IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs. No. 29,763

DEBBIE GONZALES,

Defendant-Appellee.

Criminal Appeal from the 13th Judicial District Court
Sandoval County
The Honorable George P. Eichwald

APPELLEE'S ANSWER BRIEF

Lelia L. Hood
New Mexico Public Defender Department
Capital Crimes Unit
505 Marquette Avenue, Ste 120
Albuquerque, New Mexico 87102
Counsel for Defendant-Appellee Debbie Gonzales

Gary King
New Mexico Attorney General
Margaret E. McLean
Joel Jacobsen
P.O. Drawer 1508
Santa Fe, NM 87503
Attorneys for Plaintiff-Appellant, State of New Mexico

I. TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

FEDERAL CASES

NEW MEXICO SUPREME COURT CASES

NEW MEXICO COURT OF APPEALS CASES

OTHER STATE CASES

CONSTITUTIONS

STATUTES AND RULES

SECONDARY AUTHORITIES

III. SUMMARY OF THE PROCEEDINGS AND STATEMENT OF FACTS

This case is about an American Citizen's Constitutional Right to confront and cross-examine the witnesses against them at a criminal trial. The State seeks to use testimonial hearsay – the findings, data and opinions of Dr. Timothy Williams – to secure a conviction of Ms. Debbie Gonzales without having Dr. Williams confronted and cross-examined – face to face at the jury trial.

Dr. Timothy Williams performed the original autopsy of one Mr. Jeff Packer. TR p.9, l.20-22 The Appellant's Brief in Chief refers to the alleged victim and the man who was autopsied as one "Gregory Parker." ABIC p. 1 In fact, the Indictment accuses Ms. Gonzales of killing "Jeff Packer." RP p. 1 Dr. Williams was a "forensic pathologist fellow" under the supervision of an attending physician, Dr. Rebecca Irvine, at the time the autopsy was performed at the New Mexico Office of the Medical Investigator (OMI). (ABIC p.1, ¶ 2) Dr. Williams exercised his independent judgment and skill as a forensic pathologist in fashioning and collecting data, examining the deceased and interpreting his external and internal injuries, selectively photographing the body, and reporting his opinions and findings as to the cause and manner of death of Mr. Packer in a final written report.

Clarissa Krinsky, M.D. was disclosed as an expert witness for the State on July 22, 2009. RP 215 Dr. Krinsky works for the New Mexico Office of the

Medical Investigator. RP 215 Dr. Krinsky did not perform or supervise the autopsy of Mr. Packer. TR p.9, l. 20-24 Defense counsel conducted witness interviews on July 29, 2009. RP 216 Neither Dr. Williams nor Dr. Irvine were presented by the State for a pre-trial interview with defense counsel. RP 247 The District Attorney explained that they did not know the whereabouts of Dr. Williams and someone named Dr. Krinsky would be testifying instead. RP 216; TR p. 920-22; TR. P.9, l. 23 Dr. Williams generated a report about which Dr. Krinsky will testify. TR. P. 9, l.11-25; TR p. 11, l.6-8; TR p. 13, l. 12-20 Dr. Krinsky would be relying upon Dr. Williams findings, records, and notes to form her opinions.

> THE COURT: Mr. Graham, are you saying that Dr. Krinsky is not going to rely one bit on anything that the original doctor did?
> MR. GRAHAM: She is going to look at the reports and the issue – the things that he developed during the course of the autopsy? [sic] Certainly. Photographs, notes he made on his findings, as far as what he made, what wasn't. And if the defense wishes to attack her in her review of those records, she can certainly do so.

TR p. 13, l. 12-20

Although at the defense pre-trial interviews the Appellant claimed it did not know the whereabouts of Dr. Williams, the Appellant now claims that "because of the expense and logistical difficulty of bringing either [Dr. Williams or Dr. Irvine] back for the murder trial of Ms. Gonzales, the State elected not to do so." (ABIC p. 1, ¶ 2, line 5-8)

Ms. Gonzales is accused of second degree murder. In order to prove second degree murder, the State must prove the manner of death and the cause of death as an element of the offense. TR. P. 19, l. 8-10 In this case, provocation and self defense will be issues for the jury to decide. The direct testimony, confrontation and cross-examination of the person who will testify concerning the manner and cause of death will be pivotal to both the prosecution's case in chief and the defense's burden of production as to the issues of self-defense and provocation.

The Appellant's Brief in Chief (ABIC) contains unsupported allegations in its *Summary of the Proceedings* in an effort to deflect the importance of the testimony about manner and cause of death as elements of the offense of second degree murder.

