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**Evidence**—Admission of Autopsy Reports and Surrogate Testimony of Medical Examiners Does Not Violate Confrontation Clause—*United States v. James*, 712 F.3d 79 (2d Cir. 2013)

The Sixth Amendment to the U.S. Constitution provides criminal defendants with one of the country’s most basic criminal law principles—the right to confront one’s accusers—by prohibiting prosecutors from using a witness’s adverse testimony against the accused without prior opportunity for cross-examination.<sup>1</sup> Determining what types of witness statements require the opportunity for confrontation has undergone dramatic change in recent years.<sup>2</sup> In *United States v. James*,<sup>3</sup> the Second Circuit considered these changes and held that the Confrontation Clause is not violated when autopsy and toxicology reports are admitted against a defendant, and medical examiners are allowed to testify about them despite not authoring the reports themselves.<sup>4</sup>

Richard James was convicted for his involvement in a conspiracy to fraudulently obtain and collect on life insurance policies by arranging for the murder of the insured individuals, Hardeo Sewnanan and Basdeo Somaipersuad.<sup>5</sup> On January 23, 1998, Somaipersuad was found dead in a New York City park.<sup>6</sup> New York City’s medical examiner, Dr. Heda Jindrak, conducted an autopsy and determined Somaipersuad died of an overdose of alcohol and the drug Thorazine.<sup>7</sup> At trial, the prosecution introduced the autopsy report into evidence as well as testimony by a medical examiner who did not conduct the autopsy or author the report, Dr. Corinne Ambrosi.<sup>8</sup> James did not object to the introduction of the autopsy report or to Dr. Ambrosi’s testimony.<sup>9</sup>

On January 8, 1999, Sewnanan died of what was later determined to be

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1. See U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (describing Confrontation Clause as “bedrock procedural guarantee”).

2. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (holding unavailable witness’s hearsay statements bearing “indicia of reliability” do not require opportunity for confrontation), *abrogated by* *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) (holding Confrontation Clause requires cross-examination of “testimonial statements” regardless of reliability); see also *infra* note 15 and accompanying text (explaining change in law).

3. 712 F.3d 79 (2d Cir. 2013).

4. *Id.* at 88.

5. *Id.* at 84-85.

6. *Id.* at 86.

7. 712 F.3d at 86.

8. *Id.* at 96. By the time of trial, Dr. Jindrak no longer worked for the New York City Office of the Chief Medical Examiner (OCME). *Id.*

9. *Id.*

ammonia poisoning.<sup>10</sup> At trial, James filed a motion to preclude from evidence a toxicology report written by a medical examiner who would not be testifying.<sup>11</sup> James argued admitting it would violate his right to cross-examine the author of the report.<sup>12</sup> The district court denied James' motion stating that the report was not testimonial for purposes of the Confrontation Clause.<sup>13</sup> On appeal to the Second Circuit, James argued that the introduction of the autopsy and toxicology reports as well as the accompanying testimony by medical examiners who did not conduct the tests or author the reports violated his Sixth Amendment right to confrontation.<sup>14</sup>

The Supreme Court's decision in *Crawford v. Washington* marked a significant change in the Court's Confrontation Clause jurisprudence by unanimously holding the Confrontation Clause allows the admission of testimonial statements "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."<sup>15</sup> Missing from the opinion was a definition of what qualifies as "testimonial" for purposes of the Confrontation Clause.<sup>16</sup> In *Melendez-Diaz v. Massachusetts*, the Court held

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10. *Id.* at 86.

11. 712 F.3d at 86.

12. See *United States v. James*, No. 02 CR 0778(SJ), 2007 WL 2702449 at \*1 (E.D.N.Y. Sept. 12, 2007), *aff'd*, 712 F.3d 79 (2d Cir. 2013). The author of the toxicology report, Dr. Leslie Mootoo, died between the time he authored the toxicology report and the time of James' trial. 712 F.3d at 100.

13. See *United States v. James*, No. 02 CR 0778(SJ), 2007 WL 2702449 at \*2 (E.D.N.Y. Sept. 12, 2007).

14. 712 F.3d at 87.

