No. _____

In The Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

vs.

ARNOLDO NAVARETTE,

Respondent.

On Petition For Writ Of Certiorari To The New Mexico Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause prohibits a chief medical investigator from testifying about objective facts in an autopsy report prepared nearly twenty years earlier by another medical examiner when the report was not admitted into evidence, was not certified or sworn, and was not prepared for the primary purpose of accusing a targeted individual of a crime or of providing evidence at a criminal trial.

2. Whether the definition of the constitutional term "witnesses" in *Crawford v. Washington* should be overruled or modified.

3. Whether any constitutional error in the admission of an out-of-court statement is harmless beyond a reasonable doubt when it is more beneficial to the defense than the State, a testifying expert was available for cross-examination about the statement, and the evidence of guilt was overwhelming.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of New Mexico, respectfully petitions for a writ of certiorari to issue to the New Mexico Supreme Court.

OPINIONS AND ORDERS BELOW

The New Mexico district court's judgment, sentence and commitment is unreported. App. 27-28. The opinion of the New Mexico Supreme Court reversing the district court's judgment, App. 1-26, is reported at 294 P.3d 435.

JURISDICTION

The New Mexico Supreme Court filed its opinion on January 17, 2013. App. 1. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed

> of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On May 30, 1993, Respondent Arnoldo Navarette shot and killed Reynaldo (Rey) Ornelas and shot and injured his brother, Daniel (Danny) Ornelas, in Portales, New Mexico. Respondent fled to other states and to Mexico, and he remained at large for sixteen years until his arrest in Texas in June 2009. Following a trial in September 2010, a New Mexico jury found Respondent guilty of first degree murder and aggravated battery with a deadly weapon. The New Mexico Supreme Court reversed Respondent's convictions based upon its finding of a Confrontation Clause violation from the testimony of a medical examiner describing facts contained in an autopsy report prepared by a different medical examiner over seventeen years earlier.

I. The Facts of the Crime

Respondent's family had a long-running feud with the victims' family. On the day of the shooting, Respondent and his brother-in-law, Lolo Ortega, had an argument with Rey Ornelas while he was at his friend's house. Ortega and Respondent left and

switched vehicles from Ortega's car to Respondent's Grand Am. Ortega drove, and Respondent sat in the passenger seat. Ortega told a friend and the friend's wife to follow them if they wanted to see a murder. Ortega drove Respondent back to the house where the initial argument took place. Their friends, accepting the invitation to follow, did indeed witness a murder.

Rey Ornelas, Danny Ornelas, and their cousin approached the driver's side of the vehicle, and Respondent said he wanted to shake hands and "be friends." (Trial CD 9/28/10 at 10:19:18.) Seven eyewitnesses then saw gunfire coming from the Grand Am. The gunshots wounded Danny Ornelas and killed Rey Ornelas. The only dispute at trial centered on whether the driver (Ortega) or the passenger (Respondent) fired the shots.

Danny Ornelas and a second prosecution witness saw Respondent raise a gun from his right side and fire the shots while reaching across Ortega. A third prosecution witness saw a gun in Respondent's hand and Ortega pushing Respondent's arm back. Yet another prosecution witness saw Ortega pushing something away from him before putting both of his hands on the steering wheel to drive away from the scene after the shooting.

A defense witness saw shots fired out of the vehicle by an unknown shooter; he then saw Ortega get the gun and fire additional shots at Rey Ornelas, who he said was in the process of getting up from the ground near the rear of the vehicle after having fallen

down while trying to run away. Officers later located the Grand Am at Ortega's residence but did not find the murder weapon. Upon his long-delayed capture, Respondent told a police officer that the shots had been fired by Danny Ornelas or a member of the Ornelas's group from another vehicle, but he did not testify or pursue this theory at trial.

On May 31, 1993, Dr. Mary Dudley, a medical investigator for the New Mexico Office of the Medical Investigator (OMI), performed an autopsy on Rey Ornelas. In the seventeen years between the autopsy and Respondent's trial, she had become the chief medical examiner in Kansas City, Missouri. Dr. Ross Zumwalt, the chief medical investigator and records custodian for OMI, testified at trial as an expert in forensic pathology. Consistent with common practice in the field of pathology, he relied on Dr. Dudley's autopsy report and autopsy photographs admitted at trial by stipulation for his opinions about the manner and cause of death and the nature of the injuries on the body. The autopsy report was not admitted into evidence.

Rey Ornelas died from a gunshot wound to the chest. The bullet entered his chest, passed through both lungs and his heart, and exited through his back. The entry and exit wounds were the same distance from the victim's heel, which indicated a horizontal trajectory. The bullet's path could have been consistent with someone shooting the victim from inside a car while the victim leaned over the window.

When examining a gunshot wound, pathologists routinely look for soot in the form of black discoloration on the skin or stippling, meaning pinpoint abrasions on the skin. In general, the firing of a handgun can deposit soot up to six to eight inches from the end of the barrel and can cause stippling within eighteen to twenty-four inches of the end of the barrel. A medical examiner will also inspect the victim's clothing with either the naked eye or a magnifying scope for any gunpowder deposits from a close range shooting, but gunpowder residue is difficult to see and may be obscured by blood stains on the clothing. As elicited by defense counsel, clothing could contain gunpowder flakes from a distance as great as three to four feet, but gunpowder flakes do not provide reliable evidence of a shooting's distance.

Pathologists rely on soot and stippling, as well as contact wounds, to classify shootings as contact, close range, or distant range. A distant range classification means a shooting at a distance beyond two feet, but unlike a contact or close-range classification that is based on affirmative evidence, distant range is essentially an indeterminate, or negative, classification based on the absence of evidence of a contact or close range shooting. A shooting classified as distant may actually be a close range shooting of which the evidence is undetected or undetectable.

No evidence of soot, stippling, or gunpowder flakes was seen on the victim's body or clothing. When asked on cross-examination if he was of the opinion that the shooting was more distant than two

feet, Dr. Zumwalt explained that he could only say that he had no evidence of a close range firing. Defense counsel referred to the opinion in the autopsy report that classified the shooting as distant range, and Dr. Zumwalt said the pathologist did not observe evidence of a close range shooting. A further exchange on cross-examination focused on the relationship between the distance of the shooting and the report's description of the entry wound as oval, with defense counsel suggesting that an oval wound indicates a more distant shooting. Dr. Zumwalt explained that, although yaw during a bullet's flight and tumbling upon striking an intermediate object could create a very irregular wound, the difference between a round and oval wound typically depends more on the angle at which the bullet hits the skin than the distance at which the shooter fired the gun. He also said the wound "looks fairly round to [him]." (Trial CD 11:32:10.)

The prosecution relied on the lack of evidence of a close range firing to support the eyewitnesses' testimony that Respondent fired the gun across the driver from the passenger seat. Defense counsel relied on the same part of Dr. Zumwalt's testimony to support the defense theory that Ortega fired the fatal shot while Rey Ornelas was at the rear of the car. The jury found Respondent guilty of the first degree murder of Rey Ornelas and aggravated battery of Danny Ornelas.

II. The Lower Courts' Confrontation Clause Rulings

Before Dr. Zumwalt testified, Respondent objected on confrontation grounds, and the parties examined the witness outside the presence of the jury. According to Dr. Zumwalt, OMI has a duty to perform autopsies following a sudden or unexpected death or an injury-related death. Anyone can refer an unexpected or violent death to OMI. Although police officers are usually the people in a position to report a homicide, they can only make a referral; the decision to perform an autopsy rests exclusively with OMI. Police officers referred Rey Ornelas's death as a homicide, and two officers attended the autopsy.

Dr. Zumwalt further explained that homicides comprise less than ten percent of autopsies but OMI maintains a record of every autopsy in the normal course of business. All autopsy reports are prepared the same way regardless of the cause or manner of death. There are standard protocols for completing the different sections of an autopsy report, using standardized language that allows other pathologists to understand the conditions of the body. All autopsy reports are prepared for a number of purposes, including statistics and the documentation of injuries for family members and treating physicians, as well as for criminal trials. One of the major duties of OMI is public health surveillance, which includes surveillance for infectious diseases. Testimony at a criminal trial is not the primary purpose for making a report. (Trial CD 9/29/10 at 10:48:10.) In fact, if a case is

determined to be a homicide and there is a criminal proceeding, the pathologist expects to be called to testify at trial "either by the prosecution or the defense." (Trial CD 9/29/10 at 10:47:20.)

The report in this case is signed by the pathologist that performed the autopsy and her supervisor. However, the report is neither certified nor sworn.[1]

Applying *Crawford v. Washington*, 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the trial court determined that the autopsy report was not testimonial and thus not subject to the Confrontation Clause. On appeal, in a convoluted analysis of the different opinions in *Williams v. Illinois*, the New Mexico Supreme Court disagreed with the trial court and reversed Respondent's convictions. The state court articulated seven guiding principles from *Williams*, none of which involved Justice Thomas's decisive formality test, and the court focused almost exclusively on whether the autopsy report was prepared primarily for the purpose of establishing a past fact that, objectively speaking,

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[1] The autopsy report was not admitted at trial or submitted to the trial court by Respondent as an offer of proof to support his claim that the document contained testimonial statements. Nor did the New Mexico Supreme Court obtain the report in reversing the trial court's determination that the report was not testimonial. By separate letter, the State seeks this Court's permission to lodge the report pursuant to Supreme Court Rule 32.3. *See Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J., concurring in the judgment) (relying on a similar lodging to evaluate the formality of a report).

could be relevant to a later criminal trial. App. 6-13. Citing to *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) and New Mexico statutes governing OMI's responsibilities, the court determined that the pathologist created the report for the primary purpose of serving as evidence at a criminal trial. App. 13-17. In so concluding, the court altogether ignored Dr. Zumwalt's testimony about the purposes for creating an autopsy report and instead relied on the report's conclusion that homicide had been the manner of death despite the absence of any evidence in the record to suggest that this conclusion related to any specific assailant.[2] App. 16-17.