Without reference to the Record Proper, the Appellant claims that Mr. Packer was disabled. (ABIC p. 1 ¶ 1) It is also claimed that the Ms. Gonzales stabbed her own hand while stabbing Mr. Packer. (ABIC p. 1, ¶ 1) There is no reference to the Record Proper made by the Appellant with regard to this statement of fact. A letter to the District Court Judge is mentioned by the Appellant regarding Ms. Gonzales's surgery to her hand. However, nowhere in that letter to the Court does Ms. Gonzales state that she injured her own hand while stabbing Mr. Packer. RP 84 The Appellee disputes these unsupported allegations of the Appellant. Ms. Gonzales intends to offer at trial that it was Mr. Packer who

stabbed Ms. Gonzales in the hand when she shielded her face from being stabbed by Mr. Packer.

IV. ARGUMENTS

A. STANDARD OF REVIEW

The standard of review for the District Court's factual findings is an "abuse of discretion. The District Court's application of law is reviewed de novo.

> "With respect to the admission or exclusion of evidence, we generally apply an abuse of discretion standard where the application of an evidentiary rule involves an exercise of discretion or judgment...." *Dewitt v. Rent-A-Center, Inc.,* 2009-NMSC-032, ¶ 13, 146 N.M. 453, 212 P.3d 341. A trial court abuses its discretion when its "ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Simonson,* 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983). Rule 11-403 NMRA provides in part that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." "This rule gives the trial court a great deal of discretion in admitting or excluding evidence...." *Behrmann v. Phototron Corp.,* 110 N.M. 323, 327, 795 P.2d 1015, 1019 (1990).

State v. Riley, 147 N.M. 557, 565, 226 P.3d 656, 664 (N.M.,2010). "Questions of admissibility under the Confrontation Clause are questions of law, which we review de novo." *State v. Aragon*, 2010-- NMSC – 008 ¶ 6, 147 N.M. 474, 477, 225 P.3d 1280, 1283. The District Court correctly exercised its discretion in interpreting the factual proffers by the State as requiring the exclusion of Dr. Krinsky's testimony. Furthermore, the Trial Court correctly applied and interpreted the law governing admissibility of the evidence under the Confrontation Clause.

B. CONTENTIONS AND PRESERVATION

The Appellee preserved her claims under the United States Constitution and the New Mexico Constitution by alerting the District Court to the Confrontation Claus issues in a Motion to Exclude State's Witness and in making oral arguments to the Court at a Hearing held on August 6, 2009. RP 246-251; Transcript of Proceedings Filed April 2, 2010. The Appellee specifically invoked the greater protections of the New Mexico Constitution Art. II, § 14 by making a specific argument discussing the applicable case law recognizing greater protection than the Federal Constitution with regard to the right to confront and cross examine the witnesses against him. RP 250-251, ¶ 2, lines 15-17 and 1-3.

C. APPELLEE'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WILL BE VIOLATED BY DR. KRINSKY'S TESTIMONY, WHICH WILL BE SUBSTANTIALLY BASED UPON THE FINDINGS, DATA, AND OPINIONS OF DR. WILLIAMS' ORIGINAL AUTOPSY.

The Sixth Amendment, made applicable to the states by the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *Pointer v. Texas* 380 U.S. 400, 401, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The right of confrontation has been construed to include not only the right to face-to-face confrontation, but also to the right to meaningful and effective cross-examination. *Davis v. Alaska* 415 U.S. 308, 315-316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The Appellant believes that allowing the defense to cross-examine Dr. Krinsky about her review of the records of Dr. Williams who performed the original autopsy is sufficient confrontation under the Sixth Amendment. But as Justice Scalia wrote in his path breaking opinion in *Crawford v. Washington,* 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) , that is the precise evil against which the Confrontation Clause safeguards. It is patently insufficient to say a defendant is "perfectly free to confront those who read [his chief accuser's statement] in court."

New Mexico Constitution, Art. II., § 14 forbids the complete deprivation of confrontation. *State v. Curtis* 87 N.M. 128, 129, 529 P.2d 1249, 1250 (N.M.App. 1974). ("While the extent to which cross-examination may be allowed is largely within the discretion of the trial court, the right to cross-examine cannot be so restricted as to wholly deprive a party of the opportunity to test the credibility of a witness.") "Article 2, Section 14, of our constitution provides that a defendant has the right to be confronted with the witnesses against him, and this means that he not only has the right to look upon such witnesses but to cross-examine them." *State v. Martin,* 53 N.M. 413, 417, 209 P.2d 525, 527 (1949).

Even prior to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), United States Supreme Court decisions suggested that the Confrontation Clause requires the prosecution to present the findings of its forensic

examiners through live testimony at trial. *See California v. Trombetta* 467 U.S. 479, 490, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) ("defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the fact-finder whether the test was properly administered"); *Diaz v. United States,* 223 U.S. 442, 450, 32 S.Ct. 250, 56 L.Ed.2d 500 (1912) (autopsy report and other pretrial statements, characterized as "testimony," "could not have been admitted without the consent of the accused . . . because the accused was entitled to meet the witnesses face to face.")

