IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	**:**	**SUPREME COURT**
	:	
vs.	**:**	**40 EAP and 41 EAP, 2016**
DARNELL BROWN,	**:**	
Appellant (No. 41)	**:**	

REPLY BRIEF FOR APPELLANT IN 41 EAP 2016
AND BRIEF FOR APPELLEE IN 40 EAP 2016

This is an Appeal from the Order of Judgment of the Superior Court of Pennsylvania dated May 10, 2016, on docket 1165 EDA 2015, which affirmed the Judgment of Sentence Rendered By The Honorable Scott O'Keefe on March 26, 2015, on CP-51-CR-0003322-2013, Commonwealth Application for Reargument Denied July 13, 2016.

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SUMMARY OF ARGUMENT

Darnell Brown was convicted in part on testimony from a medical examiner who neither conducted nor observed the autopsy but instead relied largely upon a written report prepared by a different forensic pathologist. That report was critical to the testifying expert's presentation, and was explicitly referenced throughout the testimony before being moved into evidence as part of the trial record. Brown never had the opportunity to confront the witness against him, the original pathologist.

In his initial Brief Brown showed that pursuant to this Court's Confrontation Clause requirements the initial report constituted "testimonial" hearsay and its direct use was prohibited. He then demonstrated that Pa.R.Evid. 703 does not permit indirect use of testimonial hearsay to support a testifying expert's conclusion(s).

It is the apparent position of the Commonwealth that *no* autopsy report, regardless of the -circumstance, is testimonial hearsay. This extreme stance is contrary to settled law, which examines the context in which a report is created. A blood draw at a hospital as a precursor to surgery will not generate a testimonial hearsay report; whereas a blood draw at the behest of police as they investigate a crime will. The failure to acknowledge context undercuts the prosecution analysis.

This is particularly true in the case at hand. The Medical Examiner of Philadelphia, which prepared the report at issue, self-describes as providing "forensic investigation" services to "[d]etermine[] whether or not a death comes under the jurisdiction of the Medical Examiner and investigat[e] the circumstances surrounding the death[]."[1] That purpose brings resulting reports

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[1] http://www.phila.gov/health/medicalexaminer/index.html (Last visited May 24, 2017).

squarely within the Confrontation guarantee.

The instant Reply Brief[2] shows that none of the legal arguments raised by the Commonwealth has merit. The Commonwealth mangles the test for whether a document is testimonial, contending that reports that are "statutorily required" cannot be testimonial[3]; that only reports created "solely" for use at trial are testimonial[4]; and that reports that are not intended to target a particular individual can never be testimonial.[5] The Commonwealth further errs by treating a concurring opinion of Justice Sotomayor, one effectively superceded by that same Justice, as a governing principle; and this error of exalting non-precedential assertions recurs when the Commonwealth seeks to apply the plurality holding in Williams v. Illinois, 132 S. Ct. 2221, 2257, 183 L. Ed. 2d 89, 130, (U.S. 2012) as controlling.

The Commonwealth fares no better in its attempt to justify use of Rule 703 in the case at bar. First, its claim of waiver is unfathomable, as Rule 703 was never an issue in the trial court and was raised by the Superior Court *sua sponte*. On the merits, the Commonwealth argument has no strength, as it never grapples with the interplay between Rule 703 and *testimonial* hearsay, *i.e.*, that for the inadmissible hearsay to have evidentiary value under Rule 703 it must be treated as true, a condition that violates the Confrontation guarantee. Nowhere does the Commonwealth acknowledge

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[2] Technically this Brief is the Reply Brief in No. 41, in which Brown is Appellant, and the Brief for Appellee in No. 40, in which the Commonwealth is Appellant. Because Brown addressed the three questions on which allowance of appeal was granted in his initial Brief, he proceeds in the fashion of a Reply.

[3] Commonwealth Brief, 15, 22.

[4] *Id.*, 19.

[5] *Id.*

that a majority of the Court in Williams - the concurrence and the dissent - accepted this position.

Two final points need to be made here. First, the claim that any error was harmless is belied by the record, as the testifying expert relied directly on the report to support the Commonwealth theory of the case. Second, and fundamental, the Commonwealth deviates from the principles set forth by this Court in Commonwealth v. Yohe, 79 A.3d 520, 537 (Pa. 2013) that a report is testimonial when it is the functional equivalent of live, in court testimony; it was made under circumstances that would lead its author to be aware it might be used in court; and it has an evidentiary purpose.

