EVIDENCE — CONFRONTATION CLAUSE — 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).

The Supreme Court's decision in *Crawford v. Washington*[1] has required courts to reevaluate the circumstances under which admitting a hearsay statement at a criminal trial comports with the Confrontation Clause of the Sixth Amendment.[2] Prior to *Crawford*, under *Ohio v. Roberts*,[3] statements of an unavailable declarant were constitutionally admissible at trial only if they bore adequate "indicia of reliability."[4] In *Crawford*, the Court set aside the "indicia of reliability" standard and instead drew a distinction between testimonial and nontestimonial hearsay.[5] Testimonial hearsay is constitutionally admissible in a criminal trial only if the defendant had a prior opportunity to cross-examine the unavailable declarant.[6] Recently, in *United States v. Feliz*,[7] the Second Circuit held that autopsy reports are not testimonial under *Crawford*.[8] As a result, these reports may be admitted into evidence at trial without affording a defendant the right to confront and cross-examine the medical examiner who prepared the report. The Second Circuit's decision in *Feliz* is not unique; the few courts that have addressed the admissibility of autopsy reports post-*Crawford* have similarly held that they are nontestimonial hearsay.[9] The *Feliz* court's opinion also resembles those of other courts in that it appears to have been motivated more by concerns of hampering prosecutions than by the definition of "testimonial" set forth in *Crawford* and its progeny. However, because autopsy reports are prepared in anticipation of trial

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[1] 541 U.S. 36 (2004).

[2] The Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

[3] 448 U.S. 56 (1980).

[4] *Id.* at 66 (internal quotation marks omitted).

[5] *Crawford*, 541 U.S. at 68.

[6] *See id.* at 68–69.

[7] 467 F.3d 227 (2d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3438 (U.S. Feb. 20, 2007) (No. 06-8777).

[8] *Id.* at 237.

[9] These courts have tended to find autopsy reports to be nontestimonial on the ground that they are business or public records neither created in anticipation of litigation nor prepared by law enforcement personnel. Although some courts have held that the entire autopsy report is nontestimonial and thus admissible, *see, e.g.*, Perkins v. State, 897 So. 2d 457, 462–65 (Ala. Crim. App. 2004); State v. Anderson, 942 So. 2d 625, 628–29 (La. Ct. App. 2006); People v. Durio, 794 N.Y.S.2d 863, 867–69 (Sup. Ct. 2005); Moreno Denoso v. State, 156 S.W.3d 166, 181–83 (Tex. App. 2005), other courts have held that only factual observations are nontestimonial and have thus required that any conclusions or opinions be redacted from autopsy reports before they may be admitted into evidence through a witness other than the preparer, *see* State v. Lackey, 120 P.3d 332, 348–52 (Kan. 2005); Rollins v. State, 897 A.2d 821, 828–35, 838–46 (Md. 2006).

and because the practical consequences of finding autopsy reports to be testimonial are likely not as grave as some courts have anticipated, the Second Circuit should have held in *Feliz* that autopsy reports in homicide cases are testimonial evidence under *Crawford*.

On February 4, 1999, a federal grand jury in New York returned a seventeen-count indictment against Jose Erbo and other alleged cocaine distributors, including Miguel Feliz.[10] Among the charges were multiple counts of murder.[11] Erbo pleaded not guilty, and the case went to trial.[12] At trial, the government introduced into evidence nine autopsy reports to establish the cause of death in each of the charged homicides.[13] Instead of calling the physicians who had conducted the autopsies to testify, the government introduced the reports into evidence through a summary witness, Dr. James Gill, an employee of the Office of the Chief Medical Examiner of New York.[14] Dr. Gill had not conducted any of the autopsies described in the reports he presented.[15] Despite Erbo's objection that the presentation of the autopsies violated his Sixth Amendment confrontation right, the district court admitted them into evidence under the business records exception to the hearsay rule under the Federal Rules of Evidence.[16] At the conclusion of the trial, the jury found Erbo guilty of twelve counts listed in the indictment, including three counts of murder.[17]

