IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE.	)	
	)	
V.	)	
	)	
DOMINIQUE BENSON,	)	DEF. I.D.: 1409003743
CHRISTOPHER RIVERS,	)	DEF. I.D.: 1409001584
	)	
Defendants.	)	

Date Submitted: February 16, 2015
Date Decided: June 2, 2015

OPINION.

Defendants' Motions in Limine. **DENIED.**
State's Application to Certify a Question of Law to the Delaware Supreme Court. **DENIED**.

Steven P. Wood, Esquire, Colleen K. Norris, Esquire, Karin M. Volker, Esquire and Jenna R. Milecki, Deputy Attorneys General, Wilmington, Delaware. Attorneys for the State of Delaware.

Patrick J. Collins, Esquire and Albert J. Roop, V, Esquire, Wilmington, Delaware. Attorneys for Dominique Benson.

Brian J. Chapman, Esquire and John A. Barber, Esquire, Wilmington, Delaware. Attorneys for Christopher Rivers.

BUTLER, J.

INTRODUCTION

Christopher Rivers and Dominique Benson have been charged with Murder First Degree and other offenses in connection with the shooting deaths of Joseph and Olga Connell. The parties appear to be in agreement that the pathologist who performed the autopsies is "unavailable" for trial. The State seeks to introduce testimony regarding the cause of death through a "substitute pathologist" who will give his own opinions, albeit after having consulted the facts as recorded by the autopsy pathologist. The defendants have filed identical motions *in limine* asking this Court to preclude the State from introducing the testimony of a substitute pathologist.

The defendants argue that the autopsy report contains "testimonial" statements and, therefore, the Confrontation Clause of the Sixth Amendment of the United States Constitution requires the in-court testimony of the medical examiner that performed the autopsy. Defendants also argue that, because the responding officers and treating physicians are able to testify that the victims died from multiple gunshot wounds, the proffered evidence is irrelevant. The State argues that the objective factual observations contained in the autopsy report are not testimonial and, therefore, are not subject to the Confrontation Clause. The State wishes to introduce the testimony of Dr. Gary L. Collins, a pathologist who will base his opinion as to the cause of death on the objective factual observations

contained in the autopsy report that was prepared by Dr. Richard T. Callery, but Dr. Collins' opinion will be that of Dr. Collins, not that of Dr. Callery.

The State has also requested that this Court forego deciding the matter, and that we certify questions of law regarding this issue to the Delaware Supreme Court.

FACTS

At approximately 1:30 a.m. on September 22, 2013, police responded to the front yard of the condominium residences at Paladin Club in North Wilmington after multiple reports of shots fired. Upon arrival, officers found Joseph and Olga Connell suffering from multiple gunshot wounds to the head and face. Mr. Connell was pronounced dead at the scene, and Mrs. Connell was pronounced dead later at Christiana Medical Center. The State intends to prove that defendant Rivers wanted to kill his business partner, Joseph Connell, and Joseph's wife, Olga Connell. The State's theory is that Rivers, in conspiracy with codefendant Joshua Bey, hired codefendant Benson and an "unnamed coconspirator" to carry out the murder.

On the day of the murder, Dr. Richard T. Callery, who was the Chief Medical Examiner for the State of Delaware at the time, performed an autopsy on each victim. Dr. Callery removed several bullets from each victim, made detailed observations regarding the victims' injuries, and ultimately formulated the opinion

that the cause and manner of each death was homicide by multiple gunshot wounds. Dr. Callery summarized his observations and his cause of death opinion in an autopsy protocol ("autopsy report"). There were no suspects at the time of the autopsy. Almost one year later, after investigation by New Castle County Police Department, the defendants were arrested and charged.

As a result of suspected malfeasance with respect to drug evidence oversight at the Office of the Chief Medical Examiner ("OCME") and other issues related to his employment, Dr. Callery was terminated from his position as Chief Medical Examiner. Prior to June 24, 2014, and on all dates relevant to this case, the OCME was an entity that existed within the Department of Health and Social Services ("DHSS").[1] Dr. Gary Collins is the new Chief Medical Examiner at the OCME.

