machine-generated graphs, charts and numerical data,"¹²¹ and its view that, since the tests were conducted before the defendant was a suspect and neither the laboratory nor the Medical Examiner's office is a law enforcement entity, "any pro-law-enforcement benefit to manipulating the results" was thereby eliminated.¹²² Each of these rationales is flatly rejected by *Melendez-Diaz*. The court of appeals made a limited attempt to distinguish *Melendez-Diaz* by pointing out that, unlike in that case, the prosecution in *Brown* called an expert who made the determination that the defendant's DNA matched the male DNA recovered from the rape kit that was analyzed by the lab; the court noted that she could have been cross-examined regarding the results of her comparison and about her knowledge of the lab's procedures.¹²³ As this Article will discuss,¹²⁴ the Supreme Court soon specifically repudiated the latter distinction.

Thus, one wonders whether the results of any of the court of appeals' decisions on this subject can be reconciled with *Melendez-Diaz*. Certainly, the result in *Rawlins* was not

¹²⁰ *Id.* at 931–32.

¹²¹ *Id.* at 931.

¹²² *Id.* at 932.

¹²³ *Id.* at 931.

¹²⁴ See *infra* pp. 125–26 (discussing *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011)).

affected. The fingerprint comparison report was a formal police report that was prepared for litigation. Indeed, in *Melendez-Diaz*, the Supreme Court specifically called attention to the value of confrontation regarding “latent fingerprint analysis.”¹²⁵ But *Meekins* and *Brown* are analytically irreconcilable with *Melendez-Diaz*.

Although the DNA test results in *Meekins* did not report a match, the Supreme Court held in *Melendez-Diaz* that whether a document is accusatory or nonaccusatory is utterly irrelevant to its testimonial character. The *Meekins* court’s rejection of the significance of the declarant’s reasonable expectation of prosecutorial use is no longer valid; the Supreme Court relied heavily on that standard in *Melendez-Diaz*. Similarly, the court of appeals in *Brown*, as in *Meekins*, relied on the DNA report’s near-contemporaneous nature, its scientific validity, and its generation by a non-law-enforcement agency in holding the report to be nontestimonial, but *Melendez-Diaz* rejected each of these justifications for admission. Under the Supreme Court’s reasoning in *Melendez-Diaz*, such a document would be testimonial since it was generated at the behest of law enforcement, prepared in anticipation of a criminal prosecution, and offered to assist in proving an essential element of the charged crime. The post-*Melendez-Diaz* court of appeals’ decision in *Brown* simply ignores all of this.

Based on *Melendez-Diaz* alone, one would think that *Freycinet* would have a short shelf life as well. As in *Meekins*, the *Freycinet* court found it critical that the report in question (here, an autopsy report) did not directly link the defendant to the crime, and hence that the pathologist “was not defendant’s ‘accuser’ in any but the most attenuated sense.”¹²⁶ As noted, whether a document is “accusatory” in nature is no longer relevant, as long as the document is offered to prove facts helpful to the prosecution, which the report in *Freycinet* was. Similarly, the court’s reliance on the report being “very largely a contemporaneous, objective account of observable facts,”¹²⁷

¹²⁵ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2538 (2009).

¹²⁶ *People v. Freycinet*, 892 N.E.2d 843, 846 (N.Y. 2008).

¹²⁷ *Id.*

and its having been prepared by a declarant who was employed by a non-law-enforcement agency, is incompatible with *Melendez-Diaz*. Moreover, as discussed above, the *Melendez-Diaz* Court referred specifically to autopsy reports, in a manner strongly suggesting that they are to be considered testimonial. Under the now-applicable Supreme Court standard, the autopsy report in *Freycinet* should be considered testimonial, since it fulfilled an obvious testimonial purpose and was prepared with the reasonable expectation of prosecutorial use.