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. ... Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.
>
> Respondent and the dissent may be right that there are other ways-and in some cases better ways-to challenge or verify the results of a forensic test.[FN5] But the Constitution guarantees one way: confrontation. ***We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.***
>
> FN5. Though surely not always. Some forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated, and the specimens used for other analyses have often been lost or degraded.

Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2536, 557 U.S. ___, 174 L.Ed.2d 314 (2009). (emphasis added) Justice Scalia writing for the majority specifically mentions "autopsies" as a type forensic analysis. *Melendez-Diaz v. Massachusetts,* 129 S.Ct. at 2536 n. 5. The opinion in *Melendez-Diaz* specifically

addresses the question of tests that cannot be repeated like autopsies and unequivocally answers that there is no "license to suspend the Confrontation Clause." Unwaveringly, the United States Supreme Court held that "[w]e do not have license to suspend" the Confrontation Clause of our Constitution because it is too expensive and logistically too difficult for the State to bring the actual person upon whose testimony a human being should be imprisoned for years or life at the order of our government. *Melendez-Diaz,* 129 S.Ct. at 2536.

> Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, Cheating the Constitution, 59 Vand. L.Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L.Rev. 1, 14 (2009). And the National Academy Report concluded:
>
> *"The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country."* National Academy Report P-1 (emphasis in original).

Melendez-Diaz v. Massachusetts 129 S.Ct. 2527, 2537 (U.S.,2009).

1. The Confrontation Clause Unquestionably Prohibits Prosecutors From Laundering The Testimonial Hearsay Of A Forensic Witness By Presenting It Through A Substitute Forensic Witness.

a. Forensic Witnesses Are Not Fungible.

The State argued to the District Court that the right to confrontation was satisfied because Dr. Krinsky could be cross examined about her review of the report and the testing by done by Dr. Williams.

Dr. Krinsky could not possibly testify to the "skill and judgment" exercised by Dr. Williams in performing the autopsy in this case because she wasn't there. Obviously, she could not testify about whether Dr. Williams deviated from standard procedures or about how carefully or competently he performed the autopsy and reported his observations. *See State v. Brewington,* 693 S.E.2d 182 (N.C. App. 2010) (substitute forensic analyst's testimony violated Confrontation Clause where testifying expert had no part in performing test or conducting independent analysis of the substance tested.)

Performing an autopsy is far from a simple act. In conducting and in reporting the autopsy, Dr. Williams was required to interpret what he saw and to exercise professional judgment. *See Melendez-Diaz*, 129 S.Ct. at 2537-2538 (methodology used in generating affidavits "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination"); Nat. Assn.

of Medical Examiners, Forensic Autopsy Performance Stds., American J. of Forensic Medicine & Pathology (Sept. 2006) vol. 27, issue 3, stds. B4, B5, pp. 200-225 (pathologist performing autopsy exercises discretion to determine need for additional dissection and laboratory tests, and is responsible for formulating all interpretations and opinions as well as obtaining information necessary to do so.)

Regrettably, some forensic pathologists falsify results; some are incompetent. (E.g., Hanley, *A Noted Medical Examiner Goes To Trial on Evidence-Tampering Charges*, N.Y. Times (Sept. 9, 1997), at http://www.nytimes.com/1997/09/09/nyregion/a-noted-medical-examiner-goes-to-trial-on-evidence-tampering-charges.html?scp=26&sq=forensic%20pathologist&st=cse; Brown, *Pathologist Accused of Falsifying Autopsies, Botching Trial Evidence Forensics: His recent indictment on charges of falsifying reports and having sloppy habits has attorneys scrambling to pinpoint any wrongful convictions*, L.A. Times (Apr. 12, 1992), at http://articles.latimes.com/1992-04-12/news/mn-286_1_wrongful-convictions.) As one New York court has observed, "we must beware of putting too much trust in the man behind the curtain. Doing so threatens to undermine one of the fundamental trial protections defendants have enjoyed since the nation's founding." *People v. Carreira,* 893 N.Y.S.2d 844, 851 (N.Y. 2010).

Under the Confrontation Clause, Appellee is entitled to have *the jury*, not Dr. Krinsky, evaluate Dr. William's "honesty, proficiency, and methodology" through the crucible of cross examination. *Melendez Diaz*, 129 S.Ct. 2538. If the prosecution is allowed to use Dr. Krinsky to convey to jurors the findings of Dr. Williams, the Appellee is denied the opportunity to meaningfully test Dr. William's statements and findings through confrontation and cross-examination.

Cross-examination of Dr. Krinsky is not an adequate substitute for questioning Dr. Williams, the true author of the testimonial statements. Dr. Krinsky's testimony is no substitute for a jury's first-hand observations of the pathologist who actually reported the *findings* upon which Dr. Krinsky will rely. As the court has observed, "[c]onfrontation is one means of assuring accurate forensic analysis." *Melendez-Diaz*, 129 S.Ct. at 2536.