The New Mexico Supreme Court found that the testifying expert's description of facts in the report – specifically, the statement that there was no evidence of soot or stippling on the body or evidence of soot or unburned gunpowder on the clothing – violated Respondent's right of confrontation. App. 21-22. Without expressly addressing the State's harmless error argument, the court reversed Respondent's convictions. App. 23.

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[2] Presumably as conveyed to her by the police officers, Dr. Dudley stated in her report that the victim "[r]eportedly" had been shot by "an occupant of the vehicle" that he approached in the street. The New Mexico courts did not have this information before them.

REASONS FOR GRANTING THE PETITION

Autopsy reports serve a vital role in the criminal justice system generally and in homicide cases particularly. These documents contain detailed descriptions of the state of a body, including any injuries suffered by the decedent, and conclusions about the cause and manner of death. This information often cannot be obtained by other means, and autopsies, by their nature and due to the subsequent disposition of the body, are ill-suited to repetition or retesting. At the same time, because such procedures involve a death, they present two frequent challenges for any later criminal trial. First, the decedent will of course be unavailable to testify about the nature and causes of any injuries he or she received. Second, prosecution for murder is not typically limited by a statute of limitations, and because some homicides may go unsolved, or a suspect not captured, for a number of years, the pathologist that performed the autopsy may become unavailable to testify by the time of trial. For these reasons, it is imperative to resolve whether the Confrontation Clause allows the admission of autopsy reports or expert testimony relying on such a report by a different pathologist.

As recognized in *Williams*, *Crawford*'s wake has produced a flood of applications seeking this Court's review of Confrontation Clause issues, but the Court has not yet addressed autopsy reports. *See Williams*, 132 S. Ct. at 2232 (plurality opinion); *id.* at 2251

(Breyer, J., concurring).[3] The frequency at which appellate courts across the nation have been required to address the Confrontation Clause implications of autopsy reports, both before and since *Crawford*, signals the issue's surpassing importance. Far from there being any consensus on the matter, there is a deep and intractable division in the reasoning and results of these cases, sometimes even within the same jurisdiction. Nowhere is the widespread confusion and disruption caused by *Crawford* more sharply focused than in judicial opinions discussing autopsy reports. *Williams* has only added to that confusion.

The expert's testimony and the autopsy report in this case do not violate the Confrontation Clause under this Court's judgment in *Williams*. Applying the test articulated in the plurality opinion, the report does not accuse a targeted individual of a crime. Applying Justice Thomas's concurrence in the judgment, the report is not a formalized testimonial document. Moreover, even under the dissent's approach, Dr. Zumwalt's testimony, which the trial court credited, shows that the autopsy report was not prepared as a substitute for live testimony or with the primary purpose of providing evidence at a criminal trial.

Reversing the New Mexico Supreme Court's misapplication of *Williams* would certainly provide

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[3] *See generally State v. Mitchell*, 4 A.3d 478 (Me. 2010), *cert. denied*, 133 S. Ct. 55 (2012).

helpful guidance to courts across the country and resolve the deep division among jurisdictions about the constitutional implications of autopsy reports. But given the widespread havoc caused by *Crawford*, more is needed. *See Williams*, 132 S. Ct. at 2248 (Breyer, J., concurring) (suggesting additional briefing on "the possible implications" of the Court's "earlier post-*Crawford* opinions" and "any necessary modifications of statements made in the opinions of those earlier cases"); *Bullcoming*, 131 S. Ct. at 2728 (Kennedy, J., dissenting) ("It is time to return to solid ground."). This Court's post-*Crawford* cases, and the fractured views they have produced, show that the dysfunctional test articulated in *Crawford* provides an inadequate framework within which to evaluate the myriad hearsay evidence introduced in criminal trials. Indeed, the Court has been forced to reformulate the primary purpose test first articulated in *Crawford* in virtually every case since *Crawford*, and all of these permutations suffer from the inability to resolve constitutional questions about evidence that was routinely admitted at the time of founding (dying declarations) and evidence that is now uniformly believed to be inadmissible (police reports). Nor is this test reflective of constitutional text or history.

As a matter of history, practicality, and much-needed predictability, this Court should abandon the "testimonial" project initiated in *Crawford* and return to the more grounded, and textually-based, term "witnesses." A witness is defined as one who – in person, by deposition, or by affidavit – gives testimony

in court. Almost all witnesses testify under oath or affirmation, with the single exception of the unsworn *ex parte* examinations of suspects that developed as a unique type of unsworn affidavit under the common law. It is this class of "witnesses" to which the Framers applied the right of confrontation, and it is this understanding of the fundamental right of confrontation that the States held at the time of the ratification of the Fourteenth Amendment. The Sixth Amendment is not an evidence code and should not be extended to out-of-court declarants that are not witnesses.

I. Joining a growing conflict within the nation's judiciary over autopsy reports, the New Mexico court improperly relied on the dissent instead of the holding in *Williams*.

1. This Court has not previously considered the Confrontation Clause implications of a pathologist's documentation of the condition of a body and opinion about the cause and manner of death from an autopsy. In *Melendez-Diaz*, the Court cited *Crawford* and Justice Breyer's dissenting opinion in *Giles v. California*, 554 U.S. 353, 399-400 (2008) for the proposition that, "whatever the status of coroner's reports at common law in England, they were not accorded any special status in American practice." 557 U.S. at 322. The cited authority shows that the reference there to "reports" meant the "statements taken by a coroner, which were[, in addition to *ex parte* magistrate examinations,] authorized by the Marian statutes."

Crawford, 541 U.S. at 47 n.2. In other words, it refers to witness testimony taken by a coroner during a quasi-judicial inquest, not to the observations and opinions of a physician while performing the medical procedure of conducting an autopsy on a body. On the other hand, "medical reports created for treatment purposes" are nontestimonial. *Melendez-Diaz*, 557 U.S. at 312 n.2. Because an autopsy report may assist physicians with medical treatment in general but obviously not for the deceased specifically, this statement would also appear to be non-determinative.

In this Court's most recent application of the Confrontation Clause to scientific reports, there was no majority opinion. Under such circumstances, the narrowest grounds supporting the judgment define the Court's holding. *Marks v. United States*, 430 U.S. 188, 193 (1977). *Crawford* dictates that a statement is testimonial, and therefore subject to Confrontation Clause scrutiny, when it satisfies some version of both a formality test and a primary purpose test. *Bullcoming*, 131 S. Ct. at 2717; *Davis v. Washington*, 547 U.S. 813, 823-24 (2006) (adopting the *Crawford* definition of testimony and characterizing a statement as "formal enough").

Applying the "formal enough" rationale of *Davis* and its companion case, *Hammon v. Indiana*, the plurality in *Williams* treated informality as insufficient grounds to make a document nontestimonial and evaluated whether an informal document had the objective primary purpose of accusing a targeted

individual of a crime. 132 S. Ct. at 2243-44 (plurality opinion). Justice Thomas, rejecting the *Hammon* "formal enough" standard, applied a strict, controlling formality test but rejected the plurality's narrow characterization of the primary purpose test. 132 S. Ct. at 2259-63 (Thomas, J., concurring in the judgment). Neither opinion articulates adequate grounds to support the holding by a majority rationale. As a result, the "narrowest" ground to support the judgment is a combination of Justice Thomas's narrow interpretation of formality (but not as a determinative factor) and the plurality's narrow interpretation of the primary purpose test. Under *Williams*, a scientific report is nontestimonial if it is unsworn and uncertified and if its primary purpose is not to accuse a targeted individual. *See People v. Dungo*, 286 P.3d 442, 455 (Cal. 2012) (Chin, J., concurring) ("[A] majority of the *Williams* [C]ourt would find no violation of the confrontation clause whenever there was no violation under the plurality's *and* under Justice Thomas's reasoning.").

The description of the plurality's primary purpose test as a dissent is thus mistaken. *See Williams,* 132 S. Ct. at 2265 (Kagan, J., dissenting). Had this been an accurate assessment, the Court's judgment would have been different.

The autopsy report in this case is not a formalized testimonial document, such as an affidavit, because it is both unsworn and, in contrast to the document in *Bullcoming*, uncertified. Whereas a certification is an attestation, *Black's Law Dictionary*

257 (9th ed. 2009), a mere signature on a document lacks the formality of an affidavit. *See Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring in the judgment).

Nor does the autopsy report have the primary purpose of accusing a targeted individual. No suspect is named on the document, the opinion of homicide as the manner of death does not purport to show that a crime occurred (if, for example, the homicide had been in self-defense) or its commission by any particular individual, and the pathologist could not know in advance that such findings as a lack of soot or stippling on the body would be inculpatory or exculpatory with respect to any particular individual. *See Williams*, 132 S. Ct. at 2244 (plurality opinion) ("The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating – or both.").

The New Mexico Supreme Court erred in determining that these facts "directly" established anyone's guilt or innocence, much less Respondent's guilt. App. 16-17. Moreover, in this particular case, there were multiple suspects, and the autopsy report does not accuse either of the suspects directly or indirectly. There is, in fact, no evidence that Dr. Dudley had any knowledge about, or interest in, the suspects' identity.

