

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

BENNIE ADAMS,

Defendant-Appellant.

Case No. 2012-1274

On Appeal from the Seventh  
District Court of Appeals  
Case No. 08 MA 246

THIS IS A CAPITAL CASE

**BRIEF OF AMICI CURIAE OHIO ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS AND CUYAHOGA COUNTY PUBLIC DEFENDER  
IN SUPPORT OF APPELLANT BENNIE ADAMS**

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## **INTEREST OF AMICI CURIAE**

The Office of the Cuyahoga County Public Defender is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County. Under the circumstances, the Office is the largest single source of legal representation of criminal defendants in Ohio's largest county.

The Ohio Association of Criminal Defense Lawyers (OACDL), founded in 1986, is a professional association with more than five hundred members in the State of Ohio. OACDL is among the largest professional organizations of criminal practitioners in Ohio, and advocates for progressive criminal laws and policies that are consistent with constitutional principles, limited governmental intrusion into the lives of Americans, and a free society.

## STATEMENT OF THE CASE AND FACTS

This is an appeal from the Seventh District's decision of June 13, 2012 denying Mr. Adams' application for reopening. That application was filed under App.R. 26 (B) and addresses seven issues that Adams' appellate counsel should have raised on direct appeal. Noting that the brief filed in support of Mr. Adams' direct appeal was "the longest brief encountered by this court," the *per curiam* opinion dismissed the application, implying that anything left off such a comprehensive document was not likely to have merit. *State v. Adams*, Mahoning App. 08 MA 246, 2012 Ohio 2719, ¶¶ 3, 8-12.

Amici's brief directs itself only to the first issue in Mr. Adams' application – specifically, that:

The trial court violated Adam's Sixth Amendment right to confront the witnesses against him when it allowed Dr. Germaniuk to testify concerning an autopsy conducted twenty-three years prior by a different coroner and when it allowed the autopsy report to be admitted into evidence; trial counsel were likewise ineffective to Adams' prejudice when they failed to object to the admission of Dr. Germaniuk's testimony as well as to the admission of the autopsy report.

The Seventh District rejected this claim, noting that the controlling law at the time of Mr. Adams' trial permitted the introduction of such evidence. In support of this conclusion, the Seventh District pointed to this Court's decision in *State v. Craig*, 110 Ohio St.3d 306, 2006 Ohio 4571 and one of its own decisions, *State v. Mitchell*, Mahoning App. 05 CO 63, 2008 Ohio 1525, which found that *Craig* was controlling.

Nevertheless, this Court is reconsidering its decision in *Craig*. To that end, this Court has asked the parties in that case to submit briefs addressing whether the introduction of the decedent's autopsy report violated the defendant's Sixth Amendment right to Confrontation under *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009); *Bullcoming v. New Mexico*, 131

S. Ct. 2705 (2011); and *Williams v. Illinois* (June 18, 2012), \_\_\_ U.S. \_\_\_, 132 S.Ct. 2221, 2012 WL 2202981. By extension, this Court also asked the parties in *Craig* to address whether, in light of these cases, it was proper to permit a medical examiner, who did not conduct the decedent's autopsy, to testify concerning the cause of death.

As discussed more fully herein, Amici maintain that the US Supreme Court's recent decisions make it clear that the introduction of autopsy reports, through the testimony of a witness, who was neither present for nor participated in that proceeding, violates the accused's right to confrontation. This case exemplifies the insurmountable difficulties created for the accused in the face of such a violation

Amici Curiae defer to Appellant Bennie Adams for the balance of his statement of the case and facts.

## ARGUMENT

THE US SUPREME COURT DECISIONS IN *MELENDEZ-DIAZ*, *BULLCOMING*, AND *WILLIAMS* ESTABLISH THAT THE EVIDENCE IN THIS CASE WAS ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSE

### A. Introduction

Between the cynical belief that government generated forensic evidence is always suspect – necessarily subject to the “crucible of confrontation” – and the blind acceptance of such evidence notwithstanding the absence of such testing, the Constitution forges a reasonable course. Such a course respects both positions without fully bending to either. In its recent Confrontation Clause decisions – specifically those in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), and *Williams v. Illinois*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2221, 2012 WL 2202981 – the U.S. Supreme Court has undertaken to navigate that path. These decisions make it clear that the introduction of an autopsy report through a witness, who, neither participated in nor was present for that procedure, violates the accused’s rights under the Confrontation Clause.