In *State v. Aragon,* 2010-NMSC-008, 225 P.3d 1280, a forensic chemist based his testimony and opinions upon the report *and findings* of another forensic chemist. The Court rejected the testimony of the substitute chemist whose opinions were based upon the report and data of the originating chemist.

> In criminal cases, a court's inquiry under Rule 703 must go beyond finding that hearsay relied on by an expert meets these standards. **An expert's testimony that was based entirely on hearsay reports, while it might satisfy Rule 703, would nevertheless violate a defendant's constitutional right to confront adverse witnesses.** The Government could not, for example, simply produce a witness who did nothing but summarize out-of-court statements made by others. A criminal defendant is guaranteed the right to an effective cross-

examination. *Lawson,* 653 F.2d at 302 (footnotes omitted). We find Lawson's rationale persuasive.

State v. Aragon, 2010-NMSC-008 ¶ 25, 147 N.M. 474, 483, 225 P.3d 1280, 1289 (emphasis added).

> The determinations of whether a substance is narcotic and its degree of purity-two conclusions that presumably require some expert judgment to compare the computerized analytical results with reference data-must be classified as "opinion," rooted in the assessment of one who has specialized knowledge and skill. Champagne ostensibly used her training, skill, and knowledge to form an opinion that the substance in question was methamphetamine. *Cf. Bullcoming,* 2010-NMSC-007, ¶ 25 (holding that the results of the gas chromatograph BAC test do not constitute expert opinion, but rather constitute "facts and data" of the type reasonably relied upon by experts). That expert determination was in turn employed by the prosecution to prove one element of the crime with which Defendant was charged. ***Defendant therefore had a right to challenge the judgment and conclusions behind Champagne's opinion. Because she did not testify, her opinion could not be effectively challenged.***

State v. Aragon, 2010-NMSC-008 ¶ 30, 147 N.M. at 484, 225 P.3d at 1290 (emphasis mine). The State here will use Dr. Krinsky's testimony to prove one element of the crime in this case. Dr. Krinsky will testify that the manner of death was homicide and that the cause of death was stabbing. Just as in *Aragon*, Ms. Gonzales has the right to challenge the judgment and conclusions behind Dr. Williams opinions and data. If Dr. Krinsky is allowed to testify in his place, his opinions, findings, skills, bias, risk of error, exercise of judgement and tests can not be effectively challenged.

While the Appellant would have this Court hold that forensic scientists and their testimony are fungible for purposes of the Confrontation Clause, this case provides what could be a textbook example of how prosecutors can use a surrogate pathologist to rely upon and relay to jurors facts gathered by a non-testifying pathologist precisely in order to prevent scrutiny of the actual pathologist's credibility and competence in the manner guaranteed by the Sixth Amendment. The State has "elected" in this case to name a surrogate pathologist "[b]ecause of the expense and logistical difficulty of bringing" the original pathologist back for the trial. (ABIC p. 1, ¶ 2, l. 3-8) In this scenario it is entirely possible that a prosecutor could decide that one pathologist might make a better witness than another. One pathologist might have more experience and make a better witness – Dr. Williams was a "fellow" in forensic pathology being supervised by an attending physician. The Confrontation Clause surely prohibits the prosecution from "us[ing] out-of-court statements as a means of circumventing the literal right of confrontation." (*Davis*, *supra*, 547 U.S. at 838 [Thomas, J., concurring and dissenting].)

The Appellant attempted to circumvent the Confrontation Clause's requirements by claiming Dr. Krinsky would offer her own opinions even though those opinions would be clearly and inextricably woven by Dr. Williams' knowledge, skills and judgment as a pathologist. The Appellant did not make a

sufficient showing to the District Court that Dr. Krinsky's opinions would be in any way independent of Dr. Williams' opinions. "Experts and their opinions are not fungible when the testifying expert has not formed an independent conclusion from the underlying facts or data, but merely restates the hearsay opinion if a non-testifying expert." *Aragon*, 2010-NMSC-008 ¶ 32.