Dr. Zumwalt testified that an autopsy report is prepared – and prepared the same way – for every autopsy. He also testified that all autopsy reports serve multiple purposes and the primary purpose is

not to create evidence for trial. Thus, regardless of her conclusion about the manner of death, Dr. Dudley would have prepared the same report with the same description of the conditions of the body. The report is nontestimonial under *Williams*' holding.

Distracted by creative counting, the New Mexico Supreme Court departed from precedent and simply applied the primary purpose test from the *Williams* dissent without examining Justice Thomas's narrower formality test or the plurality's narrower primary purpose test. App. 7-8, 10, 13-17. According to the *Williams* dissent, a signed document prepared in aid of a police investigation is formal "enough," and the primary purpose test should evaluate whether a statement was made "for the purpose of providing evidence." 132 S. Ct. at 2273, 2276 (Kagan, J., dissenting). Relying on this analysis and the report's designation of homicide as the manner of death, the New Mexico Supreme Court found it "axiomatic" that the report was prepared "primarily intending to establish some facts or opinions with the understanding that they may be used in a criminal prosecution." App. 14-15. But it is nothing short of circular to attribute a primary purpose to a document based on its later use at trial.

The homicide conclusion in the autopsy report did not change the purposes of preparing a document that is prepared in all autopsies. Nor did it change the fact that an autopsy is performed by a physician, that OMI is part of the University of New Mexico's School of Medicine and independent of any law

enforcement agency, and that the decision whether and how to perform an autopsy rests exclusively with the pathologist and not with law enforcement officers. Dr. Dudley did not prepare the report primarily for the purpose of "providing evidence," *Williams*, 132 S. Ct. at 2273 (Kagan, J., dissenting), or "creating an out-of-court substitute for trial testimony," *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011). Under all three of the opinions in *Williams*, the report is nontestimonial.

2. The widespread confusion caused by *Crawford* is well documented. *See, e.g., Bullcoming*, 131 S. Ct. at 2725-26 (Kennedy, J., dissenting); *State v. Duncan*, 796 N.W.2d 672, 676 (N.D. 2011) (observing that *Crawford* had at that time been cited 27,000 times and produced greatly inconsistent results for 911 calls); *State v. O'Cain*, 279 P.3d 926, 929 (Wash. Ct. App. 2012) ("If it is possible for jurisprudence to be in an uproar, the case law development of the Sixth Amendment confrontation clause has been in the juristic version of such a state for the past eight years."). The absence of a majority opinion in *Williams* has only exacerbated the matter, particularly in reference to autopsy reports. *See Nardi v. Pepe*, 662 F.3d 107, 112 (1st Cir. 2011) ("[E]ven now, it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.").

Before *Crawford*, courts by and large rejected Confrontation Clause challenges to the admission of autopsy reports in the absence of the performing

pathologist testifying at trial. *E.g., Manocchio v. Moran*, 919 F.2d 770, 777 (1st Cir. 1990) ("[A] medical examiner, although often called a forensic expert, bears more similarity to a treating physician than he does to one who is merely rendering an opinion for use in the trial of a case.") (quoted authority omitted); *see Melendez-Diaz*, 557 U.S. at 358-59 (Kennedy, J., dissenting) (citing cases). Since *Crawford*, however, the outcome of such a challenge is a coin toss.

At least seven state high courts and Circuit Courts of Appeals have held autopsy reports to be nontestimonial. *United States v. James*, No. 09-2732-cr, 2013 U.S. App. Lexis 6259, at *10-47 (2d Cir. March 28, 2013); *United States v. De La Cruz*, 514 F.3d 121, 133-34 (1st Cir. 2008), *cert. denied,* 557 U.S. 934 (2009); *Dungo*, 286 P.3d at 449-50; *People v. Leach,* 980 N.E.2d 570, 582-94 (Ill. 2012); *People v. Freycinet*, 892 N.E.2d 843, 845-46 (N.Y. 2008); *State v. Craig*, 853 N.E.2d 621, 638-39 (Ohio 2006), *cert. denied*, 549 U.S. 1255 (2007); *State v. Cutro*, 618 S.E.2d 890, 896 (S.C. 2005). A different seven (including New Mexico) have found that autopsy reports are testimonial. *United States v. Ignasiak*, 667 F.3d 1217, 1229-33 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30, 69-73 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2772 (2012); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1027-30 (Mass. 2009); *State v. Locklear*, 681 S.E.2d 293, 304-05 (N.C. 2009); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 226-29 (Okla. Crim. App. 2010), *cert. denied*, 132 S. Ct. 259 (2011); *State v. Kennedy*, 735 S.E.2d 905, 916-17 (W. Va. 2012). Addressing the

issue post-*Williams*, the courts in *Dungo* and *Leach* recognized that pathologists serve a public health function and their reports are not prepared primarily for litigation, while the courts in *Ignasiak* and *Kennedy* looked at the same duties for medical examiners and reached the opposite conclusion.

Some jurisdictions, after first relying on *Crawford* and later addressing *Bullcoming* or *Melendez-Diaz*, have either flip-flopped or questioned the continued validity of an earlier opinion. *Nardi*, 662 F.3d at 111-12 (discussing *De La Cruz*); *James*, 2013 U.S. App. Lexis 6259, at *30 (discussing *United States v. Feliz*, 467 F.3d 227, 233-37 (2d Cir. 2006)); *Derr v. State*, 29 A.3d 533, 548-49 (Md. 2011), *vacated and remanded for reconsideration in light of Williams*, 133 S. Ct. 63 (2012). Two other courts permitted an expert to rely on an autopsy report as basis evidence without deciding whether the report itself was testimonial. *State v. Joseph*, 283 P.3d 27, 29-30 (Ariz. 2012), *cert. denied*, 133 S. Ct. 936 (2013); *Mitchell*, 4 A.3d at 488-90.

This substantial division of authority is deepening after *Williams*, and there are no signs that courts will be able to resolve this conflict without further guidance from this Court about the reach of *Crawford* and its impact on autopsy reports. Until then, critical evidence in homicide cases is either being withheld from juries in a way that impedes the truth-finding process or being introduced at trial only to provide grounds for appeal and a potential need for later retrial.

II. The primary purpose test is a poor proxy for the Framers' notion of a witness against the accused and decidedly not a fundamental aspect of due process.

1. Fortunately, the source of this Court's primary purpose test is not "anyone's guess," *Williams*, 132 S. Ct. at 2273 (Kagan, J., dissenting), but instead one that is known and open to examination. That source is neither the text of the Sixth Amendment nor the historical context surrounding its ratification but instead a dictionary definition of a word not found in the text, and only half the definition at that.

The Sixth Amendment applies to "witnesses against" the accused. In *Crawford*, this Court relied on a definition of "witness" as one who bears testimony to turn to a second dictionary definition (of "testimony") for the essence of the right of confrontation. 541 U.S. at 51. The dictionary defined "testimony" as a solemn declaration made for the purpose of establishing or proving a fact. *Id.* Through a series of cases, this Court has refined, reformulated, and revised this purpose-based definition of testimony.

In *Davis*, the definition became, at least in the context of a police interview, a primary purpose to establish or prove past events potentially relevant to later criminal prosecution. 547 U.S. at 822. Taken literally, this test would label as testimony all written and virtually all oral speech, with the exception of excited utterances (including an "ongoing emergency"); most statements are made for the purpose of

establishing a past fact, and in a litigious society with a high crime rate, all "past events" have some potential of being relevant at a criminal trial. The Court provided a clue to a narrower focus, however, in stating that a "witness" does not "go into court to proclaim an emergency," whereas a victim providing facts in response to officer questioning in the absence of an emergency is "precisely *what a witness does* on direct examination." *Id.* at 828, 830.

In *Melendez-Diaz*, the Court clarified its focus on a statement's "evidentiary purpose," 557 U.S. at 311, and with even further refinement, this formulation later became "statements taken for use at trial" as shown by "a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 131 S. Ct. at 1155-56. This test evaluates the purposes of reasonable participants based on the circumstances of the encounter, the statements and actions of the participants, and "standard rules of hearsay." *Id.* As applied above, two further revisions appear in *Williams*, with the plurality assessing a primary purpose to accuse a targeted individual and the dissent focusing on a primary purpose of "providing evidence."

Many out-of-court statements reveal the flaws inherent in these primary purpose tests. For one, the Framers did not intend to disturb the admissibility of dying declarations, *Kirby v. United States*, 174 U.S. 47, 61 (1899), but all iterations of the primary purpose test would classify dying declarations as testimonial. Although *Crawford* described such evidence

as *sui generis*, there is no reason – certainly not in the language of the provision – to attribute to the Framers an intent to except one type of evidence from confrontation because of "the necessity of the case" and the "equivalen[ce]" of the evidence to testimony in terms of truthfulness, *Kirby*, 174 U.S. at 61, but not others. *See United States v. Leathers*, 135 F.2d 507, 511 (2d Cir. 1943) (Hand A., J.) ("[B]usiness records kept as a matter of ordinary routine are often likely to be more reliable than dying declarations.").