The State proffers Dr. Collins, an expert pathologist, to give his expert opinion that Joseph and Olga Connell were the victims of a homicide caused by multiple gunshot wounds. Dr. Collins' expert opinion will be based on the factual observations contained in the autopsy protocols, the death certificate, the death investigation report, the autopsy photographs, and photographs from the crime scene. The State does not wish to introduce any of the opinions formed by Dr. Callery, nor does it seek to introduce the autopsy report itself. The issue before the

[1] On June 24, 2014, Senate Bill No. 241 was signed by the Governor. That legislation transferred the OCME from under the umbrella of DHSS to that of the Department of Homeland Security.

Court is whether the Confrontation Clause of the Sixth Amendment prohibits Dr. Collins from providing expert opinion testimony where his opinions are partially based on observations contained in Dr. Callery's autopsy report.

DISCUSSION

The jurisprudence of the U.S. Supreme Court under the Confrontation Clause of the Sixth Amendment enjoyed a long period of relative stability after the Court's decision in *Ohio v. Roberts*.[2] *Robert*s was a case in which the prosecution successfully sought permission to read the defendant's daughter's testimony from her preliminary hearing into the record at trial, despite her unavailability at trial to offer the testimony herself.[3] The Supreme Court pointed to the traditional hearsay exception for "prior testimony" by a witness[4] and announced the rule that hearsay testimony would not violate the Confrontation Clause so long as it was grounded in a "firmly rooted" exception to the hearsay rule that bore "adequate indicia of reliability."[5]

From 1980, when *Ohio v. Roberts* was decided, until 2003, the Federal Rules of Evidence and the hearsay exceptions contained therein were generally

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[2] *Ohio v. Roberts*, 448 U.S. 56 (1980).

[3] *Id*. at 58-60.

[4] *See* D.R.E. 804(b)(1).

[5] *Roberts*, 448 U.S. at 66.

accepted as containing "adequate indicia of reliability" such that there was little dispute but that satisfaction of an evidentiary hearsay exception also satisfied the Confrontation Clause of the Sixth Amendment.[6]

This is not to suggest there was nothing to discuss. There was left to determine, for example, which exceptions to the hearsay rules were "firmly rooted."[7] And in *Thomas v. State*, our Supreme Court had to sort out whether statements admitted at trial pursuant to a new "tender years" statute (allowing statements of young victims of abuse to be admitted without cross-examination) contained adequate "indicia of reliability" under *Roberts* to satisfy the Confrontation Clause.[8]

But these disputes were all within the margins of *Ohio v. Roberts*. Twenty-three years after *Roberts*, the U.S. Supreme Court's decision in *Crawford v. Washington*[9] did not simply interpret or expand upon *Roberts*. Rather, *Crawford* was a complete abrogation of the *Robert*s rubric and the analysis of Confrontation Clause disputes. The *Crawford* holding is significant enough to require some study.

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[6] *See Id.* ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.").

[7] *See, e.g.*, *Forrest v. State*, 721 A.2d 1271, 1277 (Del. 1999) (ruling that a present sense impression is a "firmly rooted" hearsay exception).

[8] *See Thomas v. State*, 725 A.2d 424 (Del. 1999).

[9] *Crawford v. Washington*, 541 U.S. 36 (2004).

On August 5, 1999, Michael and his wife, Sylvia Crawford, went in search of one Kenneth Lee.[10] Sylvia had revealed to Michael that Kenneth Lee had raped her and when they finally found Lee, a fight ensued.[11] Lee was stabbed and went to the hospital, Michael and Sylvia went to the police station and gave statements.[12] Michael was charged with attempted murder and Sylvia declined to appear for his subsequent trial, citing Washington's marital privilege from giving testimony against her husband.[13] The prosecution sought to introduce the prior recorded statement Sylvia made at the police station as a "declaration against penal interest," which was a recognized exception to the marital privilege law in Washington.[14] The prosecution convinced the trial judge to allow it.[15]

When the matter reached the U.S. Supreme Court, the Court did not question whether the alleged declaration against penal interest was a "firmly rooted" hearsay exception or whether it contained "adequate indicia of reliability." Rather, the Court embarked on a historical search of English and colonial law to determine

[10] *Id*. at 38-40.