IV. THE INADEQUACY OF THE OPPORTUNITY TO CROSS-EXAMINE AN EXPERT WHOSE TESTIMONY RELIES ON A NONTESTIFYING ANALYST'S REPORT: *BULLCOMING V. NEW MEXICO*

In *Melendez-Diaz*, the forensic report held by the Supreme Court to be testimonial was admitted without accompanying expert testimony. In *Brown*, *Meekins*, and *Freycinet*, by contrast, the prosecution offered the reports through the testimony of experts who examined them and were familiar with the labs' procedures, but did not call any analyst who participated in the testing. Thus, the question becomes whether this matters. Logically, the answer should be no; the cross-examiner will remain unable to ask questions that test either the professional background or the techniques and procedures utilized by the person who performed the analysis. One commentator has observed that under these circumstances, "[t]he expert witness is not meaningfully subject to cross-examination, because the basis of his opinion cannot be tested according to the constitutionally prescribed procedure for assessing testimonial hearsay: cross-examination of the hearsay declarant."¹²⁸

The United States Supreme Court adopted this reasoning, with reservations expressed in a concurring opinion by Justice Sotomayor, in *Bullcoming v. New Mexico*.¹²⁹ In *Bullcoming*, a certified lab report of a test performed on the defendant's blood

¹²⁸ Seaman, *supra* note 21, at 880.

¹²⁹ *Bullcoming*, 131 S. Ct. 2713-16; *id.* at 2719 (Sotomayor, J., concurring).

alcohol level by an independent state agency was admitted, as a business record, through a supervisor from the lab who had not observed or performed the test. The state court held that

[a]lthough the blood alcohol report was testimonial, . . . its admission did not violate the Confrontation Clause, because the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation.¹³⁰

A closely divided Supreme Court reversed. Justice Ginsburg wrote the opinion, and Justices Scalia, Thomas, Kagan, and Sotomayor joined for the most part. Justice Sotomayor also wrote a concurrence primarily in order to stress the principal opinion's "limited reach."¹³¹ The *Bullcoming* Court held that the in-court testimony of a supervisor who lacked any connection to the test was an entirely inadequate substitute for testimony from the analyst: "surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."¹³² The supervisor's testimony "could not convey what [the analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part."¹³³ In short, the Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."¹³⁴

¹³⁰ State v. Bullcoming, 226 P.3d 1, 4 (N.M. 2010), *rev'd*, 131 S. Ct. 2705 (2011).

¹³¹ *Bullcoming*, 131 S. Ct. at 2719 (Sotomayor, J., concurring).

¹³² *Id.* at 2710 (majority opinion).

¹³³ *Id.* at 2715.

¹³⁴ *Id.* at 2716.

In so holding, the Supreme Court upended the only basis upon which the court of appeals distinguished *Brown* from *Melendez-Diaz*: the presence in *Brown* of an opportunity to cross-examine a surrogate expert not involved in the testing. The Supreme Court has authoritatively discredited the entire analysis of *Meekins* and *Brown*.

The *Bullcoming* Court determined with little difficulty that the lab report was testimonial under *Melendez-Diaz*. As in that decision, the report's evidentiary purpose rendered it testimonial, trumping the state's reliance on its allegedly non-"adversarial" nature.¹³⁵ Although, unlike in *Melendez-Diaz*, the report was not sworn, it was sufficiently "formalized," since the analyst signed a certificate concerning the result of the analysis.¹³⁶ In addition, relying on *Crawford*, the *Bullcoming* Court ruled that the report's "comparative reliability . . . does not overcome the Sixth Amendment bar."¹³⁷

The latter pronouncement was somewhat surprising, coming as it did just four months after the Court's decision in *Michigan v. Bryant*.¹³⁸ In a opinion by Justice Sotomayor, the Court determined in *Bryant* that an identification of the defendant by a shooting victim to police on the street a short time after the shooting was nontestimonial. The Court based its determination on its view that the "primary purpose" of the interaction between the victim and the police officer was "to enable police assistance to meet an ongoing emergency," rather than "to create a record for trial."¹³⁹ The *Bryant* Court relied, in part, on its conclusion that the victim's statement was reliable, and likely fell within the "excited utterance" exception to the rule against hearsay.¹⁴⁰ Diverging sharply from *Crawford*, the Court opined that a statement's reliability, and whether it qualified under a settled exception to the rule against hearsay, were significant factors militating against its testimonial quality.¹⁴¹

¹³⁵ *Id.* at 2717.

¹³⁶ *Id.*

¹³⁷ *Id.* at 2715.

¹³⁸ *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

¹³⁹ *Id.* at 1150, 1155.

¹⁴⁰ *Id.* at 1155.

¹⁴¹ *Id.* at 1157.