15. *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (defining situations where admitting testimonial statements does not violate Confrontation Clause). Prior to the Court's decision in *Crawford*, the admissibility of hearsay testimony based on the witness's unavailability focused solely on the reliability of the statements. *Id.* at 42. In *Ohio v. Roberts*, the Supreme Court held that for the out-of-court statement to be reliable it must meet a "firmly rooted hearsay exception" or have "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). In *Roberts*, the Court was particularly concerned with the efficient adjudication of criminal trials noting that confrontation sometimes must give way to efficiency in order to "respond[] to the need for certainty in the workaday world of conducting criminal trials." *Id.* *Crawford* fundamentally changed the analysis by focusing on the "'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51 (2004). The *Crawford* Court overruled *Roberts'* determination that out-of-court statements are inadmissible, regardless of whether a witness's statement meets an applicable hearsay exception, unless the witness is unavailable and the accused had a prior opportunity to cross-examine the witness. *Id.* at 59. For the *Crawford* Court, the Confrontation Clause "commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61; see Bailey Ince, *Confronting the Confrontation Clause: Addressing the Unanswered Question of Whether Autopsy Reports Are Testimonial Evidence Supreme Court of New York Appellate Division, First Department*, 28 *TOURO L. REV.* 993, 1002 (2012) (discussing change in Supreme Court's confrontation analysis); Carolyn Zabrycki, Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 *CALIF. L. REV.* 1093, 1096 (2008) (noting Supreme Court abandoned prior Confrontation Clause framework).

16. See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (declining to set forth definition of "testimonial"). The Court decided to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* However, the Court did note "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* In its next

forensic drug certifications were “testimonial” because they were created solely for use in a criminal trial, and therefore, required live witnesses to testify to the truth of the statements asserted in the report.<sup>17</sup>

Similarly, in *Bullcoming v. New Mexico*, the Supreme Court held that a certified blood-alcohol analysis subsequent to a Driving Under the Influence (DUI) arrest could not be introduced into evidence through the testimony of a laboratory analyst who did not sign the certification, personally perform, or personally observe the testing.<sup>18</sup> In a concurring opinion, Justice Sotomayor cited her opinion in *Michigan v. Bryant* stating that

[t]o determine if a statement is testimonial, [the Court] must decide whether it has “a primary purpose of creating an out-of-court substitute for trial testimony.” When the “primary purpose” of a statement is “not to create a record for trial,” the admissibility of [the] statement is the concern of state and federal rules of evidence, not the Confrontation Clause.<sup>19</sup>

Because the Court did not develop a working definition of what constitutes a “testimonial” statement for purposes of the Confrontation Clause, lower state and federal courts were left to reach their own conclusions regarding autopsy

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Confrontation Clause decision, *Davis v. Washington*, the Court determined that transcripts of a 911 call were not “testimonial.” *Davis v. Washington*, 547 U.S. 813, 822 (2006). The Court noted that “[s]tatements are nontestimonial when . . . the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.*; see George M. Tsiatis, Note, *Putting Melendez-Diaz on Ice: How Autopsy Reports Can Survive the Supreme Court’s Confrontation Clause Jurisprudence*, 85 ST. JOHN’S L. REV. 355, 373-74 (2011) (noting Court’s change of focus from reliability of statements to testimonial nature); Zabrycki, *supra* note 15, at 1093-94 (noting Supreme Court did not adopt definition for “testimonial”).

17. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). In *Melendez-Diaz*, a five to four decision rejected the State’s contention that the drug certificates were admissible as business records because the Business Record Exception under Federal Rules of Evidence 803(6) was never intended to apply when “the regularly conducted business activity is the production of evidence for use at trial.” *Id.* at 321. Rather, the majority found the certificates of analysis to be part of the “core class of testimonial statements” requiring the opportunity for confrontation. *Id.* at 310. Because the certificates were “the precise testimony the analyst would be expected to provide if called at trial,” the certificates were “functionally identical to live, in-court testimony.” *Id.* at 310-11 (quoting *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004)).

18. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713 (2011). The trial court admitted the certified laboratory report under the Business Record Exception though an analyst did not perform or observe the testing. *Id.* at 2712. The New Mexico Supreme Court, while finding the report to be testimonial, nonetheless held the defendant’s confrontation right had been preserved because the analyst who performed the test was simply transcribing the results of the testing equipment and the surrogate witness qualified as an expert witness who could testify to the veracity of the testing procedure. *Id.* at 2710-13. The Supreme Court explicitly rejected this reasoning, finding that the certification at issue was substantially similar to the certification in *Melendez-Diaz* because, among other things, it was a “formalized” signed document certifying the results of the testing. *Id.* at 2717.

19. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2720 (2011) (Sotomayor, J., concurring) (alteration in original) (citations omitted) (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011)).

reports.<sup>20</sup>

The Court again had the opportunity to define what types of statements qualify as “testimonial” for the purposes of the Confrontation Clause in *Williams v. Illinois*.<sup>21</sup> In *Williams*, the Court considered whether a state police lab worker could testify in a rape case to a match between the defendant’s blood sample kept in a police database and a vaginal swab analyzed by an outside laboratory.<sup>22</sup> In a fractured opinion, the Court did not agree on a definition of “testimonial,” issuing a plurality opinion featuring two concurrences and a dissent.<sup>23</sup> One reason the plurality cited for finding no Confrontation Clause violation was that the “report was sought not for the purpose of obtaining evidence to be used against [the] petitioner” but rather to “fin[d] a rapist who was on the loose.”<sup>24</sup> Writing in dissent, Justice Kagan noted five of the Justices expressly rejected the plurality’s reasoning and commented that after the Court’s unanimous decision in *Crawford* the five members of the plurality who agreed in the judgment “agree on very little . . . [leaving] significant confusion in their wake.”<sup>25</sup> The decision in *Williams* left lower courts with little guidance in determining when a forensic report is testimonial.<sup>26</sup>

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20. Compare *United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir. 2008) (admitting autopsy report as business record), *cert. denied*, 129 S. Ct. 2858 (2009), and *United States v. Feliz*, 467 F.3d 227, 236-37 (2d. Cir. 2006) (admitting autopsy report as business record), *cert. denied*, 127 S. Ct. 1323 (2007), with *United States v. Ignasiak*, 667 F.3d 1217, 1231 (11th Cir. 2012) (finding admission of autopsy reports as business records and surrogate testimony violated Confrontation Clause), and *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011) (finding admission of autopsy reports as business records and surrogate testimony violated Confrontation Clause). State courts have also come to varying conclusions. Compare *State v. Lackey*, 120 P.3d 332, 351-52 (Kan. 2005), *cert. denied*, 547 U.S. 1056 (2006) (holding no Confrontation Clause violation because autopsy report nontestimonial), and *State v. Russell*, 966 So. 2d 154, 163-65 (La. Ct. App. 2006) (holding autopsy reports not testimonial), with *State v. Locklear*, 363 N.C. 438, 452 (2009) (holding autopsy reports testimonial and surrogate testimony violated Confrontation Clause), and *Wood v. State*, 299 S.W.3d 200, 209 (Tex. Ct. App. 2009) (holding autopsy report testimonial). See generally Stephen Aiken, Comment, *Autopsy Reports, the Confrontation Clause, and a Virtual Solution*, 53 JURIMETRICS J. 213 (2013) (noting no Supreme Court decision gives comprehensive definition of “testimonial”).

21. See *Williams v. Illinois*, 132 S. Ct. 2221, 2232 (2012) (discussing lower court holding lab report not testimonial).

22. See *Williams v. Illinois*, 132 S. Ct. 2221, 229-30 (2012) (describing facts of case).

23. See *Williams v. Illinois*, 132 S. Ct. 2221, 2227, 2244, 2255, 2264 (2012) (providing multiple theories of what kinds of evidence require confrontation).

24. See *Williams v. Illinois*, 132 S. Ct. 2221, 2228 (2012). The Court also found that it was permissible for an expert to discuss the findings of a nontestifying expert in forming their own opinion even if the findings themselves are not admissible. *Id.* at 2233. The plurality emphasized that because it was a bench trial, there was minimal risk that the finder of fact would use the nontestifying witness’s findings for their truth. *Id.* at 2234-35.