In *People v. Dungo,* 176 Cal.App.4th 1388 (2009), review granted December 2, 2009, a forensic pathologist's testimony based on another expert's report and data was held to be inadmissible under *Melendez-Diaz.*

> At issue is the defendant's Sixth Amendment right to cross-examine the pathologist (Dr. George Bolduc) who prepared the report on the cause of the victim's death. A critical fact in the trial was the duration of the choking, which bore on the defendant's culpability, whether he was guilty of murder or voluntary manslaughter. Dr. Lawrence was not present at the autopsy on the victim's body and was permitted to testify, over defendant's Sixth Amendment objection, as to the cause of death, including the amount of time the victim was choked before she died. In doing so, he relied on the facts adduced in an autopsy report prepared by Dr. Bolduc, Dr. Lawrence's employee.
>
> The autopsy report itself was not admitted into evidence, though Dr. Lawrence disclosed portions of the report to the jury, and defendant was not able to cross-examine Dr. Bolduc either on the facts contained in the report or his competence to conduct an autopsy. Dr. Lawrence testified at a preliminary hearing that he was aware that Dr. Bolduc had been fired from Kern County and had been allowed to resign "under a cloud" from Orange County and that both Stanislaus and San Joaquin Counties refused to use him to testify in homicide cases. He explained that if Dr. Bolduc testifies "it becomes too awkward [for the district attorney] to make them easily try their cases. And for that reason, they want to use me instead of him."

People v. Dungo, 98 Cal.Rptr.3d 702, 704 (Cal.App. 3 Dist.,2009) review granted December 2, 2009 220 P.3d 240, 102 Cal.Rptr.3d 282.

In *Aragon*, 2010-NMSC-008, the forensic chemist had not himself supervised the work of the original chemist, had not actually weighed the material being tested and had not performed any independent testing at all. The surrogate chemist testified that "all I can do is look at the evidence and what [sic] I agree with her results. That's all I can do and from her results and testing materials and notes I agree with what she has." *Aragon* at ¶ 28. Likewise, Dr. Krinsky will read the reports and opinions of Dr. Williams, look at the pictures that were taken by Dr. Williams, and review the data recorded by Dr. Williams at the actual autopsy. Dr. Krinsky's opinions will necessarily and exclusively rely upon the materials generated by Dr. Williams. The rationale of *Aragon* is illustrative on this point.

> It should be noted that in *Bohle* the testifying expert based his opinion only in part upon the non-testifying expert's hearsay opinion, but the testifying expert's opinion still was held to be inadmissible. Our case law, however, allows partial reliance on another expert's opinion. *See Chambers,* 84 N.M. at 311, 502 P.2d at 1001. Our reliance on *Bohle* in the *O'Kelly* opinion illustrates the rationale behind our concern when an expert relies upon the opinion of another expert: The opposing party has no opportunity to cross-examine the basis for the hearsay opinion because the opinion is not the testifying expert's own opinion. This is especially true when, as is the situation in this case, the testifying expert relies *solely* on the opinion of another expert.

Aragon, 147 N.M. at 483 n.4 , 225 P.3d 1280, 1289 n.4. *See also, Com. v. Durand*, 457 Mass. 574, 585, 931 N.E.2d 950, 961 (Mass.,2010) (Confrontation

Clause violated were doctor's testimony included observations made by non-testifying medical examiner who actually performed the autopsy); *Vega v. State,* 236 P.3d 632, 634 (Nev.,2010) (Doctor's testimony relating observations and findings of sexual assault nurse violated Confrontation Clause); *People v. Dendel,* ___ N.W. 2d ___, 2010 WL 3385552 (Mich.App.,2010)(trial court violated defendant's confrontation rights when it admitted expert testimony based on a report prepared by non-testifying forensic analysts); *State v. Craven*, 696 S.E.2d 750, 754 (N.C.App.,2010) (Confrontation clause violated when forensic chemist testified based on the work of another non-testifying chemist) *Gardner v. U.S.* , 999 A.2d 55, 62 (D.C.,2010)(Testimony by DNA expert from Orchid Cellmark violated Confrontation Clause where it was based upon work of non-testifying analysts.)

While the United State's Supreme Court has yet to address the specific question of experts basing their work on the work of a non-testifying analysts and renderding so called "independent opinions," it notably did summarily reverse two such cases, where the forensic report of a non-testifying expert was admitted into evidence without limitations on its use, and a "reviewing" expert who did not perform the forensic testing testified and was cross-examined at trial as to her "own opinion" about the test results. *See Crager v. Ohio,* --- U.S. ----, 129 S.Ct. 2856, 174 L.Ed.2d 598 (2009) (granting certiorari, reversing, and remanding in

State v. Crager, 116 Ohio St.3d 369, 879 N.E.2d 745, 747-50 (2007)); *Barba v. California,* --- U.S. ----, 129 S.Ct. 2857, 174 L.Ed.2d 599 (2009) (granting certiorari, reversing, and remanding in *People v. Barba,* 2007 WL 4125230 (Cal.Ct.App. Dec. 21, 2007)).