The most recent of those decisions is *Williams*. The decision is undoubtedly fractured, with no majority favoring any particular rationale. Nevertheless, five justices did agree that the Confrontation Clause did not bar the introduction of testimony from a witness concerning DNA analysis and findings that she did not undertake and reach. What distinguishes the DNA analyst’s testimony in *Williams* from the autopsy report introduced in Mr. Adams’ case is that the autopsy protocol is a certified document, which is necessarily formal, i.e. testimonial in nature, while the DNA’s analyst’s testimony in *Williams* was not. Moreover, the evidence at issue in *Melendez-Diaz* and *Bullcoming*, like the autopsy report admitted against Mr. Adams, involved the certified findings of forensic analysts, both of which were prepared in anticipation

of trial. In both cases, the Supreme Court concluded that the evidence was barred under the Confrontation Clause. Consequently, if *Williams* is considered in light of *Melendez-Diaz* and *Bullcoming* – both of which were cited favorably throughout the *Williams* opinions – the key to determining whether evidence is testimonial, and therefore subject to the confrontation clause, is the formality of the documents/evidence involved. Since the autopsy report admitted against Mr. Adams, was, like the inadmissible materials addressed in *Melendez-Diaz* and *Bullcoming*, similarly certified and formal, it too was testimonial and, therefore, prohibited under the Confrontation Clause.

***Melendez-Diaz v. Massachusetts* involved a Certified Lab Report which the Court found to be Testimonial**

In *Melendez-Diaz*, the Court set out to determine whether a lab report concluding that a tested substance was cocaine, was “testimonial” for Confrontation Clause purposes. Mr. Melendez-Diaz was convicted of drug trafficking, after police found several bags containing a white substance in a police vehicle where Mr. Melendez-Diaz had only recently sat. The substance was sent to the crime lab for forensic analysis. At trial, the prosecution introduced the white substance along with three “certificates of analysis.” The certificates stated that forensic analysis revealed the substance to be cocaine. Melendez-Diaz appealed, complaining that introducing the certificates, without providing him an opportunity to cross-examine the analyst who prepared them, violated his right to confrontation.

The High Court agreed. The Court likened the certificates of analysis to affidavits, which *Crawford v. Washington*, 541 U.S. 36 (2004) found to be within the “core class of testimonial statements,” explaining that, “[t]he documents at issue here, while denominated by Massachusetts law ‘certificates,’ are quite plainly affidavits.” *Melendez-Diaz*, 129 S.Ct. at 2531. The Court further observed that “[t]he fact in question is that the substance found in the

possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine – the precise testimony the analysts would be expected to provide if called at trial.” *Id.* Moreover, the certificates “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.* (quoting *Crawford*, 541 U.S. at 52).

The Court also noted that under Massachusetts law the certificates were prepared “to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance.” *Id.* (quoting Mass Gen Laws ch. 111, § 13). Accordingly, the statute gave rise to a reasonable belief that the statement would be available for use as evidence at a later criminal trial. *Id.* at 2532. Ultimately, consistent with its holding in *Crawford*, the Supreme Court concluded that, “[t]here is little doubt that the documents at issue in this case fall within the ‘core class of testimonial statements.’” *Id.*

**The Supreme Court held that the Hearsay Evidence Introduced in *Bullcoming v. New Mexico* was Similarly Formal and, therefore, Testimonial.**

In *Bullcoming*, the U.S. Supreme Court reached a similar conclusion. There, the court held that the admission of another forensic laboratory report certifying that blood samples taken from the accused contained a specific concentration of alcohol violated his rights under the Confrontation Clause, where the analyst who reached that conclusion and certified it was not called to testify. The prosecution attempted to justify the introduction of that evidence under the business record exception to the prohibition against hearsay.

The High Court disagreed. The court observed that the evidence was prepared and certified in preparation for trial, rendering it undoubtedly testimonial. Specifically, the Court noted -

To rank as testimonial a statement must have a primary purpose of establishing or proving past events potentially relevant to later criminal prosecution. Elaborating on the purpose for which a testimonial report is created, we observed in *Melendez-Diaz* that business and public records are generally admissible absent confrontation . . . because – having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial.