25. See *Williams v. Illinois*, 132 S. Ct. 2221, 2277 (2012) (Kagan, J., dissenting) (explaining confusion caused by plurality opinion). “Before today’s decision, a prosecutor wishing to admit the results of forensic testing had to produce the technician responsible for the analysis. That was the result of not one, but two decisions this Court issued in the last three years. But that rule is clear no longer.” *Id.*

26. See Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 TEX. TECH. L. REV. 51, 81 (2012) (noting splintered decision in *Williams* makes determining holding difficult); Marc

In light of the uncertainty surrounding the admissibility of forensic reports, the Second Circuit in *United States v. James* revisited the issue of whether autopsy reports are testimonial.<sup>27</sup> In a previous decision, the Second Circuit found autopsy reports to be nontestimonial business records.<sup>28</sup> However, the Second Circuit noted the more recent Supreme Court cases of *Melendez-Diaz* and *Bullcoming* call that conclusion into doubt because the records at issue in both of those cases were “in some sense, business records—all were made in the course of the regular business that the laboratory conducts: forensic testing.”<sup>29</sup> The *James* court went on to note the Supreme Court found the reports in both cases, having been prepared for the sole purpose of being used at trial, to be testimonial whether or not they also qualified as business records.<sup>30</sup>

The Second Circuit next addressed the *Williams* decision by noting that it “does not . . . yield a single useful holding relevant to the case before us” and as a result the court “must rely on Supreme Court precedent before *Williams* to the effect that a statement triggers the protections of the Confrontation Clause when it is made with the primary purpose of creating a record for use at a later

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D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports—A “Testimonial,”* 74 LA. L. REV. 117, 122 (2013) (describing circuit split over the issue of whether or not autopsy reports are testimonial).

27. See 712 F.3d at 94 (discussing holding in *Feliz*). The Second Circuit’s opinion in *James* featured a concurring opinion by Judge Eaton. *Id.* at 108. While concurring in the result, Judge Eaton found autopsy reports to be testimonial. *Id.* Rather than find a statement testimonial when its primary purpose is use at a later criminal trial, Judge Eaton argued that a “testimonial statement is one having an evidentiary purpose, declared in a solemn manner, and made under circumstances that would lead a reasonable declarant to understand that it would be available for use prosecutorially.” *Id.*; see Ginsberg *supra*, note 26, at 167 (“Forensic autopsy reports do not look like transcripts of in-court or deposition testimony. They are, however, ‘official’ documents . . . issued pursuant to appropriate authority for official purposes, and their use as evidence in a criminal trial is foreseeable.”).

28. See FED. R. EVID. 803(6) (setting forth requirements for Business Record Exception to rule against hearsay); *United States v. Feliz*, 467 F.3d 227, 236-37 (2d. Cir. 2006). In *Feliz*, autopsy reports were introduced against the defendant as business records through the testimony of an employee of the OCME who did not conduct the autopsies. *Id.* at 229. After stating that the Supreme Court declined to give a definition of “testimonial,” the Second Circuit noted that “[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.” *Id.* at 233 (quoting *Crawford v. Washington*, 541 U.S. 36, 56 (2004)). The court concluded that the autopsy reports were conducted in the regular business of the OCME and concluded the reports were admissible because they bore “little resemblance to the civil-law abuses the Confrontation Clause targeted.” *Id.* at 234 (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)). Finally, the court explicitly rejected the argument that the autopsy reports “must be testimonial because a medical examiner preparing such a report must have a reasonable expectation the reports may be available for use in a subsequent trial.” *Id.* at 234; see Recent Case, *Second Circuit Holds that Autopsy Reports Are Not Testimonial Evidence.—United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006), cert. denied, 75 U.S.L.W. 3438 (U.S. Feb. 20, 2007) (No. 06-8777), 120 HARV. L. REV. 1707, 1711 (2007) (critiquing court’s decision in *Feliz* to admit autopsy reports under Business Record Exception); see also Matthew Yanovitch, Comment, *Dissecting the Constitutional Admissibility of Autopsy Reports After Crawford*, 57 CATH. U. L. REV. 269, 288 (2007) (concluding admitting autopsy reports as business records fails to comply with holding in *Crawford*).

29. 712 F.3d at 94 (explaining recent Supreme Court decision cast doubt on previous holding in *Feliz*).

