UPDATE ON THE CONFRONTATION CLAUSE:

 AUTOPSY REPORTS ARE NOW DEEMED TO BE TESTIMONIAL HEARSAY

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INTRODUCTION: (Au Revoir Freycinet)

In *People v Freycinet* (11 NY3d 38 [2008]), the Court of Appeals held that an autopsy report prepared by a medical examiner (M.E.) who performed the autopsy but did not testify, and which was admitted into evidence in redacted form through the testimony of an M.E. who did not participate in or personally observe the autopsy did not violate the defendant’s rights under the Confrontation Clause of the 6th Amendment to the Constitution.

The Court noted that: 1. the report, which was redacted as to cause and manner of death, was an objective, contemporaneous account of observable facts; 2. the opinion regarding cause and manner of death came only from the testifying M.E. who exercised her own judgment based on the factual description of the stab wounds in the autopsy report ; 3. there was no indication of a pro-law enforcement bias; and 4. the report did not directly link the defendant to the crime (fatal stabbing of the victim which the defendant claimed was administered accidentally and/or in self-defense).

More recently, however, in *People v Ortega* (2023 NY Slip Op 05956 [11/4/23]), the Court ruled that *Freycinet* should no longer be followed because its analytical approach does not measure up to the 6th Amendment’s requirement that the defendant be confronted by the witnesses against him.

Drawing largely from *Crawford v Washington* (541 US 36 [2004]), *Melendez-Diaz v Massachusetts* (557 US 305 [2009]), and *Bullcoming v New Mexico* (564 US 647 [2011]), the Court determined that the autopsy report (describing the location, shape and pattern of multiple stab wounds to the bodies of two young children, ages two and six, inflicted by their nanny) constituted testimonial hearsay as did the trial testimony of the M.E. who neither performed nor observed the examinations.

The Court noted that the autopsy report constituted a formal declaration/affirmation created to establish evidentiary facts (i.e., the homicidal nature of the deaths) (citing *Crawford*, supra, at 541 and *Garlick v Lee* [1 F.4th 122 [2nd Cir 2021]), and the fact that it may have been a contemporaneous record of objective facts did not shield it from Confrontation Clause protections (citing *Melendez-Diaz*, supra, at 315]).

In the Court’s view, whether the report contains a seemingly reliable factual recitation resulting from neutral testing or observations does not change the analysis. As the court observed, “the reliability of an out-of-court statement has NO EFFECT ON THE TESTIMONIAL NATURE OF ITS CONTENT because the Confrontation Clause commands NOT that the evidence be RELIABLE, but that reliability be assessed ….by CROSS EXAMINATION” (citing *Crawford*, supra at 61)(emphasis added).

The Court also observed that beyond having the indicia of formality, the reports were prepared under circumstances that would lead a reasonable person to believe that they would be available for use at a later trial. Clearly, the evidence of multiple stab wounds on two young children had all the earmarks of criminality and the M.E.’s office was required to report such deaths to the District Attorney’s office.

The Court concluded, therefore, that the reports were TESTIMONIAL, and since the defendant did not have an opportunity to cross examine the M.E. who performed the autopsies, their admission into evidence via the testimony of the non-participating M.E., violated the defendant’s right to confrontation.

With respect to the secondary M.E’s testimony, the court said that while an expert may give an opinion based on reliable hearsay not otherwise admissible in its own right (see Guide to NY Evidence 7.1 [5][b][1]), and may opine on cause and manner if death if he/she observed the autopsy or reached an independent conclusion based on the primary data in the report it was not clear from the trial record whether the witness reached her own conclusions or simply parroted the findings of the principal M.E.

The witness opined that the younger child was likely slashed in the throat from behind and that the older child likely tried to defend himself but the basis for these conclusions was not made clear.

The Court also noted that at times, the witness appeared to be reading the autopsy report and just rehashing the observations and conclusions of the examining M.E. (see also *People v John*, 27 NY3d 294 [2016]).

In the Court’s assessment, most of the witness’ testimony was the type of “surrogate testimony” rejected in *Bullcoming v New Mexico* (564 US at 661). In that case, it was error to admit a forensic lab report of the defendant’s BAC level through a witness who neither conducted nor observed the analysis which was clearly done for the purpose of establishing a fact likely to be introduced at trial to establish an element of the offense.

In contrast, see *People v Pealer* (20 NY2d 447 [2013]) where certified breathalyzer document reports qualified not as testimonial evidence (i.e., having no accusatory purpose) but merely as a communication that the breathalyzer machine was properly calibrated and in good working order.

