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ISSUES TO DEVELOP AT TRIAL

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We hope all are healthy and safe. As trials slowly resume, we bring to your attention an issue that has seen some interesting action in the federal courts in the past few months – whether autopsy reports are testimonial such that admission of the report into evidence and testimony by a surrogate when the examining pathologist is unavailable violates an accused's right to confrontation under the Sixth Amendment.

New York State law on this issue is squarely against us at present, holding that autopsy reports are not testimonial and surrogates can thus testify. ***But that is all the more reason to object when neither the examining pathologist nor anyone who participated in the autopsy is produced to testify.*** *That is the only way the issue will get up to the New York Court of Appeals, where we can argue that the Court must reverse its position, and the only way to take the issue into federal court, as was done recently and successfully in People v. Garlick. And the sad truth is that if the U.S. Supreme Court expressly decides that autopsy reports are testimonial — which we believe it would based on its more recent Confrontation Clause caselaw involving forensic reports — the fact that New York law held otherwise will not excuse your lack of preservation. This was a hard lesson learned following the 2018 Supreme Court Carpenter decision, which imposed (contrary to New York law) a warrant requirement for the acquisition of cell site location data. The message from the appellate courts has been loud and clear:* ***No matter how futile the objection would have been, object you must.***

Background

This is a thorny area, but here are the basics.

The Confrontation Clause bars the admission of "testimonial" statements at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36 (2004). Since Crawford, courts have grappled with whether certain statements or categories of statements are "testimonial" or not. If they are, then the evidence is inadmissible unless the defense can cross-examine the maker. If they aren't, then the defense is stuck with inadequate confrontation - cross-examination of a surrogate witness who cannot speak fully to the circumstances of the statement's creation or the underlying information it contains.

Back in 2008, the New York Court of Appeals, in People v. Freycinet, 11 N.Y.3d 38, held that autopsy reports created as part of a criminal investigation are not testimonial and therefore that the autopsy report was admissible at trial even though the pathologist who conducted the autopsy and prepared the report was not available for trial. A surrogate witness, a different medical

examiner who had not participated in the autopsy, could offer expert opinions based on the facts in the report. The Court reached its conclusion by considering several factors: (1) OCME was independent and not controlled by the prosecutor or a law enforcement agency; (2) the report was a contemporaneous record of objective facts; (3) no pro-law-enforcement bias was likely to influence the contents; and (4) the report did not directly link the defendant to the crime.

Since then, Supreme Court caselaw (Melendez-Diaz v. Massachusetts and Bullcoming v. New Mexico) has specifically rejected each of the Freycinet factors as having any constitutional relevance, but the Court of Appeals has not reconsidered its opinion and the Appellate Division, First Department has continued to rely on Freycinet, holding summarily that the Supreme Court has not decided that autopsy reports are testimonial. People v. Hall, 84 A.D.3d 79 (1st Dep't 2011); People v. Acevedo, 112 A.D.3d 454 (1st Dep't 2013); People v. Garlick, 144 A.D.3d 605 (1st Dep't 2016), habeas granted, 2020 WL WL 2854268 (June 2, 2020), appeal pending in Second Circuit.

Don't be deterred by this bleak landscape. The New York Court of Appeals is wrong, and the day of reckoning will come. Your client shouldn't be inculpated by evidence about cause and manner of death when the pathologist who created the report containing those facts cannot be cross-examined. **Remember, you don't have to win the argument (you won't) but by making a record, you'll help us change the law.**

Framing Your Objection

Object, **citing the Sixth Amendment, the Confrontation Clause, and Crawford**, if the prosecution seeks to admit an autopsy report where the original pathologist is unavailable and the surrogate witness was not present at the autopsy. **If that's all you say, you've preserved the issue, but even better if you can elaborate:**

- State that an autopsy report is a testimonial statement under Melendez-Diaz and Bullcoming, which dealt with analogous forensic reports and found them testimonial ("certificates of analysis" that a substance was cocaine, and a blood alcohol lab report respectively).

- State that Freycinet and the Appellate Division caselaw that followed it considered factors (the independence of the OCME and the reliability of the information) that do not represent the Supreme Court's modern Confrontation Clause precedent as reflected in Melendez-Diaz and Bullcoming.

    - Like the forensic reports in those cases, an autopsy report is a solemn declaration made for the purpose of establishing or proving some fact (cause of death); an autopsy report is the functional equivalent of in-court testimony; and a reasonable pathologist would expect the findings to be used prosecutorially. The independence of the OCME and whether the information in the report can be considered reliable because it's contemporaneous and unbiased is not part of the Confrontation analysis.

- to the extent possible, marshal evidence to show that the report was inculpatory of your client (had law enforcement homed in on your client by that point?). (Although Melendez-Diaz squarely rejected any reliance on the fact that the forensic report did not pinpoint a particular person as the culprit, it will be helpful for your argument if it did).

- Specifically object to the surrogate testimony as inadmissible because it derives from an inadmissible report and does not provide a fair enough opportunity for cross-examination. Surrogate testimony was specifically rejected in Bullcoming for that reason. If the DA tries to argue that the report is not being offered for its truth but is merely serving as the "basis" for surrogate testimony, cite People v. Goldstein, 6 N.Y.3d 119 (2005), and the five votes in Williams v. Illinois, 567 U.S. 50 (2012) (dealing with a DNA report), which rejected this illogical argument.

Shout-out of the month

Shout-outs to Michael Beatrice, Esq. for preserving the autopsy issue at trial in People v. Garlick, and to CAL's Matthew Bova for picking up the baton and winning the issue on habeas!

*** UPDATE ***

In our April 2019 issue, we suggested a challenge to the standard CJI Interested Witness Charge. We proposed that the CJI charge undermined your client's due process rights and the presumption of innocence. A Second Circuit case recently agreed. In United States v. Solano, 966 F.3d 184 (2d Cir. 2020), the Court found plain error in a charge that advised the jury that a witness's interest in the outcome creates "a motive" to "testify falsely" and that if it found that "any witness" whose testimony was being considered "may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care."

The Court held the charge contrary to the presumption of innocence, and prejudicial where the case was a credibility contest.

As pointed out in our April 2019 issue, the standard CJI charge likewise allows the jury to conclude that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely, even if it doesn't use the specific phrase "motive to testify falsely." The import is clear.

Add this case to your arsenal when you make this objection.