Erbo appealed, alleging that the district court violated his rights under the Confrontation Clause by admitting the autopsy reports into evidence.[18] Erbo urged that admission of the reports was constitutionally defective because he was not provided a chance to cross-examine the preparing medical examiners.[19] He did not challenge the district court's classification of the autopsy reports as business records, but rather argued that the reports were testimonial under *Crawford* and thus inadmissible against him even if they fell under the business records exception to the hearsay rule.[20]

The Second Circuit affirmed Erbo's conviction.[21] Writing for the panel, Judge Hall[22] found no constitutional error in the district court's

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[10] *Feliz*, 467 F.3d at 229.

[11] *Id.*

[12] *Id.* Judge Baer presided over Erbo's trial in the United States District Court for the Southern District of New York.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*; *see also* FED. R. EVID. 803(6).

[17] *See Feliz*, 467 F.3d at 229–30.

[18] *Id.* at 230.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 238.

[22] Judge Hall was joined by Judge Wesley and District Judge Trager, sitting by designation.

admission of the autopsy reports. Acknowledging that *Crawford* declined to adopt a comprehensive definition of what makes a statement "testimonial," the Second Circuit turned to the Supreme Court's observation 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."[23] Based on this language, the court analyzed whether business records can categorically be excluded from *Crawford*'s definition of "testimonial." Observing that under Federal Rule of Evidence 803(6) a business record is one that is "kept in the regular course of a business activity" and that the definition specifically excludes records created in anticipation of trial, the court concluded that business records are inherently nontestimonial.[24] The Second Circuit justified this classification by reasoning that business records are not created for trial and "bear[] little resemblance to the civil-law abuses the Confrontation Clause targeted," specifically ex parte examinations used as evidence against the accused.[25] Observing that autopsy reports are routinely produced in the course of normal business activity by the Office of the Chief Medical Examiner, the court concluded that autopsy reports are business records and therefore admissible even if a defendant is not provided the opportunity to confront the preparer.[26]

Contrary to the Second Circuit's holding, however, an examination of the relationship between medical examiners and law enforcement officers during homicide investigations reveals that autopsy reports should be considered testimonial evidence under *Crawford* because they are prepared in anticipation of trial. Instead of focusing on this relationship, the *Feliz* court appears to have been swayed by concerns about the practical consequence of finding autopsy reports to be testimonial — namely, the exclusion of reliable evidence from criminal trials. It is likely, however, that the practical consequences of such a finding would not be as grave or inevitable as the Second Circuit

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[23] *Feliz*, 467 F.3d at 233 (alteration in original) (quoting Crawford v. Washington, 541 U.S. 36, 56 (2004)) (internal quotation marks omitted).

[24] *Id.* at 233–34.

[25] *Id.* at 234 (alteration in original) (quoting *Crawford,* 541 U.S. at 51) (internal quotation marks omitted). In *Crawford*, the Court discussed the treason trial of Sir Walter Raleigh as the prototypical example of a case in which ex parte, out-of-court statements were unfairly used against a defendant. During Raleigh's trial, the prosecution introduced against him a letter by his alleged accomplice, Lord Cobham, which had been produced through an unsworn, out-of-court Privy Council examination. Hoping that Cobham would retract his accusation if examined in court, Raleigh sought to have Cobham brought before the court to testify. The court refused to accommodate Raleigh's request. The jury returned a conviction and sentenced Raleigh to death. *See Crawford*, 541 U.S. at 44; *see also* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 190–91 (2005).

[26] *Feliz*, 467 F.3d at 236–37.

feared. Therefore, the *Feliz* court should have adhered more closely to the Supreme Court's decision in *Crawford* and found that autopsy reports are testimonial.