When a bullet-riddled body is brought by police to the Office of the Medical Examiner, in a jurisdictions where there are hundreds of homicides per year, the person conducting the autopsy knows that the resulting report may be used in court and writes one that is the functional equivalent of live testimony. Regardless of whether some autopsy reports might not meet such conditions, the one prepared in the instant case did, and its use deprived Mr. Brown of the right to confront adverse witnesses.

ARGUMENT

1. THE COMMONWEALTH ERRS IN CLAIMING THAT THE AUTOPSY REPORT IN THE CASE AT HAND IS NOT TESTIMONIAL HEARSAY.

Pennsylvania law is clear as to *the* purpose of an autopsy. "*The* purpose of the investigation shall be to determine the cause of any such death and to determine whether or not there is sufficient reason for the coroner to believe that any such death may have resulted from criminal acts or criminal neglect of persons other than the deceased." 16 P.S. §1237 (emphasis added). And when the answer is "yes," an autopsy report is generated.

Notwithstanding this mandate and the requisites of Confrontation law, the Commonwealth maintains that no autopsy can create a testimonial hearsay report. This ignores context and the examiner's knowledge and intent, both core to the Confrontation analysis.

It is in responding to the statutory mandate that the Commonwealth makes its first analytical error. It artificially divides §1237 into a primary purpose - determining the cause of death - and then "secondarily" to assess whether criminality may be involved. Brief[6] for Commonwealth, 24. There is no basis in grammar or law for this artificial division and ranking of what is a unified purpose.

The Commonwealth errs further in not acknowledging that this forensic/testimonial purpose is explicit on the website of the Medical Examiner Office of Philadelphia:

> The Medical Examiner's Office (MEO) has a unique and highly specialized mission: to provide comprehensive death investigation to Philadelphia residents.

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[6] Because both Brown and the Commonwealth are at once Appellant and Appellee, he will refer to the initial Brief filed by the Commonwealth as "Brief for Commonwealth."

> The Philadelphia MEO consists of several specialized units, each of which contributes specific information to each case. The pathologists then assemble all of the information to determine the cause and manner of death for each case.
>
> Services
>
> > Forensic Investigation - Determines whether or not a death comes under the jurisdiction of the Medical Examiner and investigating the circumstances surrounding the deaths.[7]

This is not the only error the Commonwealth makes.

The Commonwealth's next error is to contend, twice, that documents must be created "solely" for use in court in order to be testimonial. Brief for Commonwealth, 15, 22. The error flows from the Commonwealth's reading of cases where reports did have that sole purpose and were described as such. Brief for Commonwealth, 18 (discussing Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)). That some reports are prepared solely for prosecutorial use does not mean that only such reports meet the threshold for being testimonial. No court has so held.

That the medical examiner is "required" to produce a report, another point emphasized by the Commonwealth, Brief for Commonwealth, 15, is equally of no import. The same condition, that a report was "required," existed in Massachusetts and resulted in the report deemed testimonial in Melendez-Diaz.[8]

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[7] http://www.phila.gov/health/medicalexaminer/index.html

[8] The Massachusetts statute at issue in Melendiz-Diaz provides as follows:

> a) The department shall, free of charge, or the University of Massachusetts Medical School shall, under HYPERLINK \l "section 36B of chapter 75, make a chemical analysis of any narcotic drug, any synthetic substitute for the same, any preparation containing the same, or any salt or compound thereof, and of any

The primary purpose of a medical examiner's report in a violent crime death is that of gathering information about a past event for use or potential use in a criminal investigation and trial. While the issue of whether a death was caused by another person is a data point for vital health statistics,[9] the *details* of an autopsy - the presence or absence of stippling or powder burns; the angle of entry; the location of wounds and the path/trajectory of bullets - are relevant primarily if not exclusively to a criminal investigation. Thus, the detailed examination and resulting record serve the "purpose of...establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution[.]" Michigan v. Bryant, 562 U.S. 344, 366, 131 S. Ct. 1143, 1160 (2011)(internal quotation and citation omitted).