In sum, the admission of the report and the witness’ testimony in *Ortega* violated the defendant’s right constitutional to confrontation but the error was deemed to be HARMLESS beyond a reasonable doubt since the evidence of guilt was otherwise overwhelming (*People v Crimmins*, 36 NY2d 230 [1975]). A RECAP OF THE CONFRONTATION CLAUSE

The 6th Amendment’s confrontation rule, applicable to the states by way of the 14th Amendment (*Pointer v Texas*, 380 US 400 [1965]), states that “in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witness’ against him. Pursuant to the Confrontation Clause, a witness’ our-of-court TESTIMONIAL STATEMENT may only be admitted FOR ITS TRUTH where the witness APPEARS AT TRIAL or the witness is UNAVAILABLE for trial, (and) the defendant has had a PRIOR OPPORTUNITY to CROSS EXAMINE that witness” (*Crawford v Washington*, 541 US at 48)(emphasis added).

The Guide to New York Evidence Rule 8.02 (1) similarly states that “a testimonial statement of a person who does not testify at trial is not admissible against the defendant for its truth unless the witness is unavailable to testify, and the defendant had a prior opportunity for cross examination, or the defendant engaged or acquiesced in wrongdoing intended to (and resulted in) the unavailability of the witness (see *People v Geraci*, 85 NY2d 359 [1995]).

 The *Crawford* court, as noted in *Ortega*, supra, defined TESTIMONY as a SOLEMN DECLARATION or AFFIRMATION made for the purpose of ESTABLISHING or PROVING SOME FACT (i.e., statements made under circumstances that would lead a person reasonably to believe that the statement WOULD BE AVAILABLE FOR USE AT A LATER TRIAL (*Crawford* at 51-52).

It is worth noting that the Confrontation Clause does not come into play where the out-of-court statement is NOT offered for its truth (*Crawford* supra at 59). Also, the reliability of the statement is immaterial because it is the right of confrontation (whether or not the statement otherwise satisfies some hearsay exception) that controls inasmuch as it allows the accused to test reliability in the context of cross examination.

WHAT MAKES HEARSAY TESTIMONIAL?

Testimonial hearsay can take a variety of forms including testimony in a legal proceeding (e.g., felony hearing, grand jury, or former trial), and statements involving state actors or formal police interrogations. It should be noted that while testimonial hearsay and confrontation violations can come from such sources, they only come into play if offered into evidence *at* trial, when the *declarant is unavailable*, and the *defendant had no prior opportunity for cross examination*.

In less formal contexts, courts will assess whether the PRIMARY PURPOSE of the inquiry was to obtain a statement to establish criminal conduct or prove past events of potential relevance to a future prosecution or otherwise serve as a substitute for trial testimony. If so, the out-of-court statement constitutes TESTIMONIAL HEARSAY (*Michigan v Bryant*, 562 US 344 [2011]).

However, if the primary purpose of the out-of-court exchange is to help the police meet an ONGOING EMERGENCY, the statement will not be considered testimonial and its admissibility will be determined by traditional hearsay analysis (i.e., does the statement meet some exception to ensure its reliability or is it being offered for a non-hearsay purpose).

In *Michigan v Bryant*, supra, a statement of the dying victim, made in a parking lot some distance from the crime scene, which identified the defendant as the assailant was considered non-testimonial because its main objective was to help the police respond to an ongoing emergency (i.e., attend to a person in extremis and apprehending a violent criminal).

In *Davis v Washington* (547 US 821 [2006]), a 911 call from a domestic assault victim describing the attack and the assailant’s movements immediately afterward was deemed to be non-testimonial because it was intended mainly to help the police meet an ongoing emergency.

In contrast, in the companion case of *Hammon v Indiana* (same citation), where statements of the victim of a domestic assault made in her home to responding officers who had separated the defendant and put him in the next room were testimonial because any emergency was over, and the circumstances objectively indicated that the statements were obtained for likely use in an ensuing prosecution.

New York Guide to Evidence Rule 8.2 (2) defines hearsay as testimonial when:

1. It consists of PRIOR TESTIMONY at a preliminary hearing, before a grand jury or at a trial;
2. (i) It is an out-of-court statement involving state actors engaged in a formal, out-of-court interrogation of a witness to obtain evidence for trial; or

ii. absent a formal interrogation, the circumstances demonstrate that the primary purpose of the exchange was to procure an out-of-court statement to prove criminal conduct or past events potentially relevant to a later criminal prosecution, or otherwise substitute for trial testimony.

3. A statement to police is not testimonial when made during a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to ENABLE POLICE ASSISTANCE TO MEET AN ONGOING EMERGENCY.

A statement to police is testimonial when the circumstances demonstrate that there is no emergency, and the primary purpose of the interrogation is to establish or PROVE PAST EVENTS POTENTIALLY RELEVANT TO A LATER CRIMINAL PROSECUTION.

A statement obtained by police in a FORMAL STATION HOUSE INTERROGATION for that stated purpose is testimonial.

4. A GUILTY PLEA ALLOCUTION that implicates a co-defendant is testimonial and may not be admitted at the trial of the co-defendant without an opportunity for to CROSS EXAMINE the pleading party.