*Bullcoming*, at 2714, fn6 (internal quotations and citations omitted). The Court went on to point out that, like the certificates in *Melendez-Diaz*, they were prepared to prove the pivotal issue at trial – that Bullcoming’s blood alcohol level exceeded the legal limit. Further, while not attested to, they were certified and sufficiently formal to fall within the “core class of testimonial statements described in this Court’s leading Confrontation Clause decisions.” *Id.* at 2717 (citations omitted).

***Williams v. Illinois* does not depart from the reasoning established in *Melendez-Diaz* and *Bullcoming*.**

On June 18, 2012, the United States Supreme Court decided *Williams*. A plurality of the Court held that the particular expert testimony presented at Williams’ bench trial did not run afoul of the Confrontation Clause for two reasons: First, the underlying forensic report was not “testimonial.”<sup>1</sup> Second, the out-of-court statements offered by the expert were not offered to prove the truth of the matter asserted.<sup>2</sup> As we demonstrate further herein, the DNA analyst’s testimony in *Williams* is vastly different from the certificates involved in *Melendez-Diaz* and *Bullcoming* or the autopsy report and testimony stemming from it in Mr. Adams’ case. As divided as that decision is, the reasoning underpinning the *Williams* case makes it plain that the

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<sup>1</sup> Four Justices (Alito, Roberts, Kennedy and Breyer) concluded the evidence was non-testimonial because its primary purpose was not to accuse the defendant or for use at trial. Justice Thomas agreed it was non-testimonial, but only because the report lacked the solemnity of an affidavit or deposition.

<sup>2</sup> Justice Thomas and four dissenting Justices (Kagen, Scalia, Ginsburg and Sotomayor) found that the validity of the expert's opinion turned on the truth of the out-of-court statements and thus implicated the Confrontation Clause.

autopsy report testimony admitted against Mr. Adams, unlike the evidence in *Williams*, does violate the Confrontation Clause.

**The evidence *Williams* addressed was very different from the autopsy and findings admitted in Mr. Adams' trial.**

The evidence addressed in *Williams* involved a vaginal swab taken from a rape victim. That evidence was sent to a state forensic lab, where chemical tests confirmed the presence of semen. The evidence was placed in a freezer and eventually sent to Cellmark (a DNA testing lab) which issued a report indicating that the lab had developed a male DNA profile from the vaginal swab. A forensic specialist back at the state crime lab conducted a computer search to see if the Cellmark profile matched any of the entries in the state DNA database. The computer showed a match to a profile produced by the lab from a sample of Williams' blood that had been taken after he was arrested on unrelated charges on August 3, 2000. Based on that and other evidence, the State of Illinois indicted Williams for rape.

At a bench trial, the State called three experts regarding the DNA evidence. A state crime lab scientist testified that he confirmed the presence of semen on the vaginal swabs taken from the alleged victim. Another state forensic analyst testified as to the procedures she used to develop a DNA profile from the blood sample which had been drawn from the Petitioner after his 2000 arrest, and that she entered that profile into the state forensic database. The third expert testified as to how DNA profiles from forensic samples can be matched to an individual's unique genetic code. She testified that she compared the semen which had been taken from the alleged victim to Williams' profile and concluded that they were a "match". Importantly, the Cellmark report reflecting this information was neither admitted into evidence nor shown to the factfinder.

Williams challenged the introduction of the Cellmark witness's testimony and the U.S. Supreme Court granted certiorari. In a splintered decision with no majority opinion, that Court

held that introducing the expert's testimony about the Cellmark DNA profile did not violate the defendant's right to confrontation. Because, however, there was no majority for any single rationale to justify the testimony's admission, the holding is exceedingly narrow: *In a bench trial, a prosecution expert may testify that a DNA profile reflected in a non-certified report matched the defendant's DNA profile without calling the analyst who authored the report, as long as the laboratory that tested the evidence sample was not aware of the defendant's profile when the testing was done.*

**When the various underlying rationales are parsed, and then considered in light of *Melendez-Diaz* and *Bullcoming*, they demonstrate that Mr. Adams was entitled to confront and cross-examine the doctor who undertook Gina Tenney's autopsy.**

1. The Autopsy Findings admitted against Mr. Adams.

The evidence in Mr. Adams' case stemmed from an autopsy performed in December of 1985 by a Dr. Rona. By the time the case went to trial in 2008, the state chose to introduce the autopsy and its findings through another witness. There is no indication in the record that Dr. Rona was unavailable. The State simply notified the court that Dr. Rona did not recall the autopsy, and that the prosecution was calling Dr. Humphrey Germaniuk, of the Trumbull County Coroner's Office, to testify in Dr. Rona's place.