Although the Supreme Court in *Crawford* refrained from setting forth a specific definition of "testimonial," the Court articulated potential formulations of the term, including "ex parte in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony . . . , or similar pretrial statements that declarants would *reasonably expect to be used prosecutorially*,"[27] and "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*."[28] Both of these formulations assert an expectations-based conception of "testimonial," indicating that statements produced "with an eye toward trial"[29] are testimonial evidence.[30]

Moreover, the Supreme Court's decision last Term in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*[31] confirms that an important variable in determining whether a statement is testimonial is whether the statement's use in a later prosecution can be anticipated. In *Davis*, the Court held that in the context of a police interrogation,[32] statements are not testimonial when the "primary purpose of the interrogation is to enable police . . . to meet an ongoing emergency," but are testimonial when the interrogation is designed to "establish or prove past events potentially relevant to later criminal prosecution."[33] *Davis*, therefore, clarifies *Crawford*'s notion that statements made with an "eye toward trial" fall within the definition of testimonial evidence.

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[27] *Crawford*, 541 U.S. at 51 (emphasis added) (quoting Brief for Petitioner at 23, *Crawford* (No. 02-9410), 2003 WL 21939940) (internal quotation marks omitted).

[28] *Id.* at 52 (emphasis added) (quoting Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae the Nat'l Ass'n of Criminal Def. Lawyers et al. in Support of Petitioner at 3, *Crawford* (No. 02-9410), 2003 WL 21754961) (internal quotation marks omitted).

[29] *Id.* at 56 n.7.

[30] *Cf.* City of Las Vegas v. Walsh, 124 P.3d 203, 207–08 (Nev. 2005) (interpreting the possible definitions of "testimonial" set forth in *Crawford* to hold that documents created "for use at a later trial or legal proceeding" are testimonial); Crawford and Autopsy Reports, Indignant Indigent, http://indignantindigent.blogspot.com/2005/05/crawford-and-autopsy-reports.html (May 2005) (observing that under *Crawford*'s definitions, statements a declarant would expect to be used at a later trial are testimonial).

[31] 126 S. Ct. 2266 (2006).

[32] Although the precise situation the Court addressed in *Davis* was one of statements made in the course of police interrogations, it is clear that the Court did not intend the logic underlying its holding to be exclusive to such situations. *See id.* at 2274 n.1 (emphasizing that although the statements before the Court were "products of interrogations," statements made outside of interrogations might also be testimonial).

[33] *Id.* at 2273–74.

Both the *Crawford* and *Davis* conceptions of testimonial hearsay indicate that autopsy reports are testimonial because medical examiners prepare autopsy reports in homicide cases in anticipation of trial. During homicide investigations, law enforcement officers and medical examiners "collaborate closely."[34] In many jurisdictions, the police may call a member of the medical examiner's office to the scene of the crime to take custody of the victim's body and to survey the scene and evaluate the circumstances of death. In turn, the police may attend the performance of the autopsy.[35] In some instances, the medical examiner, police officers, and district attorney meet to discuss the case.[36]

The New York City Charter, which the *Feliz* court referenced, states that the role of the Office of the Chief Medical Examiner is to examine the body of any person who died "in any suspicious or unusual manner."[37] The Charter further provides that the Chief Medical Examiner must "keep full and complete records" and deliver them "to the appropriate district attorney" in the case of any death "as to which there is, in the judgment of the medical examiner in charge, any indication of criminality."[38] Although the court in *Feliz* emphasized that, under the City Charter, the Office of the Chief Medical Examiner is an "'independent office' within the Department of Health and Mental Hygiene,"[39] the Charter makes it clear that at least some autopsies — in particular, autopsies in homicide cases — are prepared with knowledge that the information will be used at trial because medical examiners are required to bring suspicious deaths to the attention of prosecutors.[40]

To counter the argument that autopsy reports are testimonial because they are prepared with an "eye toward trial," the *Feliz* court stated that any "practical expectation" medical examiners have that autopsy reports "may be available for use at trial . . . cannot be dispositive on the issue of whether those reports are testimonial."[41] It is unclear, however, that this is an accurate reading of *Crawford*, particu-

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[34] STEFAN TIMMERMANS, POSTMORTEM: HOW MEDICAL EXAMINERS EXPLAIN SUSPICIOUS DEATHS 163 (2006).