For another, business records are nontestimonial, *Crawford*, 541 U.S. at 56, but the Court has limited this rule to documents "created for the administration of an entity's affairs." *Melendez-Diaz*, 557 U.S. at 324. A great deal of public records (court judgments, birth certificates, marriage certificates), however, are created to document facts of legal significance and, at least in part, to serve an evidentiary purpose rather than to aid an agency's internal functioning. In fact, a record of "the office's activities" is only one of three types of public records listed in the hearsay exception, with another being "a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel." Fed. R. Evid. 803(8) (suggesting by negative implication that facts derived from a public duty to observe would be admissible in a criminal trial if not prepared by a police officer).[4] The evidentiary

[4] The hearsay rule limits the admission of self-serving records made in anticipation of litigation, *see Melendez-Diaz*, 557

(Continued on following page)

purpose of public records is not only recognized but approved in the rules of evidence, designating such documents as self-authenticating when there is "a signature purporting to be an execution or attestation." Fed. R. Evid. 902(1)(A). The primary purpose test would thus transform many public records into testimony in the "anomalous" way that Wigmore blamed on "that finical wisdom which looks back over a century of unquestioned professional practice and imagines sophomoric innovations which the fathers of the profession, living at the Constitution's birth, never dreamed of." John Henry Wigmore, *Evidence* § 1398, at 109 (2d ed. 1923).

Police reports, however, are probably the most obvious example of the limitations of the primary purpose test. This Court has said that the Constitution clearly forbids the introduction of observations in a police report without testimony of the officer that prepared the report, *Bullcoming*, 131 S. Ct. at 2714-15, but a rule of evidence to the same effect has been in place for decades. *See* Fed. R. Evid. 803(8)(A)(2); N.M. Rule Ann. 11-803(8)(a)(ii). As a result, no

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U.S. at 321, but this limitation is based on a private litigant's biased preparation of a document for trial and does not apply to a public duty to observe or investigate. *Compare Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 161-70 (1988) (relying on the public records exception to uphold in a civil case the admission of an investigative report containing findings and conclusions), *with Palmer v. Hoffman*, 318 U.S. 109 (1943) (concluding that similar evidence prepared by a private litigant was inadmissible).

reasonable police officer today would prepare a report expecting it to substitute for the officer's testimony at trial. Nonetheless, police officers continue to prepare such reports. If there is one test that should conclusively show that a document is not prepared primarily for the purpose of substituting for live testimony, it is the document's continued preparation in the same manner after it has been ruled inadmissible. The primary purpose test would thus seem to permit the very information it seeks to exclude.

Justice Harlan warned not only of the "great mischief for enlightened development in the law of evidence" if the Confrontation Clause were applied to hearsay evidence, *Dutton v. Evans,* 400 U.S. 74, 95 (1970) (Harlan, J., concurring in the result), but also "the mischief of 'perpetuation of an unworkable rule.'" *California v. Green*, 399 U.S. 149, 173 n.4 (1970) (Harlan, J., concurring) (quoted authority omitted). *Crawford* establishes an unworkable rule that does not deserve the protection of *stare decisis*. *See Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991).

2. Through its different variations, the primary purpose test has sought to identify not only actual testimony but also statements that approximate or resemble testimony, using purpose as "a proxy." *Crawford*, 541 U.S. at 71 (Rehnquist, C.J., concurring in the judgment). But the words "testimony" and "purpose" do not appear in the Sixth Amendment. By relying on a watered-down version of the Framers' language and formulating a definition for statements that resemble testimony, *Crawford* established a

mission for the Confrontation Clause "for which it is not suited." *Dutton*, 400 U.S. at 96 (Harlan, J., concurring in the result).

There is no historical evidence that the Framers had any concern at all about the purpose of the participants (actual or reasonable) in an out-of-court conversation. Indeed, the Bill of Rights focuses on governmental abuses, and there is no more reason to think the Framers cared about a private individual's objective evidentiary purpose in speech than such an individual's evidentiary purpose in searching and seizing another's belongings. *See Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). The Framers would not have viewed private individuals as having the power to make themselves witnesses at a criminal trial, no matter how accusatory their motives.

Crawford's misstep is not just in replacing a constitutional term (witnesses) with its dictionary derivative (testimony) but in artificially separating the new term from its source. In addition to purpose, the dictionary definition of "testimony" specifies that, in a judicial proceeding, it "'*may be verbal or written, but must be under oath.*'" *Crawford*, 541 U.S. at 71 (Rehnquist, C.J., concurring in the judgment) (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)) (emphasis added in original). This definition is strikingly close to the legal definition of the actual constitutional term: A "witness" is "[o]ne who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit." *Black's Law Dictionary*

1740 (9th ed. 2009). Notably, this definition does not mention purpose.

By artificially replacing "witness" with "testimony" and "testimony" with "purpose," *Crawford* broadened the right of confrontation beyond the Framers' intent. The Court said this expansion of the constitutional text was necessary to reach the primary target of the Confrontation Clause, *ex parte* examinations, *Crawford*, 541 U.S. at 50-51, a shortcoming also attributed to the provision's text by Justice Harlan, *Dutton*, 400 U.S. at 94-95, 98 (Harlan, J., concurring in the result). But the above dictionary definitions – both of testimony and witness – show the falsity of this premise.

"[T]he Framers were mainly concerned about sworn affidavits and depositions. . . ." *Crawford*, 541 U.S. at 71 (Rehnquist, C.J., concurring in the judgment). The plain meaning of the constitutional term "witnesses" shows that the Framers applied the right of confrontation not just to live, in-person testimony but also to affidavits, depositions, and prior testimony. And although affidavits and depositions are typically taken under oath, a different rule applied to suspects under the common law: "Under the Marian statutes, witnesses were typically put on oath, but suspects were not." *Id.* at 52. A suspect's testimony to the magistrate thus developed as a unique form of "*unsworn ex parte* affidavit" or deposition. *Id.* at 52 n.3. The Framers would have considered those suspects – such as Lord Cobham, as well as accomplices responding to modern-day custodial examination by

the police – "witnesses" within the dictionary definition of the term. The text of the provision reaches the principal evil it sought to address and thus provides no basis upon which to search for the functional equivalent of "testimony" or "witnesses" using a purpose-based approach. The Framers did not create a code of evidence in the Constitution and did not address hearsay.[5]

3. In *Crawford,* the Court noted that most States have their own constitutional protection of the right of confrontation and turned to early state cases – ranging from 1794 to 1858 – to "shed light upon the original understanding of the common-law right." 541 U.S. at 48-50. Early state decisions, however, confirm both that autopsy reports do not implicate the Confrontation Clause and that the right of confrontation is limited to the plain meaning of "witnesses."

In an early Louisiana case, the prosecution introduced records of a coroner's inquest. *State v. Parker*, 7 La. Ann. 83, 84 (1852). Consistent with the above understanding of "witnesses," the state's high court recognized that the right of confrontation applied to "the deposition of the witnesses before the

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[5] At Raleigh's trial, the prosecution introduced hearsay through a witness named Dyer, but even though this hearsay would likely meet the primary purpose test, Raleigh objected on the ground of relevance instead of demanding the face-to-face confrontation he had with Lord Cobham. Richard H. Underwood, *Perjury: An Anthology*, 13 Ariz. J. Int'l & Comp. L. 307, 319-20 (1996).

inquest," as well as to the quasi-judicial finding by the coroner's jury that the accused caused the death for purposes of authorizing an arrest. *Id.* at 85. At the same time, however, the court distinguished these witness depositions from "the physical facts as to the death of the deceased":

> A record of those facts made at the time, and upon inspection by a public officer and intelligent men, aided by professional skill, is better and more precise evidence of those facts, than proof from the fleeting recollections of men, or the hasty and heedless observation of passers by. . . . The facts, in themselves, are evidence of neither guilt nor innocence, and have no direct tendency to implicate the accused, nor any one else. . . . There can be, therefore, no reasonable objection to this mode of ascertaining the physical facts, which caused the death, before the petty jury.

Id. at 84.

Other state courts of the same era rejected constitutional challenges to the use of public documents to establish collateral facts. *People v. Jones*, 24 Mich. 215, 225 (1872), *cited in Dowdell v. United States*, 221 U.S. 325, 330 (1911) ("Documentary evidence to establish collateral facts, admissible under the common law, may be admitted in evidence."); *see Todd v. State*, 69 So. 325, 328 (Ala. Ct. App. 1915) ("Among the recognized exceptions that do not contravene the constitutional provision upon which the general rule

is founded, is proof of essentially documentary facts by documentary evidence . . . .").

Beyond cases specifically addressing documentary evidence, numerous state courts determined in the nineteenth century that the constitutional right of confrontation does not apply to hearsay because a hearsay declarant is not a "witness against" the accused. *Green v. State*, 66 Ala. 40, 47 (1880) ("The fallacy of the objections consists in the supposition, that the deceased person, whose dying declarations are proved, is the witness in the case."); *McNamara v. State*, 60 Ark. 400, 406-08 (1895); *Campbell v. State*, 11 Ga. 353, 374 (1852) (applying the Sixth Amendment and concluding that "it is the individual who swears to the statements of the deceased, who is the witness"); *Woodsides v. State*, 3 Miss. 655, 665 (1837) ("It is the individual who swears to the statements of the deceased that is the witness, not the deceased."), *cited in Crawford*, 541 U.S. at 42-43; *People v. Corey*, 157 N.Y. 332, 347-48 (1898); *Robbins v. State*, 8 Ohio St. 131, 163 (1857) (stating that any objection to a dying declaration is "to the competency of the evidence" and not to confrontation because "[t]he accused *is confronted* by the witness on his trial"); *Brown v. Commonwealth*, 73 Pa. 321, 327-28 (1873); *State v. Waldron*, 16 R.I. 191, 194 (1888). One court, addressing a challenge to reputation evidence, discussed the Raleigh trial and observed that "'the witnesses against' an accused person are, in customary speech, the persons who testify against him, not those who merely make or repeat remarks about him."