Dr. Germaniuk was not present for the autopsy. Nevertheless, Dr. Germaniuk testified at trial concerning the autopsy Dr. Rona undertook and results he reached. Tr. 402-03. More problematic, was the fact that Dr. Germaniuk, while essentially adopting the results the autopsy reached, also took issue with some of Dr. Rona's findings. In particular Rona's finding that the cause of death was suffocation due to traumatic asphyxiation. Tr. 408. Dr. Germaniuk agreed with Rona that Tenney had died from asphyxiation, noting that there had been bruising over her mouth area as well as ligature marks on her neck. Nevertheless, after discussing – at length – the

various ways in which one can succumb to asphyxiation, Dr. Germaniuk, opined that the decedent's cause of death should have been labeled simply - asphyxia. Id.

Dr. Germaniuk then went over the original autopsy's documentation of superficial wounds, concluding that "the way to really tell if they're superficial or not you make an incision and see how superficial they really are. ... That was not done in the case so I have to go with what they say as far as superficial." Tr. 421. Dr. Germaniuk also questioned the procedure Rona used in determining the time of death. He testified that "I think they list her time of death based on vitreous, V-I-T-R-E-O-U-S, vitreous potassium at approximately 11:15 p.m." Dr. Germaniuk testified that "[vitreous humor]" was not the most accurate way to determine cause of death. Tr. 426-27. According to Dr. Germaniuk, vitreous potassium is no longer used to estimate time of death." Tr. 428. Instead, relying on the volume of the material in the decedent's stomach, and when she last consumed food according to testimony, Dr. Germaniuk placed her death between 5:00 and 10:30 p.m. Tr. 435-36.

Dr. Germaniuk also faulted Dr. Rona because the autopsy did not report any evidence of sexual trauma or assault. Dr. Germaniuk speculated that Dr. Rona had failed to note such evidence because he hadn't looked for it. Tr. 436, 438. Ultimately, Dr. Germaniuk criticized the entire operation of the coroner's office that performed the autopsy in 1985, complaining,

If you take a look at the, quote, unquote, attending physician is a coroner. What are his qualifications in forensic pathology? None. He won a popularity contest. There's no formal training or education in forensic pathology. Let's take a look at the folks that did the autopsy. Under doctors you have the entire department listed and you have the person who is doing the autopsy who is probably a trainee with, again, no formal training in forensic pathology. Tr. 440.

Dr. Rona, of course, was never in a position to defend himself, his office, or his findings – nor was the defense able to cross-examine him about the autopsy and his findings – because the State opted to call Dr. Germaniuk in his place.

Accordingly, while the autopsy and its findings were offered for their truth, they also provided a springboard for Dr. Germaniuk – to adopt and reject those findings at will, while he expounded on his views about modern forensic pathology. Mr. Adams’ inability to cross-examine the doctor who conducted and prepared the autopsy hampered the defense on two levels: First, where Dr. Rona’s findings hurt the defense case, Adams’ attorneys were unable to challenge them. Second, where Dr. Rona’s findings may have helped the defense – the time of death, for example – Dr. Germaniuk simply deflected efforts to highlight those findings by complaining about the competence of Dr. Rona and his office. The defense’s inability to cross-examine Dr. Rona, therefore, made it all the more difficult to cross-examine and confront Dr. Germaniuk. Surely, it violated Adams’ right to confront the evidence against him.