30. See *id.* (discussing Supreme Court’s holding in *Melendez-Diaz* and *Bullcoming*).

criminal trial.”<sup>31</sup> Relying on pre-*Williams* precedent, the Second Circuit used Justice Sotomayor’s “primary purpose” test to hold the autopsy report of Somaipersaud was nontestimonial because it was created “substantially before” a criminal investigation into his death began and therefore the report was “not prepared primarily to create a record for use at a criminal trial.”<sup>32</sup> Similarly, the court held Sewnanan’s toxicology report was admissible and nontestimonial because there was no indication that the “report was completed primarily to generate evidence for use at a subsequent criminal trial.”<sup>33</sup> By resorting to pre-*Williams* precedent, the Second Circuit established that autopsy reports are nontestimonial when, viewed objectively, the circumstances surrounding the report’s preparation do not indicate to a reasonable analyst that it would be used in a later criminal trial.<sup>34</sup>

In applying pre-*Williams* precedent to autopsy reports, the Second Circuit appropriately abandoned its reliance on the Business Record Exception.<sup>35</sup> While the court pointed to the recent Supreme Court cases of *Melendez-Diaz* and *Bullcoming* as the reason for this change, it failed to articulate the larger problem with admitting autopsy reports as business records.<sup>36</sup> The problem inherent in relying on the Business Record Exception is that it allows for the admission of testimonial evidence without facing the “crucible of cross-

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31. See *id.* at 95-96. In attempting to distill a holding from the *Williams* decision, the Second Circuit applied the general rule that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those members who concurred in the judgments on the narrowest grounds.” *Id.* at 95 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). Because the *Williams* plurality lacked support among the Justices, the Second Circuit concluded that it would need to apply pre-*Williams* law to the set of facts presented before them. *Id.* at 95-96.

32. *Id.* at 99. The court found the essential element to determine if the autopsy report of Somaipersaud’s death was testimonial was the relationship between the OCME and the police “both generally and in this particular case.” *Id.* at 97. The court noted that the OCME is an independent agency by statute and when an autopsy is necessary, a report must be filed “regardless of whether any further investigation results.” *Id.* at 97-98.

33. See 712 F.3d at 102. The Second Circuit began its analysis of the toxicology reports of Sewnanan by stating that the district court’s reasoning for allowing the report into evidence was of “questionable validity” because of the Supreme Court’s decisions in *Melendez-Diaz* and *Bullcoming*. *Id.* at 101. Nonetheless, the Second Circuit upheld its admission because there was no indication in the record “that a criminal investigation was contemplated during the inquiry into the cause of Sewnanan’s death.” *Id.* While the autopsy reports at issue in *James* were distinct from the reports produced in *Melendez-Diaz* and *Bullcoming* in that they were produced prior to any criminal investigation, like the reports in *Melendez-Diaz* and *Bullcoming*, autopsy reports often require medical examiners to “collect, package, label, and preserve all evidentiary items” as well as “document chain of custody of all evidentiary items.” See NAT’L ASS’N OF MED. EXAM’RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 25, (2005) available at <https://netforum.avectra.com/temp/ClientImages/NAME/ee6dc85d-5871-4da1-ae3-abfc9bb80b92.pdf>.

34. See 712 F.3d at 94.

35. *Id.* at 94-95 (explaining *Melendez-Diaz* and *Bullcoming* changed rule established in *Feliz*).

36. See *id.* In *Melendez-Diaz* and *Bullcoming*, the evidence failed to meet the Business Record Exception in both instances because the purpose of the business activity was “establishing or proving some fact in a criminal proceeding.” *Id.* (quoting *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011)).

examination,” something *Crawford v. Washington* explicitly rejected.<sup>37</sup> It is not, however, because of *Melendez-Diaz* and *Bullcoming* that autopsy reports are not admissible as business records.<sup>38</sup> Rather, it was wrong to admit the reports as business records even before those cases because leaving the admission of out-of-court statements to the rules of evidence is at odds with the right to confrontation by admitting hearsay statements under the “amorphous notions of ‘reliability.’”<sup>39</sup>

Moreover, the Second Circuit improperly relied on Justice Sotomayor’s concurring opinion in *Bullcoming* when it established that an autopsy report is testimonial when a “reasonable analyst in the declarant’s position would have . . . created a record for use at a later criminal trial.”<sup>40</sup> The court misconstrues pre-*Williams* precedent by making an autopsy report testimonial only where the analyst foresees the report’s use in a criminal trial.<sup>41</sup> Whether or not an analyst anticipates use of an autopsy report in a future criminal trial, the report is still a “solemn declaration or affirmation made for the purposes of establishing some fact.”<sup>42</sup> Autopsy reports are signed documents that establish important facts, including cause and manner of death, as well as certifying certain procedures were followed.<sup>43</sup> This makes autopsy reports testimonial regardless of the authoring examiner’s intent or expectation of its use.<sup>44</sup>