Waldron, 16 R.I. at 194. The court concluded that the "witness" for reputation evidence "is not the people whose utterances create the reputation . . . but the persons who testify to the existence of the reputation." *Id.* at 195.

Applying the doctrine of selective incorporation, this Court held in *Pointer v. Texas*, 380 U.S. 400, 403-05 (1965) that the right of confrontation is fundamental and essential to a fair trial, such that it applies to the States through the Fourteenth Amendment's Due Process Clause. Further, this fundamental right is the same whether applied to the Federal Government or the States. *Id.* at 406; *accord McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 (2010).

But the above state authorities show that, at the time of the Fourteenth Amendment's framing and ratification, the States considered the right of confrontation fundamental to the American "scheme of ordered liberty and system of justice," and qualifying as "deeply rooted in this Nation's history and tradition," *McDonald*, 130 S. Ct. 3034, 3036 (quoted authority omitted), only to the extent of requiring a face-to-face confrontation with witnesses. The same view did not apply to hearsay declarants, even those having a purpose of providing evidence. Indeed, over the course of two centuries, the States, the Federal Government, and scholars devoted considerable effort to the development of hearsay exceptions in order to improve the truth-seeking function of a trial, all with the understanding that they were not precluded from doing so by the Sixth Amendment. For the States'

part, this effort advanced their traditional police power to define the criminal law and to implement criminal trial rules and procedures.

And yet *Crawford* has resulted in "an ongoing, continued, and systematic displacement of the States and dislocation of the federal structure." *Bullcoming*, 131 S. Ct. at 2727 (Kennedy, J., dissenting). By expanding the traditional understanding of the right of confrontation, *Crawford* diminishes the fundamental quality of confrontation and effectively calls into doubt the incorporation decision in *Pointer*.

Crawford not only establishes an unworkable test but also re-writes the Sixth Amendment in a way that is divorced from its text and its history. Moreover, it severely encroaches on the States' traditional power to regulate the admission of evidence at criminal trials in a manner that is contrary to important principles of federalism and the intent of the Framers and ratifiers of the Fourteenth Amendment. The primary purpose test should be overruled.

III. Any error was harmless beyond a reasonable doubt.

The New Mexico Supreme Court implicitly rejected the State's harmless error argument and reversed Respondent's convictions based on Dr. Zumwalt testifying that the pathologist did not see evidence of soot, stippling or gunpowder flakes on the victim's clothes or body. App. 21-22. Reversal was unwarranted because it was defense counsel who primarily elicited

details about the report and those details were more beneficial to the defense than the State.

A harmless error inquiry focuses "on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Such an inquiry ensures that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Id.* This doctrine applies to Confrontation Clause errors. *Id.* at 684. Reviewing courts should consider several factors related to harmless error, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.* These factors show that the state court erred in reversing Respondent's conviction.

The testimony about soot and stippling was not particularly important to the prosecution's case. It was undisputed at trial that the victim, Rey Ornelas, was next to a vehicle when one of its two occupants shot and killed him. The only disputed question was which occupant fired the gun.

The State presented evidence to support a theory that Respondent reached across Ortega to shoot out

of the driver's window. Although in the abstract a distant shooting through a driver's side window might tend to incriminate the passenger more than the driver, the evidence that Respondent reached across Ortega – such that Respondent's hand would have been approximately the same distance away from the driver's side window as Ortega's right hand – largely negates this tendency. Further, a distant range shooting indicates only a shooting at a distance of two feet or more, and there was evidence that the distance to the driver's window from the middle console was twenty-five inches.

In addition, Dr. Zumwalt's testimony was equivocal. He could not say that the shooting occurred at a distance greater than two feet but only that he had no evidence of a close range shooting. He explained that a shooting classified as distant range could actually be a close range shooting for which the evidence was obscured, washed away by blood, or otherwise not detected.

Had Respondent introduced evidence that Ortega fired at a much closer range (such as by reaching up to the window and firing the gun within a few inches of the victim), Dr. Zumwalt's testimony might have been marginally important to the State's rebuttal. But Respondent, like the State, argued a distant shooting, and Dr. Zumwalt provided crucial evidence in support of this defense theory.

A defense witness claimed to have seen the shooting and said that, after shots were fired from

inside the car, the victim ran toward the rear of the car and slipped and fell near a back tire. Ortega leaned out of the car window with a gun in his hand. As the victim got up from the ground, Ortega fired the gun at him three times and hit him once. (Trial CD 9/29/10 at 3:17:09.)

Evidence of a close range firing would have been fatal to this defense theory, and defense counsel's cross-examination of Dr. Zumwalt shows an attempt to strengthen, not undermine, the distant range opinion. On direct examination, Dr. Zumwalt said only that no evidence of a shooting at a distance of less than two feet was seen during the autopsy; he did not offer an opinion about the shooting's distance or communicate Dr. Dudley's opinion. Defense counsel rephrased this testimony to suggest an opinion that the shooting occurred at a distance of more than two feet. Dr. Zumwalt corrected him and emphasized that he could only say that there was no evidence of a firing closer than two feet. Defense counsel then revealed to the jury for the first time that the report contained the conclusion that it was a distant range shooting. Defense counsel pursued a line of questioning about the absence of gunpowder flakes in an attempt to show a distance even greater than two feet; he suggested that powder could be seen at eight feet, but Dr. Zumwalt only went as far as three or four feet. Defense counsel also mentioned the report's description of the shape of the wound and tried to use this information to support a more distant shooting.

In his closing argument, defense counsel argued that Dr. Zumwalt's testimony did not dispute the defense witness's testimony in any way and emphasized Dr. Zumwalt's testimony as supporting a distant shooting. (Trial CD 9/30/10 at 10:59:34.) Thus, the evidence deemed objectionable by the New Mexico Supreme Court was not, in *Van Arsdall*'s terms, important to the State's case but was instead important to the defense case.

Applying the second *Van Arsdall* factor, Dr. Zumwalt's testimony was both cumulative of and corroborated by the autopsy photographs depicting the entrance wound with no soot or stippling. Had the district court precluded the witness from referring to the autopsy report, his testimony on direct would have been the same – he did not have any evidence of a close range firing.

The extent of cross-examination also shows harmless error. Although Respondent could not cross-examine Dr. Dudley, Dr. Zumwalt, having once been Dr. Dudley's supervisor, was available for cross-examination about her qualifications and methods, as well as the routine procedures within OMI. Further, defense counsel either described or elicited more information from the autopsy report about the distance of the shooting than had been discussed on direct. Indeed, Respondent sought to bolster Dr. Dudley's conclusion rather than test it through the adversarial process available to him.

Finally, the prosecution's case was strong. Several witnesses described the feud between the victim's family and Respondent's family, establishing a motive for the shooting. Witnesses also described how Respondent and Ortega called out to Rey Ornelas, luring him closer to the car before the shooting. Two eyewitnesses saw Respondent shoot the victims, and another witness saw Respondent with the gun in his hand. Dr. Zumwalt offered his own opinion that the location of the entrance and exit wounds, together with the trajectory of the bullet, was consistent with the victim leaning on the driver's window when he was shot. In short, the evidence against Respondent was overwhelming.

Dr. Dudley was not a witness at all, but to the extent her statements implicate the Confrontation Clause, she was more a witness *for* Respondent than one of the "witnesses against" him. Viewed under the *Van Arsdall* factors, any Confrontation Clause violation was harmless beyond a reasonable doubt.

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CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review and reverse the opinion of the New Mexico Supreme Court.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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NO. 32,898

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ARNOLDO NAVARETTE,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY
Teddy L. Hartley, District Judge

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OPINION

CHÁVEZ, Justice.

{1} The main question in this case is whether *Crawford v. Washington,* 541 U.S. 36 (2004) and its progeny preclude a forensic pathologist from relating subjective observations recorded in an autopsy report as a basis for the pathologist's trial opinions, when the pathologist neither participated in nor observed the autopsy performed on the decedent. We answer this question affirmatively and conclude that there was a Confrontation Clause violation because (1) the autopsy report contained statements that were made with the primary intention of establishing facts that the declarant understood might be used in a criminal prosecution, (2) the statements in the autopsy report were related to the jury as the basis for the pathologist's opinions and were therefore offered to prove the truth of the matters asserted, and (3) the pathologist who recorded her subjective observations in the report did not testify at trial and Defendant Arnoldo Navarette did not have a prior opportunity to cross-examine her. We therefore reverse and remand for a new trial. The remaining issues raised by Navarette are without merit.

BACKGROUND

{2} Navarette was tried and convicted as a principal for the first-degree murder of Reynaldo Ornelas and aggravated battery with a deadly weapon for the non-fatal shooting of Reynaldo's brother, Daniel Ornelas.

The Ornelas brothers were shot while leaning into the open driver's side window of a parked car driven by Dolores "Lolo" Ortega, in which Navarette was the front-seat passenger. Navarette's defense was that the driver was the shooter. Daniel testified that Navarette shot him and his brother. However, the first police officer who interviewed Daniel about the shooting testified that Daniel said that he did not know who shot him. Only two other witnesses testified that they saw who shot the Ornelas brothers.[1] Diane Ornelas testified that Navarette was the shooter. Miguel Montoya testified that Lolo, the driver, was the shooter.