The Appellant clearly overlooks the problem of allowing the surrogate pathologist to testify about the specific thought processes, procedures, and bias employed by the non-testifying pathologist. A number of fairly recent incidents demonstrate that the work of individual forensic analysts and even entire forensic laboratories may be compromised by forensic misconduct, systemic inaccuracies, and lax oversight, calling into doubt the accuracy and reliability of their work product. If for no other reason than this, confrontation of individual experts directly involved in forensic analysis of evidence must be ensured to permit the defendant to test the reliability and accuracy of their work in "the crucible of cross examination." *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). Confrontation of the analyst who performed the testing that is the basis for expert interpretation is "one means of assuring accurate forensic analysis." *Melendez-Diaz v. Massachusetts* 129 S.Ct. at 2536.

b. When The Sixth Amendment Was Adopted, An Expert Witness Would Not Have Been Permitted To Relay The Contents Of An Autopsy Report To Jurors To Explain The Basis Of Opinion Testimony.

Following *Crawford*, the first step in evaluating the extent to which an expert may properly rely upon and convey the substance of testimonial hearsay consistent with the Confrontation Clause is to consider whether common law courts at the time the Sixth Amendment was adopted would have understood such evidence to be admissible absent confrontation of the statement's author. *See Crawford*, 541 U.S. at 54. The Appellant's position should be rejected because they fail to demonstrate that an expert would have been permitted to relay testimonial hearsay to jurors in support of an expert opinion when the Confrontation Clause was adopted.

In fact, experts were *not* permitted to convey such hearsay to jurors when the Sixth Amendment was adopted. "A common law court in 1791 would not have admitted testimonial hearsay into evidence without a showing of unavailability and cross-examination and similarly would not have allowed an expert to base an opinion on testimonial hearsay." (Note, Oliver, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington* (2004) 55 Hastings L.J. 1539, 1540 ["Oliver"].) At common law, an expert witness "could testify only if necessary to

provide information that was beyond the ken of the average juror, could testify only in response to a hypothetical question, could not assume anything that was not already in evidence, and could not offer an opinion on the ultimate issue before the jury." (*Id.* at 1548.)

c. The United States Supreme Court Has Made It Clear That Surrogate Witnesses Do Not Satisfy The Requirements Of The Confrontation Clause.

The Sixth Amendment guarantees a defendant the right "to be confronted with *the* witnesses against him." (U.S. Const., 6th Amend. [emphasis added].) The definite article in the constitutional provision is not surplusage; it commands that if the prosecution introduces testimonial evidence against a defendant, it must give the defendant the opportunity to be confronted with the person who actually authored the statement. *Crawford*, 541 U.S. at 68. It is irrelevant to the Confrontation Clause analysis that the contents of Dr. Williams' report and findings will be conveyed to jurors through the testimony of Dr. Krinsky, rather than through the admission into evidence of the autopsy report itself, and irrelevant that the statements might be admissible, under state law such as Rule 11-703, to explain or support an expert opinion.

Under *Crawford* and its progeny, it is simply not enough that the defendant gets to cross-examine *someone*. In response to the suggestion that the Confrontation Clause guaranteed only the right to confront those witnesses who

actually testify at trial, the *Crawford* court wrote, "we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'" *Crawford, supra*, 541 U.S. at 50-51, quoting 3 Wigmore, § 1397, at 101.

Crawford also made it clear that it does not matter that state law permits a testifying witness to relay to the jury another person's testimonial statement: "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford*, 541 U.S. at 51. Moreover, "ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." *Crawford*, 541 U.S. at 51.

The Court repeated the point in *Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), observing:

> In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it.

Davis v. Washington, 547 U.S. at 826.

In *Melendez-Diaz*, the court again indicated that substitute cross-examination is not constitutionally adequate. It specifically observed that, where

the results of a forensic analysis are introduced in a criminal case, the prosecution's failure to call the witness *who performed the analysis* prevents the defense from exploring the possibility that the analyst lacked proper training or had poor judgment, or from testing the analyst's "honesty, proficiency, and methodology." *Melendez-Diaz*, 129 S.Ct. at 2538. The dissent in *Melendez-Diaz* also recognized that the court in *Davis* had made it clear "that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second." *Melendez-Diaz*, 129 S.Ct. at 2546 (Kennedy, J., dissenting.)

As with a policeman reading the statement of an absent declarant, it is inconceivable that the Framers contemplated having the protections of the Confrontation Clause evaded by allowing the prosecution to present the observations and conclusions of a non-testifying pathologist through the testimony of his successor in employment. "The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits", and the court has made it eminently clear that the analysis is the same whether the document itself is introduced or the statement is conveyed through another witness's testimony. *Melendez-Diaz*, 129 S.Ct. at 2542; *Davis v. Washington*, 547 U.S. at 826.

The Confrontation Clause trumps evidentiary rules where testimonial statements are concerned. It follows that an expert's testimony conveying autopsy

findings that are testimonial and introduced for their truth are admissible only when the pathologist who performed the autopsy and wrote the report is subject to confrontation.

d. The *Bullcoming* Opinion Does Not Control This Case – The New Mexico Supreme Court Has Plainly Held that Laundering of Testimonial Hearsay Through a Surrogate Witness Is a Violation of the Sixth Amendment and The New Mexico's Constitution's Right to Confront and Cross-Examine The Witnesses Against One Face to Face.