[11] *Id*.

[12] *Id*.

[13] *Id*. at 40.

[14] *Id*.

[15] *Id*.

the roots of the Confrontation Clause.[16] Taking readers on a journey through the treason trial of Sir Walter Raleigh in 1603[17] and the bill of attainder trial of Sir John Fenwick in 1696,[18] the Court determined that "[t]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[19]

If we analyze Sylvia Crawford's statement through this lens, it is easy to conclude, as did the Court, that her statement to the police was inadmissible absent her presence and availability for cross-examination at trial. Those who favor their Constitution to guarantee whatever rights were available to citizens at the time of its passage have much to be happy about with the *Crawford* opinion. Those who favor a clear delineation of what is or is not "constitutional" from the Supreme Court, less so. In one of its most confusing passages, the Court held that the Confrontation Clause was intended to focus on "witnesses" against the accused.[20] Witnesses are, according to the Court, those who "bear testimony" and those who

[16] *Id*. at 42-50.

[17] *Id*. at 44.

[18] *Id*. at 45-46.

[19] *Id*. at 50.

[20] *Id*. at 51.

do so make "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[21] The *Crawford* Court then decided that it was these "testimonial statements" that required confrontation and cross-examination. Alas, the Court felt it best to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[22]

Certainly *Crawford* was a paradigm shift in Confrontation Clause analysis. Its implications for the instant dispute require further investigation and analysis. We would do well to consider some of the Court's decisions subsequent to *Crawford*, decisions to which we now turn. For if the autopsy report is "testimonial," then the Confrontation Clause may be implicated.

In *Davis v. Washington*, the Court dealt with two iterations of Confrontation Clause issues, both in the context of domestic violence prosecutions.[23] In *Davis* itself, the issue was the admissibility of a 911 call in which the complaining witness was describing the violent behavior of Mr. Davis while on the phone with the dispatcher.[24] A companion case (*Hammon*), decided with *Davis*, involved a police interview with a domestic violence victim at her home immediately after the

[21] *Id*. (citing 2 N. Webster, An American Dictionary of the English Language (1828).).

[22] *Id*. at 68.

[23] *Davis v. Washington*, 547 U.S. 813 (2006).

[24] *Id*. at 817-819.

violence had occurred.[25] In each case, the complaining witness failed to appear for trial and in each case, the victim's statements were admitted against the alleged perpetrator.

The Court's conclusions that the 911 call in *Davis* was properly admitted while the victim interview with police in *Hammon* was not, were not terribly remarkable. What is useful for these purposes is that the Court attempted to differentiate "testimonial" statements from "nontestimonial" statements. The *Davis* Court said:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the *primary purpose* of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[26]

Thus, the Court for the first time indicated that the testimonial/non testimonial riddle created by *Crawford* might be solved by looking to the "primary purpose" for which the statement was procured. This "primary purpose" test has become the primary means by which this dichotomy has been cleaved ever since.

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[25] *Id*. at 819-821.

[26] *Id*. at 822 (emphasis added).

The primary purpose test got a test of its own in *Michigan v. Bryant*.[27] In *Bryant*, a gunshot victim gave the police a dying declaration identifying the shooter as Bryant.[28] The identification was indeed in response to police questioning as in *Crawford* and, like the victim interview in *Hammon*, it described a past event.[29] The Court held that the primary purpose in interviewing the dying victim was not to create a record for use at trial and it was therefore not a "testimonial statement."[30] Further, the Court said, there may be other circumstances in which the primary purpose in procuring the statement is not for use at trial and it too would not be "testimonial."[31] The Court explained that "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause."[32]

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[27] *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

[28] *Id*. at 1150.

[29] *Id*. at 1154; *See Davis*, 547 U.S. at 819.

[30] *Bryant*, 131 S. Ct. at 1166-67.

[31] *Id*. at 1155 ("[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.").

[32] *Id*.

