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Autopsy Report Admission Is Not Confrontation Violation

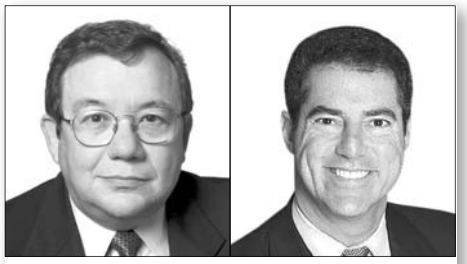
In this month's column, we report on a recent decision by the U.S. Court of Appeals for the Second Circuit holding that autopsy reports may be admitted into evidence without violating the Confrontation Clause of the U.S. Constitution inasmuch as they are nontestimonial and qualify as both business and public records.

The Second Circuit reached this result on the basis of the U.S. Supreme Court's far-reaching 2004 decision in *Crawford v. Washington.*[1]

In *United States v. Feliz, et. al*,[2] the Second Circuit, in a unanimous opinion written by Judge Peter W. Hall and joined by Judges Richard C. Wesley and David G. Trager (U.S. District Judge, Eastern District of New York, sitting by designation), affirmed defendant Jose Erbo's conviction and held that the district court's admission of nine autopsy reports into evidence did not run afoul of either the U.S. Supreme Court's holding in *Crawford* or the Confrontation Clause.[3]

Background and Procedural History

For several years, Jose Erbo, a/k/a "Pinguita" a/k/a "Tito" a/k/a "Miguel Garcia" led a violent drug organization known as "Tito's Crew," whose members sold vast amounts of crack cocaine and committed multiple murders. On Feb. 4, 1999, Mr. Erbo and his codefendants were indicted on 17 counts of murder, racketeering and conspiracy to commit murder. Before Mr. Erbo could be brought to trial on these charges, he was convicted and sentenced to two years imprisonment in the Dominican Republic on weapons charges. Upon completion of that sentence, Mr. Erbo was returned to the United States to answer the 1999 indictment.



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Mr. Erbo pleaded not guilty to the indictment and the trial commenced in May 2002. During the course of the trial, the government sought to admit nine autopsy reports into evidence to establish the manner and cause of death of each of Mr. Erbo's alleged victims. The government introduced the autopsy reports through the testimony of Dr. James Gill, an employee of the Office of the Chief Medical Examiner of the City of New York. Dr. Gill had not performed any of the nine autopsies, but used the autopsy reports to testify as to the cause of death of each of the nine victims. The trial court admitted the reports over Mr. Erbo's objection on the basis that the government had established that the reports constituted business records. Mr. Erbo objected to the admission of the reports, asserting that the reports constituted inadmissible hearsay in violation of the Confrontation Clause.

Mr. Erbo was convicted on 12 of the 17 counts, including racketeering, conspiracy and murder, and was sentenced to six consecutive life terms and a mandatory and consecutive 45-year term of imprisonment.

He appealed his conviction on a number of grounds; however, all but one ground was summarily dismissed by the court. Mr. Erbo's sole remaining basis for appeal was that the admission of the autopsy reports violated his Sixth Amendment rights because he was denied the opportunity to cross-examine the medical examiners who conducted each of the nine autopsies.

'Crawford v. Washington'

Under established Second Circuit law at the time of Mr. Erbo's appeal, the admission of autopsy reports did not violate the Confrontation Clause.[4] Prior to briefing the appeal, however, the U.S. Supreme Court decided *Crawford*, which "substantially alter[ed]... existing Confrontation Clause jurisprudence."[5] In *Crawford*, the Supreme Court announced a per se bar on the admission of "testimonial" out-of-court statements unless the declarant is unavailable and the defendant has had an opportunity to test the statements through cross-examination.[6]

Upsetting nearly a quarter-century of precedent, the Supreme Court in *Crawford* abrogated its holding in *Ohio v. Roberts*[7] that an out-of-court statement of an unavailable hearsay declarant will be admissible if it "bears adequate indicia of reliability." Thus, under *Crawford,* even an out-of court statement that is firmly rooted in a hearsay exception or bears particularized guarantees of trustworthiness is no longer admissible. The Supreme Court made a striking analogy: to hold (as the Court did in *Roberts*) that the Confrontation Clause may be dispensed with where the testimony is "obviously reliable" is "akin to dispensing with a jury trial because the defendant is obviously guilty."[8]

Nevertheless, *Crawford* left an open question—that is, are nontestimonial statements

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governed by *Crawford* or *Roberts*? The Second Circuit and its sister circuits continued to apply the reasoning of *Roberts* to nontestimonial statements. Recently, the Supreme Court clarified the issue. In *Davis v. Washington*,[9] the Court held that the right to confrontation applies only to testimonial statements. In other words, nontestimonial statements do not implicate the Sixth Amendment.

Against this background, the remaining inquiry for the Court was whether autopsy reports are testimonial statements.