The opinion of the Court in *Bullcoming* seemingly signifies that the *Bryant* decision's focus on reliability was not the precursor to a full-scale retreat from *Crawford* as some had believed, at least regarding the testimonial status of laboratory reports. Justice Sotomayor, the author of *Bryant*, stressed in her *Bullcoming* concurrence that *Bryant* "deemed reliability, as reflected in the hearsay rules, to be 'relevant,' not 'essential.'"¹⁴² However, her opinion also pointed out recurring fact patterns in lab report cases that she viewed as left open by *Bullcoming*: (1) cases in which there is an alternate purpose, or alternate primary purpose, for the report; (2) cases in which the testifying witness has some connection to the test at issue; (3) cases in which an expert is asked for her independent opinion about underlying testimonial reports that were *not* themselves admitted into evidence; and (4) cases in which the state introduces only "machine-generated results."¹⁴³ The Supreme Court should shortly address the third of these fact patterns in *Williams v. Illinois*.¹⁴⁴

The New York court of appeals has not addressed a Confrontation Clause lab report issue since *Bullcoming*. Given the court's manifest failure to apply controlling Supreme Court precedent in the post-*Melendez-Diaz* case of *People v. Brown*, it is impossible to predict what it will do in such a case, though an essential element of *Brown*, the supposedly critical in-court presence of a surrogate expert, has now been declared irrelevant by the Supreme Court. It is noteworthy that in *People v. Morrison*,¹⁴⁵ decided after *Bullcoming*, the Fourth Department held that the defendant's Confrontation Clause rights had been violated by the introduction of a certified DNA report prepared

¹⁴² *Bullcoming*, 131 S. Ct. at 2720 n.1 (Sotomayor, J., concurring) (quoting *Bryant*, 131 S. Ct. at 1155–56).

¹⁴³ *Id.* at 2721–23.

¹⁴⁴ *Williams v. Illinois*, No. 10-8505 (U.S. argued Dec. 6, 2011); see *People v. Williams*, 939 N.E.2d 268 (Ill. 2011), *cert. granted*, 131 S. Ct. 3090 (2011). In *Williams*, an expert testified in court, despite the fact that he was not involved in conducting the DNA testing. The report itself was not admitted, but a critical part of its substance was made known to the jury. See *Williams*, 939 N.E.2d at 271–72.

¹⁴⁵ *People v. Morrison*, 935 N.Y.S.2d 234 (App. Div. 2011).

by an analyst who did not testify, where the prosecution did call another analyst who read the report and determined that the lab had followed proper procedure. The court cited *Bullcoming*, but did not discuss it, instead choosing to factually distinguish *Brown*.¹⁴⁶

CONCLUSION

Following its important recognition of the testimonial-hearsay character of expert “basis” testimony in *Goldstein*, the court of appeals has taken an insupportably restrictive view of *Crawford* in subsequent decisions involving the admission of scientific test reports in the absence of an opportunity to cross-examine the lab analyst. *Melendez-Diaz* and *Bullcoming* have discredited the court of appeals’ decisions in *Meekins* and *Freycinet*, although those cases were defensible at the time they were decided. The court’s refusal to reconsider *Meekins* in *Brown*, decided after *Melendez-Diaz*, is astonishing, and the court has already missed an opportunity to rectify that mistake after *Bullcoming* by denying permission to appeal in *People v. Hall*,¹⁴⁷ in which the Appellate Division recently reaffirmed the validity of *Freycinet*.¹⁴⁸ Of course, intervening developments at the Supreme Court, particularly the forthcoming decision in *Williams v. Illinois*, could be dispositive as well. The court of appeals has shown no signs of considering an independent state constitutional approach in this area. Unfortunately, its unanimous rejection of the defendant’s Confrontation Clause claim in *Brown* provides no assurance that it will follow binding Supreme Court Sixth Amendment authority either.

¹⁴⁶ *Id.* The Appellate Division determined that the Confrontation Clause violation was harmless error. *Id.* at 237.

¹⁴⁷ *People v. Hall*, 923 N.Y.S.2d 428 (App. Div. 2011), *leave denied*, 2012 N.Y. Slip Op. 97220(U) (Ct. App. Feb. 24, 2012) (Lippman, Ch. J.).

¹⁴⁸ *Id.* at 428. Following *Bullcoming*, two circuits and one state high court have recognized that autopsy reports are testimonial in character. *United States v. Ignasiak*, Nos. 09-10596, 09-16005, 10-11074, 2012 WL 149314, at *9–12 (11th Cir. Jan. 19, 2012); *United States v. Moore*, 651 F.3d 30, 69–74 (D.C. Cir. 2011); *People v. Lewis*, 806 N.W.2d 295 (Mich. 2011).