{3} Presumably to assist the jury in assessing who shot the victims, the State called Dr. Ross Zumwalt, the Chief Medical Investigator for the State of New Mexico, to testify about the cause and manner of Reynaldo's death; whether the entry and exit wounds could explain Reynaldo's position at the time he was shot; and whether Dr. Zumwalt had an opinion, based on the observations recorded in the autopsy report, as to whether the gun was fired from within two feet of the victim. Dr. Zumwalt testified that Dr. Mary Dudley, who at the time of trial was the Chief Medical

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[1] Rosemary Ortega, Lolo's sister, testified at Navarette's trial that she could not recall specific events from the day of the shooting. The State impeached Ortega and presented her with her testimony from Lolo's trial. However, she still could not remember anything and the prosecution was allowed to read her testimony from Lolo's trial. At that trial, she testified that she saw Navarette with the gun in his hand.

Investigator in Kansas City, Missouri, performed the autopsy on Reynaldo. The autopsy was performed as part of a homicide investigation and two of the investigating officers attended the autopsy. Dr. Zumwalt neither participated nor observed Dr. Dudley perform the autopsy, yet he testified that Dr. Dudley followed the standard procedure for performing autopsies.

{4} Navarette objected to both Dr. Zumwalt's testimony and Dr. Zumwalt's reliance on the autopsy report, asserting his Sixth Amendment right to confront witnesses against him. After hearing preliminary testimony from Dr. Zumwalt and listening to oral argument, the trial court asked the State whether Dr. Zumwalt's testimony was necessary. Based in part on the representation that his testimony was necessary, the trial court overruled Navarette's objection, and Dr. Zumwalt was permitted to testify before the jury and to rely on the contents of the autopsy report in expressing his opinions.

{5} The State referred Dr. Zumwalt to the contents of the autopsy report throughout his direct examination. The autopsy report itself was never offered into evidence. Photographs of the decedent showing entry and exit wounds were admitted without objection, as were figure diagrams illustrating the location of the entry and exit wounds. Based on the photographs and the contents of the autopsy report describing Reynaldo's injuries, Dr. Zumwalt testified that Reynaldo died rapidly from internal bleeding resulting from a single gunshot wound. This opinion was corroborated by eyewitnesses, each of whom testified

that they heard gunshots, saw Reynaldo take a few steps backward, and collapse dead shortly after being shot.

{6} The disputed issue was who shot Reynaldo – the driver, who was closest to Reynaldo, or Navarette, who was several feet away from Reynaldo. Relevant to this disputed issue, Dr. Zumwalt testified that based on the entry and exit wounds, Reynaldo could have been leaning into the window at the time he was shot. Perhaps more important was Dr. Zumwalt's testimony regarding the absence of soot or stippling. He testified that the standard procedure is for a pathologist to look for soot or stippling on the decedent's clothing or body. He further testified that evidence of soot, stippling, and gunpowder is not always clear to the naked eye, and therefore analysts often need to "use a magnifying scope to look for [evidence of gunpowder or powder flakes]." He also testified that at times a decedent's clothing is preserved and sent to a crime lab for closer analysis regarding the presence of soot or stippling. Through his testimony, Dr. Zumwalt suggested that at the time the gun was fired, the gun was not within two feet of Reynaldo because the autopsy report states that no evidence of soot or stippling was found on Reynaldo's body or clothing. During cross-examination Dr. Zumwalt again repeated Dr. Dudley's assertion in the report that this was a distant range shooting, because Dr. Dudley did not see any evidence of a close range shooting. The prosecution emphasized Dr. Zumwalt's testimony in his closing argument to the jury,

explaining that based on the expert testimony, the shooter could not have been the driver. It is against this factual backdrop that we analyze Navarette's Confrontation Clause objection.

DISCUSSION

The Validity of Navarette's Confrontation Clause Objection Depends on Whether Dr. Zumwalt Related Testimonial Statements Made by Dr. Dudley.

{7} Our examination of *Crawford* and its progeny reveals that at least five justices of the United States Supreme Court have agreed upon the following principles that we conclude are essential to a Sixth Amendment Confrontation Clause analysis. *Crawford,* 541 U.S. at 36; U.S. Const. amend. VI. The first principle relevant to this case is that an out-of-court statement that is both testimonial and offered to prove the truth of the matter asserted may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford,* 541 U.S. at 53-54 ("[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, andthe defendant had had a prior opportunity for cross-examination."). What constitutes a testimonial statement is not easily discernable [sic] from a review of *Crawford* and its progeny. In *Crawford,* the United States Supreme Court described "testimonial" statements as "solemn declaration[s] or affirmation[s] made for the

purpose of establishing or proving some fact." *Id.* at 51 (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). The *Crawford* majority also set forth the following non-exhaustive list of "core class of 'testimonial' statements":

> [*E*]*x parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[;] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;] [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.

Id. at 51-52 (internal quotation marks and citations omitted).

{8} Since *Crawford,* a majority of the United States Supreme Court has mainly focused on the primary purpose for which the statement was made. "[Statements] are testimonial when . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington,* 547 U.S. 813, 822 (2006).

> We have previously asked whether a statement was made for the primary purpose of establishing "past events potentially relevant

> to later criminal prosecution" – in other words, for the purpose of providing evidence. *Davis,* 547 U.S., at 822, 126 S.Ct. 2266; see also *Bullcoming* [*v. New Mexico*], 564 U.S. [___], at ___, 131 S.Ct. [2705], at 2716-2717 [(2011)]; [*Michigan v.*] *Bryant,* 562 U.S., at ___, ___, 131 S.Ct. [1143], at 1157, 1165 [(2011)]; *Melendez-Diaz* [*v. Massachusetts*], 557 U.S. [305], at 310-311, 129 S.Ct. 2527[, at 2532 (2009)]; *Crawford,* 541 U.S., at 51-52, 124 S.Ct. [at] 1354.

Williams v. Illinois, ___ U.S. ___, ___, 132 S. Ct. 2221, 2273-74 (2012) (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.). Justice Thomas agrees with the primary purpose analysis, although he would also require the statement to be solemn or formal, akin to an affidavit.

> The original formulation of that test asked whether the primary purpose of an extrajudicial statement was to establish or prove past events potentially relevant to later criminal prosecution. I agree that, for a statement to be testimonial within the meaning of the Confrontation Clause, the declarant must primarily intend to establish some fact with the understanding that his statement may be used in a criminal prosecution.

Id. at ___, 132 S. Ct. at 2261 (Thomas, J., concurring in the judgment) (internal quotation marks and citation omitted). Therefore, we conclude that the second principle, with which at least five justices agree, is that a statement can only be testimonial if the declarant made the statement primarily intending

to establish some fact with the understanding that the statement may be used in a criminal prosecution.

{9} The third principle is that when determining whether an out-of-court statement is testimonial, there is no meaningful distinction between factual observations and conclusions requiring skill and judgment. This principle was articulated by the majority in *Bullcoming v. New Mexico,* ___ U.S. ___, 131 S. Ct. 2705 (2011):

> The New Mexico Supreme Court held surrogate testimony adequate to satisfy the Confrontation Clause in this case because analyst Caylor "simply transcribed the resul[t] generated by the gas chromatograph machine," presenting no interpretation and exercising no independent judgment.
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> . . . .
>
> Most witnesses . . . testify to their observations of factual conditions or events, *e.g.,* "the light was green," "the hour was noon." Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact – Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. Could an officer other than the one who saw the number on the house or gun present the information in court – so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures?

> As our precedent makes plain, the answer is emphatically "No."

Id. at ___, 131 S. Ct. at 2714-15.

{10} The fourth principle is that even if a statement (in this case, a forensic report), does not target a specific individual, the statement may still be testimonial. In *Williams,* four justices concluded that a forensic report was not testimonial because the report did not target a specific individual. *Id.* at ___, 132 S. Ct. at 2243 (plurality opinion). Justice Thomas rejected this approach in his concurring opinion, stating "The new primary purpose test [from the *Williams* plurality opinion] asks whether an out-of-court statement has the primary purpose of accusing a targeted individual of engaging in criminal conduct. That test lacks any grounding in constitutional text, in history, or in logic." *Id.* at ___, 132 S. Ct. at 2262 (Thomas, J., concurring in the judgment) (internal quotation marks and citation omitted). Writing for four justices who dissented in *Williams,* Justice Kagan also rejected this approach, stating:

> [T]he plurality states that the Cellmark report was not prepared for the primary purpose of accusing a targeted individual. Where that test comes from is anyone's guess. Justice THOMAS rightly shows that it derives neither from the text nor from the history of the Confrontation Clause. And it has no basis in our precedents.

Id. at ___, 132 S. Ct. at 2273 (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.) (internal quotation marks and citations omitted).

{11} The fifth principle is that the fact that an out-of-court statement (in this case, the forensic report) is not inherently inculpatory does not make it non-testimonial. Again, four justices in *Williams* held that a report which is not inherently inculpatory is not testimonial. *Id.* at ___, 132 S. Ct. at 2243-44 (plurality opinion). Justice Thomas rejected this conclusion, stating that "the distinction between those who make 'inherently inculpatory' statements and those who make other statements that are merely 'helpful to the prosecution' has no foundation in the text of the [Sixth] Amendment." *Id.* at ___, 132 S. Ct. at 2263 (Thomas, J., concurring in the judgment). Justice Kagan, writing for four justices, also rejected this notion, stating that the plurality could not "gain any purchase from the idea that a DNA profile is not inherently inculpatory." *Id.* at ___ n.5, 132 S. Ct. at 2274 n.5 (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.) (internal quotation marks and citation omitted).