[35] *Id.* at 164.

[36] *Id.* In fact, the relationship between law enforcement and medical examiners is so close, according to Professor Timmermans, that "[t]he mutual exchange of evidence and information, the coordination of schedules, and the prerogative of police to attend autopsies as a matter of course underscore the routinized collaboration of a *joint investigation*." *Id.* (emphasis added).

[37] N.Y. CITY CHARTER § 557(f) (2004).

[38] *Id.* § 557(g).

[39] *Feliz*, 467 F.3d at 237 (quoting N.Y. CITY CHARTER § 557(a)).

[40] In a case like Erbo's, in which many of the victims died of gunshot wounds, Brief of Defendant-Appellant at 3, *Feliz* (No. 02-1665), 2004 WL 4054358 — deaths that are inherently "suspicious" — it stands to reason that a medical examiner would be fully aware that he was preparing a report for use by the prosecution.

[41] *Feliz*, 467 F.3d at 235.

larly in light of *Davis*. In *United States v. Saget*,[42] the Second Circuit acknowledged that "*Crawford* at least suggests that . . . the declarant's awareness or *expectation* that his or her statements may later be used at a trial" is determinative of whether a statement is testimonial.[43] Although the *Feliz* court argued that the Second Circuit's subsequent dicta in *Mungo v. Duncan*,[44] which suggested looking to the "formality, command, and thoroughness" of questioning to determine if a statement is testimonial,[45] undermined *Saget*'s expectations-based assessment of *Crawford*,[46] the court's logic in this regard is not compelling. *Mungo*'s discussion of the post-*Crawford* definition of "testimonial" was tethered strictly to situations of interrogation.[47] After *Mungo* was decided, however, the Supreme Court made clear in *Davis* that interrogation is not the only context in which testimonial statements are produced, as "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."[48] Furthermore, *Davis* emphasized the importance of expectations in assessing whether a statement is testimonial by holding that testimonial statements include those whose "primary purpose" is to "prove past events potentially relevant to later criminal prosecution."[49] Therefore, in light of *Davis*, the Second Circuit's decision to move away from an expectations-based approach to *Crawford* seems misguided.

Since the most intuitive reading of *Crawford* and *Davis* reveals that autopsy reports are properly considered testimonial evidence that falls within the ambit of the Confrontation Clause, the *Feliz* court was probably at least in part motivated by other concerns. The court's language indicates that an important factor motivating its decision was a concern with the consequences of an alternative outcome. In assessing the practical consequences of holding autopsy reports to be testimonial, the *Feliz* court adopted the analysis of a New York state trial court. In that court's view, if autopsy reports were testimonial evidence, a long period of time between the performance of the autopsy and trial could "lead to the unavailability of the examiner who prepared the report."[50] Because "an autopsy cannot be replicated by an-

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[42] 377 F.3d 223 (2d Cir. 2004).

[43] *Id.* at 228 (emphasis added).

[44] 393 F.3d 327 (2d Cir. 2004).

[45] *Id.* at 336 n.9 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1182 (1976) (defining "interrogate")).

[46] *See Feliz*, 467 F.3d at 235.

[47] *See Mungo*, 393 F.3d at 336 n.9.

[48] Davis v. Washington, 126 S. Ct. 2266, 2274 n.1 (2006).

[49] *Id.* at 2274.