In failing to establish the correct means of triggering the Confrontation Clause with respect to autopsy reports, the Second Circuit failed to appreciate an autopsy report’s technical nature and susceptibility to error and “shades of gray.”<sup>45</sup> While a medical examiner may not be in the sole business of creating

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37. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (overruling *Ohio v. Roberts*); Aiken, *supra* note 20, at 225-26. (explaining *Crawford* severed Confrontation Clause analysis from hearsay rules); Zabrycki, *supra* note 15, at 1101-02 (noting post-*Crawford* hearsay exceptions cannot take place of procedural guarantee of confrontation); see also *supra* note 15 (discussing change in Confrontation Clause analysis).

38. See 712 F.3d at 94 (noting *Melendez-Diaz* and *Bullcoming* cast doubt on using Business Record Exception to admit autopsy reports); see also Ginsberg, *supra* note 26, at 129 (arguing autopsy reports still require confrontation even if considered business records).

39. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (holding admission of hearsay based on indicia of reliability inconsistent with right of confrontation).

40. See 712 F.3d at 94.

41. See *id.* at 109 (Eaton, J., concurring). “[T]he speaker need not expect that the statement will be used in a criminal trial, or even that it is objectively likely that the statement will be used in a criminal trial, only that it is foreseeable that the statement could be used prosecutorially.” *Id.*; see *supra*, note 27 (discussing alternative approach to determining what statements require confrontation).

42. See *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

43. See Ginsberg, *supra* note 26, at 167-68 (explaining autopsy reports often require pathological interpretations and opinions).

44. See Aiken, *supra* note 20, at 224. (“[A]utopsy reports contain affirmations and certifications . . . [and] the medical examiner is essentially attesting to certain facts, which are potentially relevant to later criminal prosecution. This makes autopsy reports testimonial, regardless of whether one focuses on the autopsy’s purpose, the examiner’s expectation, or the formality of the report.”)

45. See Tsiatis, *supra* note 16, at 383 (discussing complexity involved in autopsy reports). “Autopsies are also much more complex than the identification of a narcotic, and are more prone to shades of gray, as their outcome is a diagnosis, not a chemical compound match.” *Id.*

evidence for use at a later criminal trial, the creation of an autopsy report requires skill, training, and judgment.<sup>46</sup> The Supreme Court in both *Melendez-Diaz* and *Bullcoming* required testing the veracity, accuracy, and adherence to procedure of forensic testing by confrontation.<sup>47</sup> To hold autopsy reports nontestimonial is inconsistent with the Supreme Court's post-*Crawford* Confrontation Clause cases because it allows a solemn affirmation of some fact proven at trial to go untested by confrontation.<sup>48</sup>

The Second Circuit was correct in no longer relying on the use of the Business Record Exception to admit autopsy reports and corresponding testimony by medical examiners who did not author the reports. However, the court erred in holding autopsy reports are nontestimonial when a medical examiner may not foresee its use in a future criminal trial. An autopsy report is testimonial in at least two respects: it is made to establish cause and manner of death, and it is a complex procedure that requires a particular medical examiner's skills and judgment. Regardless of a medical examiner's lack of awareness that an autopsy report may be used in a criminal trial, adherence to the Sixth Amendment's guarantee of confrontation requires defendants have the opportunity to assess the report's veracity and accuracy by questioning the examiner who prepared it.

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46. See *United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012). (“[A]utopsy reports are the product of skill, methodology, and judgment of highly trained examiners who actually performed the autopsy.”); see also Ginsberg, *supra* note 26, at 134 (arguing skill, judgment, and subjectivity involved in autopsy reports makes them testimonial).

47. See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011) (holding confrontation not satisfied by surrogate testimony because defendant unable to expose lapses in procedures); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 (2009) (stating confrontation required to test “honesty, proficiency, and methodology”).

48. See 712 F.3d at 111 (Eaton, J., concurring). (“Both *Bullcoming* and *Melendez-Diaz* hold that a laboratory analyst’s report of sufficient solemnity triggers . . . the Confrontation Clause. It would be incongruous indeed, if an autopsy report requiring numerous skilled judgments on the part of a medical examiner did not require the same confrontation.”).