2. Primary purpose test has been rejected and, in any case, is inapplicable here.

In Justice Alito's opinion (garnering a total of four votes), he concluded that even if the Cellmark lab report had been introduced for its truth, the evidence was not “testimonial.” It reasoned, first, that the Cellmark report “plainly was not prepared for the primary purpose of accusing a targeted individual.” (*Williams*, at p. \*61.) It reasoned that “the primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial.” The Alito opinion observed that the court looked “for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances.” (*Id.* at p. \*62.)

The Alito opinion did not secure a majority, however. The primary purpose test it posits finds no history or constitutional underpinning, which could be said to derive from any previous Supreme Court jurisprudence. Nevertheless, even if the reasoning had carried the day, it would

still not control the proper result in Mr. Adams' case – addressing a very different type of evidence presented under very different circumstances.

3. Formality of the document is a critical consideration

More importantly for purposes of this discussion is Justice Thomas's opinion. It is Thomas's analysis in *Williams* which permitted the High Court to hold that the Cellmark expert's testimony was permissible. Justice Thomas expressly rejected Alito's primary purpose test. Instead, Justice Thomas concluded that the Cellmark report was not testimonial solely because it lacked sufficient formality and solemnity. (*Williams*, at p. \*88 [Thomas, J., concurring in the judgment]; *id.* at pp. \*106-\*107 [contending that the plurality's formulation of the primary purpose test "lacks any grounding in constitutional text, in history, or in logic"].) The Justice went on to criticize the plurality's approach as diminishing "the Confrontation Clause's protection in cases where experts convey the contents of solemn, formalized statements to explain the bases for their opinions," observing that "[t]hese are the very cases in which the accused should 'enjoy the right... to be confronted with the witnesses against him.'" (*Id.* at p. \*113.)

Justice Thomas, nevertheless, concluded that the Cellmark report was not testimonial because it "lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact." In addition, the report did not attest that its statements accurately reflected the testing processes used or the results obtained. While the report was signed by two "reviewers," "they neither purport to have performed the DNA testing nor certify the accuracy of those who did." (*Id.* at p. \*102.)

By contrast, the circumstances of Gina Tenney's autopsy and Dr. Rona's resulting report in Mr. Adams' case were substantially more formal and solemn than the lab test at issue in

*Williams*. As a practical matter, the case is not about the simple mailing of evidence to an examiner for subsequent analysis from an unidentified author. Dr. Rona conducted statutorily governed formal proceedings, the goal of which is to establish time, cause, and manner of death. The results of that process are then set forth in a certified report, the contents of which are attested to by the County Coroner (which was someone other than Dr. Rona, who has since passed away). Further –

- \* The autopsy was conducted not simply pursuant to a police request, but pursuant to a government mandate (R.C. 313.10);

- \* The Coroner is required by law to report detailed medical findings, including all positive and negative findings pertinent to establishing the cause of death in accordance with medicolegal practice. (R.C. 313.09);

- \* The Coroner is required by statute to notify law enforcement if he determined that there was a reasonable ground to suspect the death was a homicide (R.C. 313.09).

The heavy involvement of government and law enforcement in the production of an autopsy report in cases of suspected homicide results in a highly formalized document that is “functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.” (Williams, at p. \*104 [Thomas, J., concurring in the judgment].) This is so whether or not the document is signed under oath. The autopsy report in this case is testimonial under Justice Thomas's formulation – and remains consistent with *Williams*' thrust, particularly given the Court's resolution of *Melendez-Diaz* and *Bullcoming*.

## CONCLUSION

The autopsy report admitted against Mr. Adams in the absence of any opportunity to confront or cross-examine the author of that report violated his rights to Confrontation under the Sixth and Fourteenth Amendments of the Constitution. Under the circumstances, Amici join Appellant Adams in asking this Court to reverse his conviction and remand this matter for a new trial.

Respectfully submitted,



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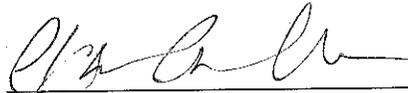
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief of Amici Curiae Ohio Association of Criminal Defense Lawyers and the Cuyahoga County Public Defender in Support of Appellant Bennie Adams was forwarded by regular U.S. Mail, postage pre-paid, to Paul Gaines, Mahoning County Prosecutor, 21 West Boardman Street, 6<sup>th</sup> Floor, Youngstown Ohio 44503 on this 28<sup>th</sup> day of September, 2012.



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