[50] *Feliz*, 467 F.3d at 236 (quoting People v. Durio, 794 N.Y.S.2d 863, 869 (Sup. Ct. 2005)).

other pathologist," that court concluded that there exists a possibility that the unavailability of the examining physician could "preclude the prosecution of a homicide case."[51] Given that the Second Circuit believed that these consequences would follow from finding autopsy reports testimonial, it is likely that the court's desire to avoid erecting a perceived evidentiary roadblock to prosecution was a significant motivating factor behind its decision.[52]

An examination of the Second Circuit's decision in *Mungo* reveals a second, but related, policy concern behind the court's decision. In examining whether the Supreme Court's holding in *Crawford* applies retroactively on collateral review, the *Mungo* court opined that *Crawford*, as contrasted with the *Roberts* doctrine, "precludes admission of highly reliable testimonial out-of-court statements."[53] In the *Mungo* court's view, switching from the *Roberts* "indicia of reliability" test to the *Crawford* testimonial test likely "diminish[es], rather than increase[s], the accuracy of the [prosecutorial] process."[54] This position is particularly applicable in the case of autopsy reports, which the Second Circuit had previously determined to be important evidence[55] and whose reliability the *Feliz* court explicitly endorsed.[56] Therefore, it seems likely that the fear, first expressed in *Mungo*, that "juries will be deprived of highly reliable evidence of guilt, and cases that otherwise would have resulted in well-deserved convictions will now result in acquittals or hung juries,"[57] was a significant motivating factor behind the court's decision in *Feliz*.

These practical concerns, however, are likely not as grave as the *Feliz* court anticipated and should not have dissuaded the court from adhering to the most faithful reading of Supreme Court precedent. The concerns expressed by the court could easily, though admittedly not inexpensively, be overcome by allocating additional resources to medical examiners' offices. For example, if two pathologists were to work together in producing an autopsy report, it is only logical that the information they gathered would be less likely to be lost with time due to unavailability.

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[51] *Id.* (quoting *Durio*, 794 N.Y.S.2d at 869). This concern has been echoed by other courts examining autopsy reports under *Crawford*. *See* State v. Lackey, 120 P.3d 332, 350 (Kan. 2005); Rollins v. State, 897 A.2d 821, 832 (Md. 2006).

[52] *See* Michael J. Polelle, *The Death of Dying Declarations in a Post-*Crawford *World*, 71 MO. L. REV. 285, 287 n.13 (2006) (noting that some courts that "agree business records or official records are not testimonial do so more because of practical difficulties than because of strict constitutional doctrine").

[53] Mungo v. Duncan, 393 F.3d 327, 335 (2d Cir. 2004).

[54] *Id.* at 336.

[55] *See* United States v. Rosa, 11 F.3d 315, 333 (2d Cir. 1993).

[56] *See Feliz*, 467 F.3d at 232 n.2.

[57] *Mungo*, 393 F.3d at 335.

Furthermore, the long-accepted rule that police reports are inadmissible hearsay[58] presents the same problems for prosecutors as would a rule that autopsies are testimonial: the details of a police report taken years before trial — a document that may contain information important to the prosecution — are inadmissible if the reporting officer is no longer available to testify. In light of the lack of any strong movement to amend the Federal Rules of Evidence to accommodate prosecutors' desire to introduce old police reports at trial, it appears likely that the court's concerns about the consequences of holding autopsies testimonial are overblown. In short, given that any practical impediments to prosecution could be ameliorated with an infusion of additional resources, and that the similar situation of inadmissibility of old police reports does not appear to have unduly hampered prosecutors, the court's fear that rendering autopsy reports testimonial would create an irresolvable impediment to prosecution seems unsubstantiated and should not have been a driving force behind its decision.

The Second Circuit faced a difficult choice in *Feliz*: the most compelling interpretation of *Crawford* pointed toward finding autopsy reports to be testimonial evidence, but the practical difficulties the court perceived and its instinct to admit evidence it considered reliable pushed back against such a finding. However, in the end, the court should have more closely followed Supreme Court precedent, concluded that the possible consequences of excluding autopsy reports from admission at some trials are likely not as grave as they appear, and found autopsy reports to be testimonial evidence.

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[58] Under Federal Rule of Evidence 803(8)(B), police reports are excluded from the public records exception to the hearsay rule. And, in *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), the Second Circuit held that Congress did not intend reports by law enforcement officials to "be admissible against a defendant in a criminal case under *any* of the Federal Rules of Evidence's exceptions to the hearsay rule." *Id.* at 78.