Thus it can be seen that the "primary purpose test" has become the focal point for any attempt to determine which out of court statements are "testimonial" and which are barred without cross-examination under *Crawford.*

In order to complete our discussion of the Confrontation Clause and *Crawford*, we must turn to the Court's treatment of documentary evidence in light of *Crawford*. First, there is *Melendez-Diaz v. Massachusetts*.[33] In this case, the Commonwealth of Massachusetts sought to dispense with the need to produce drug chemists to testify about the lab results by substituting instead a certified copy of the lab test results.[34] The Supreme Court, noting that the lab reports were created for the "sole purpose" of providing evidence against the accused at a later criminal trial, held the reports were "testimonial" within the meaning of *Crawford* and inadmissible without the availability of the chemist for cross-examination.[35]

Next came *Bullcoming v. New Mexico*,[36] a case in which a DUI defendant was convicted in part on the basis of a lab report showing his blood alcohol content above the legal limit where the lab technician, as in *Melendez-Diaz*, certified his

[33] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

[34] *Id*. at 308-09.

[35] *Id*. at 310-11.

[36] *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).

results, but did not testify.[37] The Court held the document inadmissible: "A document created solely for an 'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial."[38] Justice Sotomayor noted specifically that in order "[t]o determine if a statement is testimonial, we must decide whether it has 'a primary purpose of creating an out of court substitute for trial testimony.'"[39]

Finally, we have the "less than clear"[40] holding in *Williams v. Illinois*.[41] In *Williams*, a rape prosecution relied on a DNA profile that was produced by Cellmark Labs from semen left at the crime scene to match the DNA of the defendant taken by the police.[42] Cellmark is an independent lab, it did not testify, but its report was used by an expert witness to confirm the match with the defendant.[43] In a plurality opinion, the Court ruled the lab result was not "testimonial" because it was not created for the primary purpose of accusing a

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[37] *Id*. at 2709-10.

[38] *Id*. at 2717 (citing *Melendez-Diaz*, 557 U.S. at 311.).

[39] *Bullcoming*, 131 S. Ct. at 2720 (Sotomayor, J., concurring) (citing *Bryant*, 131 S. Ct. at 1155.).

[40] *Martin v. State*, 60 A.3d 1100, 1104 (Del. 2013) ("The precise holding of *Williams* is less than clear (and not only to us).").

[41] *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (plurality opinion).

[42] *Id*. at 2227.

[43] *Id*. ("The expert also explained the notations on documents admitted as business records, stating that, according to the records, vaginal swabs taken from the victim were sent to and received back from Cellmark.").

targeted individual or creating evidence for use at trial.[44] Most useful for our purposes is the concurring opinion of Justice Breyer, who wondered if barring the Cellmark data

> could undermine, not fortify, the accuracy of factfinding at a criminal trial. Such a precedent could bar the admission of other reliable case specific technical information such as, say, autopsy reports. Autopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial. Autopsies are typically conducted soon after death. And when, say, a victim's body has decomposed, repetition of the autopsy may not be possible. What is to happen if the medical examiner dies before trial? Is the Confrontation Clause effectively to function as a statute of limitations for murder?[45]

While we may be getting a bit ahead of ourselves to ponder Justice Breyer's question, it counsels the real life consequences that derive were we to conclude that autopsies are "testimonial" and may not be admitted without the appearance of the medical examiner that performed the autopsy.[46] It is not fanciful to say that if the autopsy report were deemed testimonial and the pathologist who performed the autopsy were not available for the trial, some would literally get away with murder.

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[44] *Id*. at 2243-44.

[45] *Id*. at 2251 (Breyer, J., concurring) (internal quotation marks omitted).

[46] *See generally* Carolyn Zabrycki, *Toward A Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of A Testimonial Statement*, 96 CAL. L. REV. 1093 (2008).

Turning away then, from the U.S. Supreme Court's treatment of Confrontation Clause issues after *Crawford*, and confident that we are on the right course in seeking out the "primary purpose" for the creation of the autopsy protocol, we look next to the primary purpose for the creation of autopsy reports under Delaware law.

