F22 "You Have the Right to Remain Silent": Autopsy Reports and a Defendant's Sixth Amendment Confrontation Rights

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After attending this presentation, attendees will understand the limitations of out-of-state subpoenas, the requirements of the Confrontation and Compulsory Process Clauses, and the process expert witnesses may wish to follow in the event of responding to subpoenas.

This presentation will impact the forensic science community by educating expert witnesses on the availability of legal measures to respond to out-of-state judicial decrees.

A forensic pathologist, who has practiced for 30 years, receives a subpoena from another state requesting court appearance with five days' notice on a 20-year-old homicide case in the location of his/her previous employment. The forensic pathologist declines to appear. In another instance, a prosecutor orders an exhumation on a 30-year-old homicide case to re-examine a gunshot wound on the skeletonized body due to the fact that the original pathologist who performed the autopsy has died.

Over the course of a career, forensic pathologists perform thousands of autopsies. Forensic pathologists serve as expert witnesses and regularly receive subpoenas to testify before fact finders. In some instances in which the original pathologist, who performed the autopsy and authored the report, is unavailable due to death or distance, another forensic pathologist will frequently testify before the court. Is the autopsy report considered a business record and can be admitted without testimony of the author, or is the autopsy report to be considered simply as a testimonial, which triggers a defendant's Sixth Amendment Confrontation Clause rights and provides the defendant in a criminal case the right to confront the witnesses testifying against the defendant? Does the forensic pathologist possess rights within the Compulsory Process Clause? Can the pathologist be compelled to testify in an out-of-state trial?

In *Crawford v Washington*, the United States Supreme Court held that admission of out-of-court statements of witnesses who do not appear at trial is prohibited by the Confrontation Clause if the statements are testimonial unless witnesses are unavailable and the defendant has had the prior opportunity to cross-examine the witnesses.[1] The United States Supreme Court did not define the word "testimonial" but stated in general terms that the primary class of statements implicated by the Confrontation Clause includes statements made under circumstances leading an objective witness reasonably to believe that statement would be available for use at a later trial.[2]

In *Williams v Illinois*, a majority of United States Supreme Court justices held expert witness testimony on a DNA profile produced by an outside laboratory from a rape victim's vaginal swabs matching the defendant's DNA profile produced by a state police laboratory from the defendant's blood sample did not violate a defendant's right to confrontation.[3,4] The DNA report itself was not admitted into evidence and was not shown to the fact finder. The expert witness also did not quote or read from the report or identify the report as the source of any of her opinions. Four of the five justices reasoned that the statements in the DNA report were non-testimonial because, first, the out-of-court statements were related by the expert solely for the purpose of explaining the assumptions on which the expert's opinion relied and were not offered for their truth. Secondly, even if the DNA report had been admitted

into evidence, it was not a testimonial document because it was not prepared for "the primary purpose of accusing a targeted individual," which distinguished this report from the forensic reports in cases of *Melendez-Diaz* and *Bullcoming*. The United States Supreme Court delayed "for another day any effort to spell out a comprehensive definition of 'testimonial." States are divided on this issue.

The Rhode Island Supreme Court and other state courts have adopted the Federal Rules of Evidence FRE 803(6) that identifies the autopsy report as having special attributes and qualifies as a business record rather than simply a testimonial. This allows the autopsy report to be received in evidence regardless of the absence of the pathologist who performed the autopsy and authored the original report.[5]

In addition, most states provide legislation directing subpoenas and other out-of-state judicial requests to be initially submitted to the district or county court of the expert's residence.[6] In this way, the expert has the ability to file a motion to quash and to act upon the request through a local court. The expert has no requirement to recognize or respond to a decree rendered outside of his or her state and without following the required procedure.

Expert witnesses are mobile, frangible, and in limited supply. Laws and rules of court should facilitate the admission of evidence and expert testimony while balancing the need to comply with the Confrontation Clause and respecting the availability of expert witnesses.[7]

Reference(s):

1. *Crawford v. Washington*, 541 U.S. 36 (2004).
2. Sarah Clifton. Confronting the Coroner: The Admissibility of Autopsy Reports Post-Melendez-Diaz. *Federal Criminal Defense Journal*, Vol.III (2010); 1-26.
3. *Williams v. Illinois*, 132 S. Ct. 2221 (2012).
4. Ronald Coleman, Paul Rothstein. "Williams v. Illinois and the Confrontation Clause: does Testimony by a Surrogate Witness Violate the Confrontation Clause?" *PublicSquare.net.* (Dec. 6, 2011*).* http://publicsquare.net/williams-v-illinois-and-the-confrontation clause-part-I.
5. *Federal Rules of Evidence FRE 803(6).*
6. *Michigan Complied Laws Act 236 of 1961 Section 600.1852(2).*
7. Daniel Capra and Joseph Tartakovsky, " Autopsy Reports and the Confrontation Clause: A Presumption of Admissibility. 2 V.C.J.L. 62 (2014).

Confrontation Clause, Compulsory Process Clause, Sixth Amendment