Second Circuit Decision

Turning to *Crawford* for guidance, the Second Circuit noted that although the *Crawford* Court failed explicitly to define "testimonial," the Court nevertheless set forth a skeletal framework for determining whether a statement is, in fact, testimonial. For example, the Supreme Court noted that the Confrontation Clause historically was intended to eliminate the use of ex parte communications as evidence against a criminal defendant. Similarly, because of the unique potential for prosecutorial abuse, statements produced with either government involvement or "with an eye towards trial" are deemed to be testimonial.[10]

The court also explicated what it described as "the core class of testimonial statements."[11] According to the Supreme Court, the core class includes various formulations that share a common nucleus and comprise, for example, ex parte in-court testimony in the form of affidavits and custodial examinations, extrajudicial statements in the form of affidavits, depositions, prior testimony and confessions as well as statements that "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[12]

Finally, the Supreme Court noted that prior testimony at a preliminary hearing, before a grand jury, or at a former trial and police interrogations represent the archetype of testimonial statements intended to be protected by the Confrontation Clause; conversely, business records or statements in furtherance of a conspiracy, by their very nature, are nontestimonial.[13]

The Second Circuit disagreed with the government that the Supreme Court's statement that business records were nontestimonial ended the inquiry because, although appealing, it was too simplistic. Similarly, the court disagreed with those courts that have held that testimonial statements could never qualify as business records.

Rather, the Second Circuit reasoned that a statement properly admitted under FedREvid 803(6) cannot be testimonial "because it is fundamentally inconsistent" with *Crawford*.

The basis for the Second Circuit's decision was twofold: the definition of a business record as defined by FedREvid 803(6)[14] and the court's decision in *Rosa*.[15]

- First, the court determined that because a business record must be kept in the course of a "regularly conducted business activity," such a record, by its very definition, cannot be created in anticipation of litigation.
- Second, the court noted that, under *Rosa*, records in criminal cases that contain observations made by police officers or other law enforcement personnel are excluded under Rule 803(6). The court determined that business records are entirely different from the testimonial statements examined in *Crawford* and, consequently, did not raise any Confrontation Clause issues.

Given that the Second Circuit found that autopsy reports are admissible both as business records and public records, the finding that they are nontestimonial and do not implicate the Confrontation Clause is unlikely of itself to have any broad impact.

Mr. Erbo stressed, however, that autopsy reports are prepared in contemplation of litigation. Relying on an expansive reading of *United States v. Saget*,[16] Mr. Erbo argued that whether the declarant was aware or expected that his or her statements may at some later date be used at trial is a determinative factor in deciding whether the Confrontation Clause is implicated. He reasoned that a medical examiner, concluding that a victim was murdered, undoubtedly should expect that his or her statements will be used in court. The court acknowledged that, practically speaking, a medical examiner may reasonably expect autopsy reports to be available at trial, but that expectation alone does not militate against a finding that such reports are nontestimonial.

Because autopsy reports are reports kept in the course of a regularly conducted business activity, do not constitute observations by a police officer, are regularly performed without any expectation that they ultimately will be used in a trial, and are nontestimonial, the Second Circuit concluded that autopsy reports qualified as business records under FedREvid 803(6). Applying the same analysis, the court also determined that autopsy reports qualified as public records under FedREvid 803(8).

Conclusion

Having determined that autopsy reports are nontestimonial and that their admission by the district court into evidence did not violate the Confrontation Clause, the Second Circuit affirmed *Erbo's* judgment of conviction. Given that the Second Circuit determined that autopsy reports are admissible both as business records and public records, the court's finding that they are nontestimonial and do not implicate the Confrontation Clause is unlikely, in and of itself, to have any broad impact. That being said, the court's thoughtful and thorough examination of the indicia of testimonial statements as contrasted with nontestimonial statements will have significant evidentiary implications in criminal trials in this circuit and likely will present the court yet another opportunity to revisit the issue in a different context.

1. 541 US 36 (2004).
2. _F.3d_, 2006 WL 3021118 (2d Cir. Oct. 25, 2006).
3. The Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses again him...." U.S. Const. Amend. VI.
4. See *United States v. Rosa*, 11 F3d 315, 333 (2d Cir. 1993).
5. 2006 WL 3021118, at *3 (quoting *United States v. Saget*, 377 F3d 223, 226 (2d Cir. 2004).
6. *Crawford*, 541 US at 59, 68; *Feliz*, 2006 WL 3021118, at *3.
7. 448 US 56 (1980).
8. *Feliz*, 2006 WL 3021118, at 3 (quoting *Crawford*, 541 U.S. at 62).
9. _US_, 126 SCt 2226, 2274 (2006).
10. *Feliz*, 2006 WL 3021118, at *4 (internal quotations omitted).
11. Id. (internal quotations and alterations omitted).
12. Id. (internal quotations and citations omitted).
13. Id.
14. FedREvid 803(6) defines a business record as "A memorandum report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation."
15. *Rosa*, 11F3d at 331-32.
16. 377 F3d 223 (2d Cir. 2004).