{12} The sixth principle is that the Confrontation Clause is violated only if the testimonial statement is offered to prove the truth of the matters asserted. *Crawford,* 541 U.S. at 59-60 n.9 (citing *Tennessee v. Street,* 471 U.S. 409, 411-12, 414 (1985) (where the defendant testified that police had read accomplice's confession to him and forced him to repeat it, admission of accomplice's confession was proper so that the jury could see how the confessions differed)); *accord State v. Aragon,* 2010-NMSC-008, ¶ 6, 147 N.M. 474,

225 P.3d 1280, *overruled on other grounds by State v. Tollardo,* 2012-NMSC-008, 275 P.3d 110.

{13} The seventh and final principle that we have identified as relevant to the inquiry in this case is that an out-of-court statement that is disclosed to the fact-finder as the basis for an expert's opinion is offered for the truth of the matter asserted. Therefore, the declarant must testify at trial and be subject to cross-examination, or alternatively must be unavailable, and the defendant must have had a prior opportunity to cross-examine the declarant. This principle is also derived from *Williams.* Four justices concluded that an out-of-court statement that supports an expert witness's opinion is not offered to prove the truth of the matter asserted, but is only offered as the basis for the expert's opinion. *Williams,* ___ U.S. at ___, 132 S. Ct. at 2239-40 (plurality opinion). The four justices did, however, acknowledge that the basis must otherwise be established during the trial, or the expert's opinion that depends on the basis is not entitled to any weight. *Id.* at ___, 132 S. Ct. at 2241.

{14} Justice Thomas disagreed that statements which form the basis of an expert's opinion are not introduced to prove the truth of the statements. "[S]tatements introduced to explain the basis of an expert's opinion are not introduced for a plausible non-hearsay purpose. There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth." *Id.* at ___, 132 S. Ct. at 2257 (Thomas, J., concurring

in the judgment). Justice Kagan, writing for the balance of the Court, was more to the point.

> [W]hen a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, . . . the statement's utility is then dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies. That is why the principal modern treatise on evidence variously calls the idea that such "basis evidence" comes in not for its truth, but only to help the factfinder evaluate an expert's opinion "very weak," "factually implausible," "nonsense," and "sheer fiction."

Id. at ___, 132 S. Ct. at 2268-69 (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.).

{15} Applying these principles, we must answer whether the statements in the autopsy report that formed the basis of Dr. Zumwalt's testimony were testimonial. Our Court of Appeals has held that an autopsy report admitted into evidence in a homicide trial was testimonial hearsay under the Confrontation Clause. *State v. Jaramillo,* 2012-NMCA-029, ¶ 16, 272 P.3d 682. In *Jaramillo,* the court held that the autopsy report was testimonial because it contained findings and conclusions including "an exercise of judgment and analysis . . . as [the medical examiner] formed opinions based on his medical training

and as he interpreted factual findings." *Id.* ¶ 9. The Court of Appeals also justified its holding by explaining that:

> The medical examiner's finding of homicide was critical to substantiate allegations that Defendant abused [the victim] and caused his death. Therefore, the autopsy report was prepared with the purpose of preserving evidence for criminal litigation. In this case, the face of the autopsy report itself states that an autopsy was requested because of "the circumstances" of [the victim's] death, being a severe brain injury of a sort commonly associated with trauma. By the time the medical examiner had determined the cause of death to be closed head injuries and the manner of death to be homicide, there was no doubt this would be used against someone in a criminal prosecution. NMSA 1978, Section 24-11-7 (1973) requires an autopsy with complete findings when a "medical investigator suspects a death was caused by a criminal act or omission or the cause of death is obscure[.]"

Id. ¶ 10.

{16} In this case, Dr. Zumwalt acknowledged that the autopsy on Reynaldo was performed as part of a homicide investigation. In fact, two police officers attended the autopsy. It is axiomatic that Dr. Dudley made the statements in the autopsy report primarily intending to establish some facts or opinions with the

understanding that they may be used in a criminal prosecution. As the *Jaramillo* court noted:

> [I]n New Mexico, any sudden, violent, or untimely death, the cause of which is unknown, must be reported to law enforcement. NMSA 1978, § 24-11-5 (1975). Medical examiners are obligated by statute to report their findings directly to the district attorney in all cases they have investigated. NMSA 1978, § 24-11-8 (1973). This forensic role is entirely in keeping with the medical examiner's purpose to "serve the criminal justice system as medical detectives by identifying and documenting pathologic findings in suspicious or violent deaths and testifying in courts as expert medical witnesses."

Id. ¶ 13 (quoting *Strengthening Forensic Science in the United States: A Path Forward* 244 (Nat'l Research Council of the Nat'l Acads. 2009)). These same statutory sections, NMSA 1978, §§ 24-11-5 (1975), -7 (1973), and -8 (1973), would apply here because this case involved a violent death by shooting in New Mexico, which would ordinarily raise suspicion that the death was caused by a criminal act. A medical examiner obligated to report her findings to the district attorney should know that her statements may be used in future criminal litigation. As the *Jaramillo* court observed:

> There is no reason to suspect that a pathologist with considerable experience and knowledge of statutory duties to report suspicious deaths to law enforcement officers

> would not anticipate criminal litigation to result from his determination that the trauma-related death of a child was the result of homicide. . . . [R]uling the death a homicide reflects directly on the issue of a defendant's guilt or innocence. No question existed that the report would support and be used in a criminal prosecution.

Id. ¶ 11.

{17} Similarly, there is no reason that Dr. Dudley, aware of her statutory duties to report, should not have anticipated that criminal litigation would result from her autopsy findings of death by a bullet wound and her findings regarding soot, stippling, and gunpowder. As Dr. Zumwalt explained, the Office of the Medical Investigator's primary duties "are to examine those individuals in New Mexico who die suddenly and unexpectedly or who die of an injury in order to determine the cause of death . . . and give an opinion as to the manner of death. . . ." Thus, these statutory sections apply as a general matter to cases within the Office of the Medical Investigator. Because Dr. Zumwalt conceded that it was immediately clear that this autopsy was part of a homicide investigation, the observations in *Jaramillo* apply with equal force here. As in *Jaramillo,* the medical examiner's findings as to the cause of death and as to soot, stippling, and gunpowder all went to the issues of whether Reynaldo's death was a homicide and, if so, who shot him. These issues reflected directly on Navarette's

guilt or innocence. Thus, as in *Jaramillo,* these statements are testimonial.

{18} Moreover, our conclusion is bolstered by *Bullcoming,* ___ U.S. at ___, 131 S. Ct. at 2705. The *Bullcoming* majority made clear that "[a] document created solely for an 'evidentiary purpose' . . . made in aid of a police investigation, ranks as testimonial." *Id.* at 2717. Because an autopsy conducted in the context of a death caused by this type of injury will automatically trigger a duty by medical examiners to report their findings to the district attorney, *see* § 24-11-8, we conclude that autopsy reports regarding individuals who suffered a violent death are testimonial. As indicated by the fourth and fifth principles, it does not matter that the autopsy report does not target a specific person or that the autopsy report does not produce inherently inculpatory evidence. *See* discussion, ¶¶ 10-11, *supra.* The observations, findings, and opinions within the report are statements that were made when the pathologist understood that the statements might be used in a criminal prosecution.

{19} However, the Court of Appeals in *Jaramillo* carefully emphasized that it was the admission of the autopsy report itself that violated the Confrontation Clause. *See Jaramillo,* 2012-NMCA-029, ¶¶ 6-14. The court noted that "[b]ecause admission of the autopsy report alone constituted prejudicial error mandating reversal, we need not address Defendant's argument regarding Dr. Parsons' [reference to the report]." *Id.* ¶ 6. In this case, the autopsy report was not admitted into evidence. Thus, the issue here is whether an

expert can relate out-of-court statements to the jury that provide the basis for his or her opinion, as long as the written statements themselves are not introduced. This question was answered by the United States Supreme Court in *Williams*. We note that the *Jaramillo* opinion was issued on November 23, 2011, and *Williams* was not decided until June 18, 2012. Therefore, the Court of Appeals did not have the benefit of the fractured *Williams* opinion at the time it wrote *Jaramillo*. However, prescient of how a majority of the United States Supreme Court might rule on the issue, the Court of Appeals held that the autopsy report in *Jaramillo* could not be introduced even under Rule 11-703 NMRA, which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the

> expert's opinion substantially outweighs their prejudicial effect.[2]

(quoted in *Jaramillo,* 2012-NMCA-029, ¶ 18 (internal quotation marks omitted)).

{20} Although our evidentiary rule permits the disclosure of inadmissible evidence if a court specifically determines that the probative value of the inadmissible evidence in assisting the jury to evaluate the expert's opinion substantially outweighs their [sic] prejudicial effect, a majority of the United States Supreme Court rejects this approach. In *Williams,* Justice Thomas addressed this issue by stating:

> Of course, some courts may determine that hearsay of this sort is not substantially more probative than prejudicial and therefore should not be disclosed under Rule 703. But that balancing test is no substitute for a constitutional provision that has already struck the balance in favor of the accused. *See Crawford,* 541 U.S., at 61, 124 S.Ct. 1354 ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination").

Williams, ___ U.S. at ___, 132 S. Ct. at 2259 (Thomas, J., concurring in the judgment). Writing for four

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[2] Effective June 16, 2012, the language of Rule 11-703 has been amended to be consistent with the restyled Federal Rules of Evidence. The changes are stylistic and have no effect on the substance of the rule. Rule 11-703 cmt.

justices, Justice Kagan rejected the approach as a subterfuge.