In *State v. Bullcoming*, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1, *cert. granted,* --- S.Ct. ----, 2010 WL 2008002, 1 (2010), the Court held that a blood-alcohol report was indeed testimonial pursuant to Melendez-Diaz but that a surrogate analyst could testify about the report because the original analyst had exercised no independent judgment and was a "mere scrivener." *Bullcoming*, 2010-NMSC-007 ¶ 19

State v. Aragon, 2010-NMSC-008, 147 N.M. 474, 225 P.3d 1280 was decided the same day. *Aragon* presented the Court with an entirely different scenario. There the analyst was no "mere scriver" but had to exercise independent judgment. The surrogate analyst was brought in to testify and supposedly to give an independent opinion. However, just as Dr. Krinsky will have to do, the surrogate analyst necessarily has to rely upon the exclusive findings and data of the original pathologist. Dr. Krinsky's opinions will necessarily be premised upon Dr. William's findings. The findings of Dr. Williams are testimonial hearsay. The

jury cannot accurately weigh the allegedly independent opinions of Dr. Krinsky without also gauging the truth of the findings supporting Dr. Krinsky's opinions.

The Confrontation Clause trumps evidentiary rules where testimonial statements are concerned. It follows that an expert's testimony conveying autopsy *findings* that are testimonial and introduced for their truth are admissible only when the pathologist who performed the autopsy and wrote the report is subject to confrontation. The laws of evidence cannot subvert the right of our citizens to defend themselves in a criminal case.

> Article 2, Section 14, of our constitution provides that a defendant has the right to be confronted with the witnesses against him, and this means that he not only has the right to look upon such witnesses but to cross examine them. Tate v. Smith, 86 Ala. 33, 5 So. 575; Wray v. State, 154 Ala. 36, 45 So. 697, 15 L.R.A.,N.S., 493, 129 Am.St.Rep., 18, 16 Ann.Cas. 362. **While the extent of the cross examination is largely within the discretion of the trial court it is, nevertheless, a valuable right and it cannot be so restricted as to wholly deprive a party of the opportunity to test the credibility of a witness.** *State v. Talamante*, 50 N.M. 6, 165 P.2d 812.

State v. Martin, 53 N.M. 413, 417, 209 P.2d 525, 527 (N.M.1949) (emphasis mine). Using one expert to disclose as "truth" to a jury the findings of other experts has been termed "stealth testimonial hearsay." *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Geo.L.J. 827, P. 830

> While congress may change by statute the acceptable basis for an expert's opinion, a statute [or a rule] may not abrogate a defendant's constitutional right to confrontation. A court therefore must prohibit

> an expert from testifying to an opinion in those cases where the opinion relies upon testimonial hearsay to such an extent that it substantially transmits to the jury the content of the hearsay, unless the defendant has an opportunity to test the hearsay by cross-examination.

Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington (2004) 55 Hastings L.J. 1539, 1540. "However, reliance upon such hearsay facts or data . . . to form an independent expert opinion does not necessarily make the hearsay itself admissible." *State v. Aragon*, 2010-NMSC-008, ¶ 23. NMRA 11-703 states that "[f]acts 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."

The District Court found that Dr. Krinsky's "opinions" could not be untangled from what would necessarily form the basis of her opinions – Dr. Williams thought processes, independent photographs, testing, observations, data, biases, and final opinions. The District Court was able to see the handwriting on the wall. Ms. Gonzales would be deprived of her right to meaningfully challenge Dr. Krinsky's final opinions without also being able to attack their basic and substantial foundation – Dr. Williams' findings, data and opinions. The New Mexico Supreme Court recognized this unfairness in *Aragon* and pledged its

allegiance to our Citizenry and its substantial right to confront and cross-examine the witnesses against them face to face before the jury.

The *Aragon* decision does not hold that it is acceptable to use *testimonial* hearsay as the substantial basis for another experts opinion in a criminal case. In fact, *Aragon's* rationale suggests that there must be a real and concrete independent basis for the surrogate expert's opinions. "An expert's testimony that was based entirely on hearsay reports, while it might satisfy Rule 703 would nevertheless violate a defendant's constitutional right to confront adverse witnesses." *Aragon*, 2010-NMSC-008 at ¶ 25 *quoting United States v. Lawson*, 653 F.2d 299, 302 (7th Cir., 1981). "In a criminal case, even though Rule 703 warrants the use of hearsay as a basis for an opinion, the constitutional right of confrontation may require that the defendant have the opportunity to cross-examine the persons who prepared the underlying data on which the expert relies." Weinstein's Evidence, P 703(03) at p. 703-18 (1980). The Appellant has offered no real independent basis for Dr. Krinsky's testimony. The Appellant has only offered that Dr. Krinsky will rely upon the work of Dr. Williams exclusively and then render her own opinion based exclusively on his data, reports, photos and opinion.