5. a. A STATEMENT of a STUDENT made in response to an INQUIRY by an EDUCATOR is not testimonial when the primary purpose of the inquiry is to provide for the safety of the child (see *Ohio v Clark*, 576 US 249 [2015]: statement of child to preschool teacher describing physical abuse by mother’s pimp/ boyfriend not testimonial even though teacher was a mandated reporter of child abuse).

b. A STATEMENT OF A PATIENT made in response to an INQUIRY by a PHYSICIAN is not testimonial when the primary purpose of the inquiry is to DIAGNOSE the patient’s condition and PROVIDE MEDICAL TREATMENT (see *People v Duhs*, 16 NY3d 305 [2011]: young child’s statement that mommy’s boyfriend put him in a bathtub filled with hot water was not testimonial because the primary purpose of the physician’s inquiry was to determine the mechanism and agency of the child’s injury and provide treatment. No matter that the doctor had a duty to report child abuse).

6. FORENSIC REPORTS: a. a testimonial forensic report includes one that IDENTIFIES an item CONNECTED TO THE DEFENDANT as an ILLEGAL DRUG, or DELINEATES THE BAC of the defendant’s blood, or IDENTIFIES THE DEFENDANT THROUGH A FINGERPRINT ANALYSIS or through DNA ANALYSIS of incriminating evidence (see *Bullcoming v New Mexico*, supra: Testimony of surrogate analyst who did not participate in or observe BAC testing violated Confrontation Clause. In contrast, see *People v Hao Lin*, 28 NY3d 701 [2017]: certified breath test operator who observed administration of breath test to defendant was a suitable substitute witness.).

b. A testimonial forensic report entitles a defendant to be CONFRONTED with either the person who MADE THE FORENCIC REPORT or a TRAINED ANALYST who SUPERVISED, WITNESSED or OBSERVED the testing, even without having personally conducted it.

c. (i) AUTOPSY REPORTS are testimonial evidence and the admission of an autopsy report through an expert witness who did not perform the autopsy, as well as that witness’ testimony, violates the defendant’s right of confrontation where the defendant has not been given a prior opportunity to cross examine the performing medical examiner.

ii. An expert medical examiner may, however, offer conclusions as to the cause and manner of death, and surrounding circumstances, where that testifying expert PERFOMED, SUPERVISED, OR OBSERVED the autopsy or used his/her INDEPENDENT ANALYSIS of the PRIMARY DATA (see *People v Ortega*, supra).

Autopsy PHOTOGRAPHS and VIDEO RECORDINGS of a conducted autopsy may properly be relied upon by a testifying witness reaching his/her own INDEPENDENT CONCLUSIONS as well as STANDARD ANATOMICAL MEASUREMENTS devoid of the subjective skill and judgment of the performing examiner.

D. NON-TESTIMONIAL REPORTS include:

i. documents pertaining to the routine inspection, maintenance, and calibration of a BREATHALYYZER MACHINE, (see *People v Pealer*, supra);

ii. a report setting forth the RAW DATA of a DNA PROFILE from an item in the contents of a RAPE KIT BEFORE THE DEFENDANT WAS A SUSPECT (see *People v John*, supra).

In contrast, see *People v Pacer*, (6 NY3d 350 [2006]: DMV report indicating revocation of defendant’s driver’s license in VTL 511(3) (AUO) prosecution was testimonial because it was created with an eye toward prosecution of the defendant and established an element of the offense.

OPENING THE DOOR RULE CLOSED FOR TESTIMONIAL HEARSAY

In *People v Reid* (19 NY3d 382 [2012]), the Court of Appeals permitted the introduction of otherwise inadmissible evidence (including testimonial hearsay) to rebut evidence offered by the opposing party that was unfairly misleading under the “Opening the Door” rule set forth in *People v Melendez* (55 NY2d 445 [1982]).

However, in *Hemphill v New York* (142 S Ct 681 [2022]), the Supreme Court rejected *Reid* and held that such rebuttal evidence cannot include unconfronted testimonial hearsay (See also Guide to NY Evidence rules 4.08 [1] and 8.02 [7]), and TPF Monograph # 93: “US Supreme Court Limits the Opening-the-Door Rule by Precluding the Introduction of Unconfronted, Testimonial Hearsay that Violates the Confrontation Clause” assigned.org 1/25/22.).

FINAL THOUGHT

Whenever confronted with an out-of-court statement in oral or documentary form, counsel must be sure to analyze it to determine whether it meets some hearsay exception (or can be offered for some relevant, non-hearsay purpose) and then decide if it constitutes testimonial hearsay from an unavailable witness whom the defendant had no previous opportunity to cross examine.

If the statement qualifies as testimonial hearsay, counsel should insist that the witness be produced to give in-court testimony subject to cross examination or the statement be precluded in its entirety. The latter scenario is generally preferred.