At least at the time the autopsies were performed in this case, the Office of the Chief Medical Examiner ("OCME") was organized as a department within the State Department of Health and Social Services.[47] Its mission, as explained in the Delaware Code, is to "fully investigate the essential facts concerning the medical causes of death . . . ."[48] The OCME is directed to prepare an autopsy report which is to be "[a] detailed report of the findings written during the progress of the autopsy, related laboratory analysis and the conclusions drawn therefrom . . . ."[49] While the Attorney General is certainly mentioned in the Code, these mentions are simple reporting requirements; the Attorney General is not in the "chain of command" of the OCME, and there is no suggestion in the Code that the "primary purpose" of the OCME or of autopsy reports is to aid the government in the apprehension or prosecution of anyone, much less a particular, identified

[47] 29 *Del. C.* §4701 (before July 4, 2014).

[48] 29 *Del. C.* §4706(c).

[49] 29 *Del. C.* §4707(c).

individual. There is thus no reason to conclude that the statutory milieu of the OCME renders its work product "testimonial" within the meaning of *Crawford*.[50]

This statutory framework helps us appreciate that the work of the OCME in performing autopsies is not the type of work the Supreme Court found accusatory or "testimonial" in *Crawford* and its progeny. Indeed, we are reminded that in this case, the autopsies were performed approximately one year before the police had developed any suspects in the murder of the victims. This framework is one of the reasons the Court finds the logic of the California Supreme Court in *People v. Dungo*[51] compelling.

California's statutory structure for its medical examiner is substantially similar to Delaware's: County coroners are charged with investigating deaths that may or may not have resulted from foul play.[52] Autopsies are used for a variety of purposes, including insurance claims and satisfying grieving family members.[53] In

[50] *See United States v. Ignasiak*, 667 F.3d 1217 (11th Cir.2012) (ruling that, in light of Florida's statutory scheme where the medical examiner's office was created and existed within the Department of Law Enforcement, the autopsy reports at issue were testimonial).

[51] *People v. Dungo*, 286 P.3d 442 (Cal. 2012).

[52] CAL. GOV'T. CODE §27491.

[53] "For example, the decedent's relatives may use an autopsy report in determining whether to file an action for wrongful death. And an insurance company may use an autopsy report in determining whether a particular death is covered by one of its policies. Also, in certain cases an autopsy report may satisfy the public's interest in knowing the cause of death, particularly when (as here) the death was reported in the local media. In addition, an autopsy report may provide answers to grieving family members." *Dungo*, 286 P.3d at 450 (internal citation omitted).

Dungo, an autopsy was performed by a medical examiner who did not testify at trial.[54] The government, like the State in this case, conceded the inadmissibility of both the autopsy report itself and the expert opinion of the non-testifying examiner and relied instead on a substitute medical examiner who reviewed the report of the non-testifying expert, as well as photos of the autopsy.[55] The second expert then testified to his own opinions as to the cause and manner of death.[56]

In affirming the use of the autopsy report in this manner, the *Dungo* court said, "[i]n short, criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes."[57] We think this is exactly right.

The Court finds further support for its conclusion closer to home. *Rollins v. State*[58] is a Maryland case that arose in the immediate aftermath of *Crawford*. In *Rollins*, a substitute pathologist testified in lieu of the original medical examiner

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[54] *Id*. at 445.

[55] *Id*. at 446.

[56] *Id*.

[57] *Id*. at 450 (emphasis in original) ("The presence of a detective at the autopsy and the statutory requirement that suspicious findings be reported to law enforcement do not change that conclusion. The autopsy continued to serve several purposes, only one of which was criminal investigation.").

[58] *Rollins v. State*, 392 Md. 455 (Md. 2006).

that conducted the autopsy.[59] This second pathologist relied on the factual details contained in the autopsy report, but rendered her own opinions and conclusions based on the facts as recorded at the autopsy.[60] Unlike *Dungo*, which relied on the statutory structure of California's medical examiner laws, *Rollins* distinguished between those "objective facts" that were observed and recorded by the original pathologist and those "opinions" that the original pathologist formed based upon the facts.[61] The *Rollins* court determined that while the Confrontation Clause would be implicated if the second pathologist simply parroted the opinions of the non-testifying pathologist, the Clause was not implicated by the objective facts that were gathered by the first pathologist and relied upon by the second pathologist.[62] And since the second pathologist testified and was available for cross-examination on her own opinions, defendant's conviction was affirmed.[63]

It is clear enough to the Court that the State here has read the opinions carefully and has taken pains to steer down the main thoroughfare and not get tied

[59] *Id*. at 465-66.