Yet even if there were a claim that the detailed autopsy report generated here has two or more

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> poison, drug, medicine or chemical submitted to it by police authorities, as the department shall approve for this purpose; provided, however, that neither the department nor the medical school shall conduct such analysis unless it is satisfied that the analysis submitted to it is to be used in connection with the enforcement of law.
>
> (b) A certificate by a chemist or analyst or other designated employee of the department or of the University of Massachusetts medical school of the result of the chemist's or analyst's or other designated employee's analysis, signed and sworn to by that chemist or analyst or other designated employee, shall be prima facie evidence of the composition, quality and, when appropriate, net weight of the substance or any mixture containing the substance.

Mass. Ann. Laws ch. 22C, § 39 (LexisNexis, Lexis Advance through Act 13 of the 2017 Legislative Session)

[9] *See, e.g.*, Pennsylvania and County Health Profiles, 5 (tabulating various causes of death including "assault(homicide)"), http://www.statistics.health.pa.gov/HealthStatistics/VitalStatistics/CountyHealthProfiles/Documents/County_Health_Profiles_2015.pdf (last visited May 24, 2017).

equal purposes, one for criminal investigation and another or others for public health policy, the report itself remains testimonial hearsay.

The Commonwealth fails in its attempt to argue that a statement with two co-equal "primary" purposes is not a testimonial one when one of those purposes is to create the equivalent of testimony detailing a past criminal episode or some aspect of the same. The definition of "primary," set forth in Brown's initial Brief, does not connote a single, greater-than-all-other, category; rather, as illustrated by a simple internet search, it means top-ranked *and* may have multiple objectives. Thus, for example, dictionary.com defines "primary" as "first or highest in rank or importance; chief; principal" and immediately illustrates this with the phrase "his primary goals in life." http://www.dictionary.com/browse/primary (Last visited May 24, emphasis added).

That the word "primary" is not limited to a singular object is confirmed by the use of that term in decisional law, as used by the United States Supreme Court, *see, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 708, 128 S. Ct. 2783, 2862 (2008)("Regardless, to consider the military-training objective a modern counterpart to a similar militia-related colonial objective and to treat that objective as falling within the Amendment's primary purposes makes no difference here")(Stevens, J., dissenting; emphasis added) and by this Court. W. Phila. Achievement Charter Elem. Sch. v. Sch. Dist. of Phila., 132 A.3d 957, 964 (Pa. 2016) (Another category of cases in which delegation has been challenged involves the legislative establishment of primary objectives or standards and the entrustment to another entity to "fill up the details under the general [legislative] provisions[.]" Indeed, the Commonwealth has used the word "primary" in this Court to refer to multiple rather than single grounds. Commonwealth v. Wallace, 626 Pa. 362, 372, 97 A.3d 310, 316 (2014) ("Second, the Commonwealth contends that the primary purposes behind the law of expungment have little

application in a prison setting.")(emphasis added).

The Commonwealth makes too much of a one-Justice concurring opinion, that of Justice Sotomayor in Bullcoming v. New Mexico, 564 U.S. 647, 672, 131 S. Ct. 2705, 2722 (2011) where she wrote that "this is not a case in which the State suggested an alternative purpose, much less an alternative primary purpose, for the BAC report." Beyond being a rumination regarding what was *not* in the case, the words lose any import when measured against her vote with the dissent in Williams v. Illinois, 567 U.S. 50, 121, 132 S. Ct. 2221, 2266 (2012) where she joined in and therefore approved of the following tests for forensic reports, agreeing that they "fell within the Clause's core class of testimonial statements because they had a clear evidentiary purpose [as they] were made under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial." *Id.*, Kagan, J. Dissenting (internal quotations and citation omitted).

More importantly, that position is at odds with the rationale of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004) and its progeny. The Confrontation right ensures that any hearsay developed in a fashion akin to the formal presentation of testimony warrants presence and cross-examination as predicates for admissibility. The Confrontation guarantee "applies to witnesses against the accused--in other words, those who bear testimony. Testimony, in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford v. Washington, 541 U.S. at 51, 124 S. Ct. at 1364 (internal quotations omitted).

When a person objectively should know - and medical examiners do know - that a report being generated is a core part of the prosecution arsenal, it matters not from a constitutional perspective that the report writer is also fulfilling some additional function(s). He/she is preparing

'witnessing' information and as such is subject to Confrontation requirements. This is inherent in this Court's explanation of when and why forensic reports are testimonial: "the report was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[;] and it "was plainly created for an 'evidentiary purpose.'" Commonwealth v. Yohe, 79 A.3d at 537.