> Imagine for a moment a poorly trained, incompetent, or dishonest laboratory analyst. (The analyst in *Bullcoming,* placed on unpaid leave for unknown reasons, might qualify.) Under our precedents, the prosecutor cannot avoid exposing that analyst to cross-examination simply by introducing his report. Nor can the prosecutor escape that fate by offering the results through the testimony of another analyst from the laboratory. But under the plurality's approach, the prosecutor could choose the analyst-witness of his dreams (as the judge here said, "the best DNA witness I have ever heard"), offer her as an expert (she knows nothing about the test, but boasts impressive degrees), and have her provide testimony identical to the best the actual tester might have given ("the DNA extracted from the vaginal swabs matched Sandy Williams's") – all so long as a state evidence rule says that the purpose of the testimony is to enable the factfinder to assess the expert opinion's basis. (And this tactic would not be confined to cases involving scientific evidence. As Justice THOMAS points out, the prosecutor could similarly substitute experts for all kinds of people making out-of-court statements.) The plurality thus would countenance the Constitution's circumvention. If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it

> in through the back. What a neat trick – but really, what a way to run a criminal justice system. No wonder five Justices reject it.

Id. at ___, 132 S. Ct. at 2272 (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.).

{21} The record in this case does not reveal that the trial court was ever asked to perform the Rule 11-703 balancing test. Given the viewpoint of a majority of the United States Supreme Court, the Confrontation Clause analysis makes any Rule 11-703 analysis irrelevant in this case. Additionally, in this case, the importance of a bright-line constitutional rule that requires the out-of-court declarant to be subjected to cross-examination is readily apparent. Dr. Zumwalt testified that evidence of soot, stippling, or gunpowder cannot always be easily seen by the naked eye and often ends up on the clothing, rather than the skin, and therefore autopsy photographs of the body would not necessarily capture such evidence. Consequently, in material respects, the autopsy findings do not involve objective markers that any third party can examine in order to express an independent opinion as to the existence or non-existence of soot or stippling. Such observations are not based on any scientific technique that produces raw data, but depend entirely on the subjective interpretation of the observer, who in this case was Dr. Dudley. How Dr. Dudley reached the conclusion that there was no evidence of soot or stippling on Reynaldo's body or clothing should have been the subject of cross-examination.

Inquiry into her training, the equipment used to arrive at her subjective conclusion, whether the evidence of soot or stippling might have been masked by blood, or any other variables that would influence her decision should have been tested in the crucible of cross-examination. "[T]he analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'" *Bullcoming,* 131 S. Ct. at 2715 (quoting *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 319 n.6 (2009)).

{22} This is not to say that all material contained within an autopsy file is testimonial and therefore inadmissible. Without attempting to catalogue all material in a file that could be admissible, we note that an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause. *See Aragon,* 2010-NMSC-008, ¶¶ 26-30 (confrontation case framing the question presented as whether the testifying analyst was testifying to his own opinion or merely parroting the opinion of the analyst who performed the forensic analysis and noting that the testifying analyst had not analyzed the raw data to reach his conclusion). For example, in this case, after being shown the autopsy photographs, Dr. Zumwalt expressed his own opinion about the entry and exit wounds, explaining the basis for his opinion. He did not simply parrot the opinion or subjective statement of the pathologist who performed the autopsy and

took the photographs. Thus, he was available for cross-examination.

{23} Because Dr. Zumwalt related testimonial hearsay from Dr. Dudley to the jury, and it was not established that Dr. Dudley was unavailable and Navarette had a prior opportunity to cross-examine Dr. Dudley, Navarette's confrontation rights were violated. We therefore reverse his convictions and remand for a new trial consistent with this opinion.

Navarette's Remaining Issues Are Without Merit

{24} Pursuant to *State v. Franklin,* 78 N.M. 127, 129, 428 P.2d 982, 984 (1967) and *State v. Boyer,* 103 N.M. 655, 658, 715 P.2d 1, 4 (Ct. App. 1985), Navarette contends that the trial court abused its discretion by admitting the testimony of Ricky Ornelas, a witness to the crime, who testified that Navarette had threatened Ricky with a pistol several months before the shooting. The State had served notice of its intention to introduce the evidence before trial pursuant to Rule 11-403 NMRA. After hearing argument of counsel during a pretrial hearing, the trial court reserved ruling on the issue until the evidence was offered at trial. At the time that the testimony was offered, Navarette did not object to the testimony. Because we reverse and remand for a new trial, we do not need to address this issue.

{25} Navarette also argues that the trial court erred in failing to quash the indictment because he received a target letter describing the charges against him

written in English and he speaks only limited English. He raises this challenge pursuant to Article II, Section 14 of the New Mexico Constitution, which guarantees a defendant the right "to have [criminal] charge[s] and testimony interpreted to him in a language that he understands . . . ." To support a motion to quash an indictment based on improper notice, the defendant must demonstrate prejudice. *State v. Haynes,* 2000-NMCA-060, ¶ 25, 129 N.M. 304, 6 P.3d 1026. Navarette has not asserted that he was prejudiced, much less demonstrated any prejudice. The evidence before the trial court was that Navarette had been interviewed by police officers for over one hour in English and had also answered all of the arraigning judge's questions in English. We therefore conclude that the trial court did not err in denying Navarette's motion to quash the indictment.

{26} Finally, Navarette argues under *Franklin* and *Boyer* that he was deprived of the right to present witnesses in his defense under the Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution. *Boyer,* 103 N.M. at 658, 715 P.2d at 4; *Franklin,* 78 N.M. at 129, 428 P.2d at 984. Article II, Section 14 of the New Mexico Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right . . . to have compulsory process to compel the attendance of necessary witnesses in his behalf . . . ." Similarly, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to

have compulsory process for obtaining witnesses in his favor . . . ." U.S. Const. amend. VI.

{27} As the source of the violation, Navarette asserts that he was not able to call Officer Ted Shoemaker as a witness because Officer Shoemaker was ill and unable to testify. Despite his protests, Navarette and the State stipulated to the substance of Officer Shoemaker's testimony or rather, the testimony he would have given had he been able to testify, and the substance of that stipulation was presented to the jury. The parties stipulated that Officer Shoemaker was near the scene at the time of the shooting, that he heard four gunshots before being dispatched to the scene, and that he was the second officer to arrive on the scene. Therefore, Navarette has no reason to complain. In any event, this case is remanded for a new trial, in which case Navarette may consider whether to call Officer Shoemaker as a witness.

CONCLUSION

{28} Because the forensic pathologist related testimonial hearsay to the jury in support of his opinions, Navarette's confrontation rights were violated. We reverse his convictions and remand for a new trial.

{29} **IT IS SO ORDERED.**

/s/ Edward L. Chávez
EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

/s/ Petra Jimenez Maes
PETRA JIMENEZ MAES,
Chief Justice

/s/ Richard C. Bosson
RICHARD C. BOSSON,
Justice

/s/ Charles W. Daniels
CHARLES W. DANIELS,
Justice

/s/ Barbara J. Vigil
BARBARA J. VIGIL,
Justice

IN THE NINTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO, COUNTY OF ROOSEVELT

STATE OF NEW MEXICO,

Plaintiff,

vs. No. D-0911-CR-200900122

ARNOLDO NAVARETTE

Defendant.

D.O.B. [1970]]
SS#: [redacted]
STN: Not Available

JUDGMENT, SENTENCE AND COMMITMENT

(Filed Jan. 14, 2011)

THIS MATTER coming on for hearing on December 17, 2010, before the Honorable Teddy L. Hartley, District Judge, Plaintiff appearing by Donna J. Mowrer, Deputy District Attorney, and Defendant appearing personally and by his attorney, W. Gilbert Bryan, the Defendant having been convicted on September 30, 2010 pursuant to a Jury Verdict of Guilty and recorded by the Court of the following crime(s): Count 1-Murder in the first degree (willful & deliberate), (0001), a capital offense, contrary to § 30-2-1(A)(1), NMSA 1978, Count 2-Aggravated battery (deadly weapon), (0070), a third degree felony contrary to §30-3-5(A)&(c), NMSA 1978.

Defendant is hereby found and adjudged guilty and convicted of said crime(s), and is sentenced to be imprisoned by the Department of Corrections for a Life Term as to Count 1 and for a term of three (3) years as to Count 2. Count 2 shall run consecutively to Count 1.

Defendant is hereby granted pre-sentence confinement credit of five hundred forty seven (547) [June 18, 2009 to December 17, 2010] days against said sentence and will receive post-sentence confinement until delivery to the Department of Corrections.

Defendant will pay a $100 DNA fee and submit a biological specimen, pursuant to § 29-16-1 et. seq., NMSA, 1978. Defendant will pay restitution as determined appropriate by the Department of Corrections pursuant to § 31-17-1, NMSA 1978.

That upon completion of service of the sentence provided herein, the Defendant shall be released under parole supervision as to Count 1 in accordance with § 31-21-10, NMSA 1978. As to Count 2 – Defendant shall be released under parole for a period of two (2) years subject to the statutory provisions relating to condition, supervision and return of parolees.

Therefore, You, the Sheriff of Roosevelt County, are hereby commanded to take Defendant in custody and deliver Arnoldo Navarette, together with this commitment, to the Department of Corrections, which is hereby commanded to receive and confine him for the above term.

The Court hereby sets an appeal bond in the amount of $100,000 cash only, although pursuant to § 31-11-1(B), Defendant will not be eligible for release pending appeal.

IT IS SO ORDERED.

/s/ Teddy L. Hartley
HONORABLE TEDDY L. HARTLEY
DISTRICT JUDGE

HAVE SEEN:

/s/ Donna J. Mowrer
DONNA J. MOWRER
DEPUTY DISTRICT ATTORNEY

/s/ W. Gilbert Bryan
W. GILBERT BRYAN
ATTORNEY FOR THE DEFENDANT