[60] *Id*. at 489-90.

[61] *Id*. at 489-95 ("The autopsy report in the instant case was redacted to omit any information that could be construed as an 'opinion.' . . . The observations of Dr. Pestaner are more in line with the findings of medical examiners that constitute non-analytical findings that are objectively ascertained i.e., the determination and description of the weight, characteristics and description of the deceased.").

[62] *Id*. at 495.

[63] *Id*. at 509-10.

up in the traffic of the side streets. We are thus not called upon to rule on the admissibility of the autopsy report itself – the State does not intend to introduce it. We are also not asked to rule on a proposal that the new medical examiner simply repeat what the previous examiner concluded in his professional opinion; this will be the second examiner's opinion and conclusions, based on facts as known to him, some of which will include the autopsy conducted by another. By shrinking its proffer, the State has left the defense with a very small target. The cases, *Dungo*, *Rollins* and the great weight of decisional authority throughout the country all support the admissibility of the second pathologist's opinion testimony.[64] We are

[64] *See United States v. De La Cruz*, 514 F.3d 121, 134 (1st Cir. 2008) ("[W]e are unpersuaded that a medical examiner is precluded under *Crawford* from either (1) testifying about the facts contained in an autopsy report prepared by another, or (2) expressing an opinion about the cause of death based on factual reports-particularly an autopsy report-prepared by another."); *United States v. James*, 712 F.3d 79, 99 (2d Cir. 2013) *cert. denied*, 134 S. Ct. 2660 (2014) (holding that statements in an autopsy report are not testimonial when the report is not prepared primarily to create a record for use at a criminal trial); *State v. Maxwell*, 9 N.E.3d 930, 950 (Ohio 2014) ("Autopsy reports are not intended to serve as an out-of-court substitute for trial testimony. Instead, they are created for the primary purpose of documenting cause of death for public records and public health." (citations and internal quotation marks omitted)); *State v. Medina*, 306 P.3d 48 (Ariz. 2013) *cert. denied*, 134 S. Ct. 1309 (2014) (holding that an autopsy report was not testimonial and therefore admissible into evidence because it was not created primarily to accuse a specified individual and it lacked the requisite solemnity); *State v. Dixon*, 250 P.3d 1174, 1182 (Ariz. 2011) ("Our cases teach that a testifying medical examiner may, consistent with the Confrontation Clause, rely on information in autopsy reports prepared by others as long as he forms his own conclusions."); *People v. Leach*, 980 N.E.2d 570, 592 (holding that an autopsy report was not testimonial because it was prepared in the normal course of operation of the medical examiner's office in order to determine the cause of death and not for the primary purpose of accusing a specified individual or providing evidence in a criminal trial).

thus confident that Dr. Collins may testify in accordance with the proffer made by the State.

Turning then to the State's request that we certify this question to the Delaware Supreme Court, we note that there is no Delaware Rule of Criminal Procedure setting forth a procedure by which a question may be certified to the Delaware Supreme Court. The Rules of Civil Procedure do provide a framework by which to analyze the issue, but the same prudential considerations are not present in interlocutory appeals of civil cases as exist in criminal cases, not the least of which is the defendant's constitutional right to a speedy trial. Nonetheless, we understand that the Civil Rules provide that an issue may be certified upon a petitioner's request along with "facts and issues at such length and with such clarity as to enable the Superior Court to make a finding necessary to warrant a certification under the terms and conditions of Supreme Court Rule 41."[65] The State has here argued – quite convincingly – that defendant's motion ought to be denied. The State has not convinced the Court, however, that there are "important and urgent reasons for an immediate determination" by the Supreme Court.[66]

[65] Super. Ct. Civ. R. 75.