Several other courts have held that the procedure of offering an expert who can be cross-examined is insufficient where hearsay is used as a basis for the opinion. In *New York v. Goldstein*, 6 N.Y.3d, 119, 843 N.E.2d 727, 810 N.Y.S.2d

100 (2005), cert denied, 547 U.S. 1159, 126 S.Ct. 2293, 164 L.Ed.2d 834 (2006), a psychiatrist testified that the defendant was not insane at the time of the crime. *Goldstein*, 6 N.Y.3d at 122. The prosecution argued that it was not presenting hearsay because the third-party statements were not offered for the truth of the matter but merely to help the jury evaluate the psychiatrist's opinion. The Court rejected that argument. "We find the distinction the people make unconvincing. We do not see how the jury could use the statements of the interviewees to evaluate [the psychiatrist's] opinion without accepting as a premise that the statements were true or that they were false." *Goldstein*, 6 N.Y.3d at 127, citing *Kaye, et. al., The New Wigmore: Expert Evidence* § 3.7, at 19 (Supp. 2005) ("The factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the experts' conclusions but not for its truth ought not to permit an end-run around a constitutional prohibition.")

Similarly in *Smith v. Alabama*, 898 So.2d 907, 916 (Ala.Crim.App.,2004) the admission of autopsy evidence, without testimony of medical examiner who performed autopsy, violated defendant's Sixth Amendment right to confrontation in a murder prosecution.

In *Roberts v. United States*, 916 A.2d 922 (D.C. 2007), a DNA expert gave an opinion about the probabilities of a match although he was not one of the scientists who did the original analysis. *Roberts,* 916 A.2d at 937. As is proposed

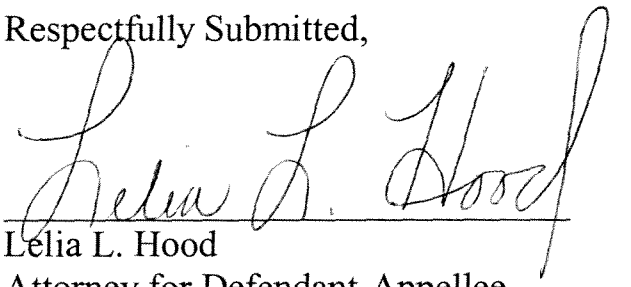
in this case, the testifying expert reviewed the data himself and came to his own opinion. *Roberts,* 916 A.2d at 937-038. Some of the data upon which the testifying based his opinions was offered as substantive evidence. *Roberts,* 916 A.2d at 939. The Government in argued in Roberts, however, that a testifying expert should nevertheless be permitted to rely on such information as part of the basis of his opinion, as Fed. R. Evid. 703 permits. *Roberts*, 916 A.2d at 938-939. The *Roberts* Court rejected that argument. "[A]ppellant was erroneously denied the right to cross-examine witnesses whose conclusions formed part of the DNA evidence against him." *Roberts*, 916 A.2d at 939.

V. CONCLUSION

Dr. Krinsky's "opinions" are inextricably tied to the independent judgments, data, reports, photos and work of Dr. Williams, the original pathologist. Cross-examination and confrontation of Dr. Krinsky is wholly insufficient to satisfy the right of a citizen under the Sixth Amendment to the United State Constitution and the right to confront and cross-examine witnesses face to face under the New Mexico Constitution, Art. II, § 14.

Therefore, the decision of the District Court to Exclude the Testimony of Dr. Krinsky should be affirmed.

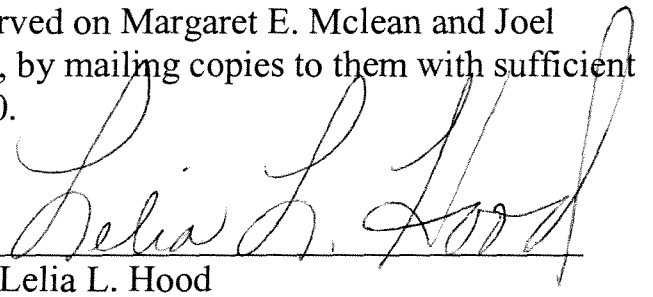
Respectfully Submitted,



Lelia L. Hood
Attorney for Defendant-Appellee
New Mexico Public Defender Department
Capital Crimes Unit
505 Marquette Avenue, Ste. 120
Albuquerque, N.M. 87102
(505) 841-5110

CERTIFICATE OF SERVICE

A copy of this document was served on Margaret E. Mclean and Joel Jacobsen, Assistant Attorneys General, by mailing copies to them with sufficient first-class postage on October 22, 2010.



Lelia L. Hood
Attorney for Defendant-Appellee