The Commonwealth's final error regarding whether the autopsy report used and admitted into evidence against Mr. Brown comes from its reliance on the plurality Opinion Announcing Judgment of the Court in Williams, *supra*. Brief for Commonwealth, 28 (arguing that because an autopsy report did not target a particular individual it cannot be testimonial). Omitted from the Commonwealth Brief is any acknowledgment that five of the nine members of the Court expressly repudiated this position. Justice Thomas did so in his concurrence;[10] so too did Justice Kagan's dissent, which commanded four votes.[11] As such, it has no precedential value and should not be

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[10] The new test first requires that an out-of-court statement be made "for the purpose of proving the guilt of a particular criminal defendant." Ante, at 84, 183 L. Ed. 2d, at 115 (emphasis added). Under this formulation, statements made "before any suspect was identified" are beyond the scope of the Confrontation Clause. See ante, at 58, 183 L. Ed. 2d, at 99. There is no textual justification, however, for limiting the confrontation right to statements made after the accused's identity became known.

Williams v. Illinois, 567 U.S. 50, 114, 132 S. Ct. 2221, 2262 (2012) (Thomas, J. Concurring).

[11] As its first stab, the plurality states that the Cellmark report was "not prepared for the primary purpose of accusing a targeted individual." Ante, at 84, 183 L. Ed. 2d, at 115. 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.

cited as such.

In sum, when a medical examiner is presented with a victim of an indisputably violent crime and prepares a report as detailed as the likely in-court testimony that will follow if a trial occurs, that report has as its primary purpose proving a past event in an evidentiary manner. The Commonwealth's arguments to the contrary, such a report is therefore testimonial and its introduction and use at trial must comply with the Confrontation guarantee - presence and cross-examination.

II. RULE 703 MAY NOT OVERRIDE THE CONSTITUTION

As an alternative to its claim that an autopsy report in a shooting death can never be testimonial hearsay, the Commonwealth argues that use of the report was permissible pursuant to Pa.R.Evid. 703 and that Brown's challenge to the same is waived. The former argument misapprehends how Rule 703 works, and that it is reliant on the truth of the underlying proof, thereby directly implicating the Confrontation guarantee; and the latter is simply wrong.

Brown begins with the ill-informed claim of waiver. At trial, defense counsel challenged the testimony of the trial witness because his reliance on someone else's testimonial report violated the Constitution. N.T. 11/5, 101. That objection was overruled. The Commonwealth made no mention of Rule 703, and neither did the trial judge in his subsequent OPINION. On direct appeal the Constitutional issue was raised and the Commonwealth responded on the merits, again with no mention of Rule 703 in its Brief. It was only the Superior Court that injected Rule 703, raising it on its own initiative in its OPINION.

Williams v. Illinois, 567 U.S. 50, 135, 132 S. Ct. 2221, 2273 (2012) (Kagan, J. Dissenting joined by Scalia, Ginsburg and Sotomayor).

In that context, where a new ground is raised by an appellate court, Mr. Brown cannot be deemed to have waived the issue. More importantly, Brown is not raising Rule 703 but is raising the Sixth Amendment - his analysis has been and is that his right of Confrontation was violated, and that the Superior Court's *application* of Rule 703 does not cure the Constitutional defect. So it is not that Mr. Brown has a Rule 703 claim that is subject to a waiver analysis; rather, his single, preserved claim is that use of testimonial hearsay - directly or via Rule 703 - deprived him of the right of Confrontation.[12]

That interplay between Rule 703 and the Confrontation guarantee eludes the Commonwealth. The Commonwealth's sole contention is that the report was used not for its truth but to explain the "how and why" of the testifying examiner's conclusions. BRIEF FOR COMMONWEALTH, 40-41. What the Commonwealth fails to grasp, and where the Constitutional dilemma lies, is that *unless* the initial report is true the reliance on it is improper from a relevance perspective; and for a jury to credit the testifying expert it must assume the truth of the observations recorded by the initial examiner.