[66] Supr. Ct. R. 41(b).

This is not to suggest the issue is not important. It strikes the Court that this dispute is like all issues in a capital case – quite important. But if that were the criteria by which the Court adjudged "importance," there would be nothing for the Court to decide except that in capital cases the matter is important, urgent, and ought to be passed up to the Supreme Court for decision. While this may explain why there is no criminal rules analog to the availability of certification in civil cases, we do not think we have to go that far to determine that certification is inappropriate in this case.

Rather, the State has made a clear, convincing argument that leaves the Court with little doubt but that the opinions of Dr. Collins are admissible, and defendant's motion to exclude same must be denied. By excluding the autopsy report itself and the prior opinions of Dr. Callery, the State has hewn carefully to the most conservative line available in order to avoid any potential peril under *Crawford*, and we are left with the inescapable conclusion that it has done so successfully.

What, then, are we to do with an issue raised *in limine*, with which the Court is quite comfortable ruling and which, in the Court's view, raises issues that are certainly important, arguably "urgent," but not so hopelessly ambiguous as to require the immediate intervention of the appellate process? In answering this question, we should be mindful too that either side in a capital case may well make

the same argument: that "their" issue is so pressing as to require interlocutory review, thus disabling the orderly administration of justice and further, denying the appellate courts of the "benefit of the reasoning and analysis of the trial court."[67]

In *Martin v. State*, the Court clearly adopted the "primary purpose" test of *Melendez-Diaz* in ruling that a lab technician's "batch reports" were "testimonial" within the meaning of *Crawford*.[68] We are thus not required here to divine what test applies in this case. And we have already concluded that this autopsy report, prepared some twelve months before the defendants were arrested, was not created solely for an evidentiary purpose or with a "primary purpose" of aiding in the prosecution of an identified individual. Therefore, the factual observations in the autopsy protocols are not testimonial under *Melendez-Diaz*. Further, the "batch tests" that were the subject of the controversy in *Martin* were gas chromatography tests and "[t]he U.S. Supreme Court has held that interpreting the results of a gas chromatograph machine involves more than evaluating a machine generated number."[69]

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[67] *State v. Caliboso*, 787 A.2d 101, 2001 WL 1548971 (Del. 2001). For example, in this case the State seeks certification to establish the precedent for the use of a substitute pathologist in all "Dr. Callery" autopsies. The defense is so uninterested in the issue it has called the substitute pathologist's testimony "irrelevant." Acute legal argument in the Supreme Court requires two sides with equally vested interests in the outcome. That cannot be said in this case, making it less suitable for immediate appellate intervention.

[68] *Martin v. State*, 60 A.3d 1100, 1107-08 (Del. 2013).

[69] *Id*. at 1108 (citing *Bullcoming*, 131 S. Ct. at 2710-11).

We are further buttressed in our conclusion today by the U.S. Supreme Court's observation that "medical reports created for treatment purposes," are not testimonial under its decision in *Melendez-Diaz*.[70] While an autopsy report is certainly not created for "treatment purposes," it is no stretch to say they are created for purposes other than prosecution.

This calls to mind the U.S. Supreme Court's treatment of "business records" in *Melendez-Diaz*. The Court stated that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial."[71]

In this sense the case law has been quite consistent: autopsy reports are more like "business records" or "public records" or "medical records," and not at all like lab tests in drug or alcohol cases, whose sole purpose is to provide the evidence to convict the defendant. It is therefore abundantly clear to the Court that certification of the question raised would be an inappropriate use of judicial resources and set a dubious precedent in capital litigation.

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[70] *Melendez-Diaz*, 557 U.S. at 312 n.2 ("[M]edical reports created for treatment purposes . . . would not be testimonial under our decision today.").

[71] *Id*. at 324.

CONCLUSION

For the foregoing reasons, the defendants' Motions in Limine are **DENIED** and the State's Application to Certify a Question of Law to the Delaware Supreme Court is **DENIED**.

IT IS SO ORDERED.

/s/ Charles E. Butler
Judge Charles E. Butler