Appellant Brown detailed the truth-relationship to Rule 703 in his initial Brief (pages 19-21) and will not repeat that here. Two points suffice. First, as he detailed in that Brief, in Williams a majority of the Court agrees that a Rule 703 analysis requires an assumption that the underlying facts are true, which places the Confrontation right directly at issue, yet the Commonwealth makes no

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[12] In this regard, the Commonwealth's complaint that it was somehow disadvantaged by Brown not mentioning 703 at trial because "the Commonwealth was not asked to clarify whether Dr. Chu was basing his opinion on photographs of the victim or the autopsy report[]" is frivolous. BRIEF FOR COMMONWEALTH, 40 n. 6. Use of the report was being challenged, giving ample notice of the need to show that it had an independent basis for the opinions it elicited from the non-examining expert.

mention of Williams when discussing the Rule 703 claim. The second observation is that the state court decisional law cited by the Commonwealth does not support its position, as it was in some instances decided before Williams and thus fails to discuss the Constitutional analysis of Rule 703 the United States Supreme Court conducted, and in other instances actually supports Brown.

Illustrative of the latter is Adams v. State, 390 P.3d 1194 (Alaska Ct. App. 2017). The Commonwealth cites Adams for the proposition that when a testifying analyst relies on test data there is no Confrontation violation. BRIEF FOR COMMONWEALTH, 42. Adams, however, distinguishes between reliance on photographs and toxicology analyses, neither of which can be hearsay, and observations of the original examiner, which it found would raise a Confrontation concern:

> Whitmore then referred at length to the photographs that were taken during the autopsy, to the results of toxicology testing that was done in connection with the autopsy, and to the conclusions he (Whitmore) drew from this information. Each time Dr. Whitmore offered opinions about what those photographs and test results showed, and when he gave his ultimate opinion about the cause of Stacey Johnston's death, **those opinions were based on his own analysis of the raw data.**
>
> It is true that, at six points in his lengthy testimony, Dr. Whitmore explicitly relied on Dr. Fallico's observations (as recorded in the autopsy report): that there were no injuries to Johnston's palms; that Johnston was 67 inches tall and weighed 117 pounds; that there were fractures on both sides of Johnston's ribs and multiple contusions between her ribs; that Johnston's body had older bruises that were healing; that there were injuries to Johnston's tongue; and that a cloudy pink liquid was present in her stomach.
>
> Conceivably, these particular answers might not have survived a confrontation clause objection.

Adams v. State, 390 P.3d 1194, 1205 (Alaska Ct. App. 2017)(**bold** emphases added).

In sum, Rule 703 works on a presumption of reliability [*i.e.*, truthfulness] of the underlying

information; but in the narrow range of cases where said information is testimonial hearsay, the Rule runs afoul of the Confrontation guarantee.

III. THE ERROR WAS NOT HARMLESS

The Commonwealth's final resort is to the contention that any possible error was harmless because of "substantial evidence supporting the testifying medical examiner's conclusion regarding cause of death." BRIEF FOR COMMONWEALTH, 37. This claim, not raised in the Superior Court by the Commonwealth[13], fails. Omitted from the Commonwealth harmlessness argument is the trial prosecutor's direct use of the autopsy report to support the Commonwealth theory of how the crime occurred. The testifying examiner was asked whether the findings *of the report* were consistent with the prosecution theory of the case.

> Q: But based on your review of the report, are the wounds incurred by Cory Morton consistent with somebody shooting him from a distance of six to eight feet away while facing him and then Mr. Morton either turning or otherwise showing his back to the victim and being struck one time in the back?
>
> A: It would be consistent with that.
>
> Q: Would
>
> A: Yes.

N.T. 11/5, 129.

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[13] *See*, Commonwealth v. Brown, 1165 EDA 2015, Brief for the Commonwealth as Appellee (with no claim of any error being harmless).

CONCLUSION

In a violent death case, the detailed examination of the corpse and the resulting detailed report of a forensic pathologist serve the primary purpose of establishing facts of a past crime for use in a subsequent prosecution, making them paradigmatically testimonial in nature. As such, the author of that testimonial report must appear and face cross-examination or the report must be excluded both from direct and derivative use. "The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause --like those other constitutional provisions--is binding, and we may not disregard it at our convenience." Melendez-Diaz v. Massachusetts, 557 U.S. at 325, 129 S. Ct. at 2540.

With modern technology that is almost no burden at all, as autopsies are photographed and may be captured on video. The *visual* portrayals are not hearsay, and thus present no Confrontation concerns if a new expert relies on the same to form an opinion. But in a case where the written report is the source of information, the Confrontation Clause may not be disregarded, and Rule703 provides no 'back door' for the product of a forensic investigation.

WHEREFORE, for the reasons contained herein and in his initial Brief, Darnell Brown requests this Court to find that his Confrontation rights were violated, reverse the lower courts, and remand for a new trial.

Respectfully submitted,

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