

STATE OF LOUISIANA

DOCKET NO. 99,657

VS

39TH JUDICIAL DISTRICT

RYAN D. RUSSELL, SR.

RED RIVER PARISH


MOTION IN LIMINE TO EXCLUDE AUTOPSY REPORT

NOW INTO COURT comes the defendant, RYAN D. RUSSELL, SR., who moves to exclude Dr. George M. McCormick, II's September 2, 2004 autopsy report from the trial of this matter because its introduction would violate the defendant's right to confront the witnesses against him pursuant to the Sixth Amendment's Confrontation Clause, as interpreted by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), as specifically discussed in the defendant's memorandum in support of this motion, incorporated herein by reference.

WHEREFORE, defendant, RYAN J. RUSSEL, SR. moves to exclude from the trial of this matter the September 2, 2004 autopsy report performed by Dr. George McCormick, II on any and all grounds, including the grounds that La. C.Cr.P. art. 105 is unconstitutional and in violation of the Confrontation Clause; defendant further seeks an order prohibiting all witness at trial from reading from or otherwise referring to Dr. McCormick's report, and for all other relief allowed by the law, facts, and equity.

FILED
STUART SHAW
NOV 15 2005
CLERK OF COURT
RED RIVER PARISH

RESPECTFULLY SUBMITTED,


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STATE OF LOUISIANA
VS
RYAN D. RUSSELL, SR.

DOCKET NO. 99,657
39TH JUDICIAL DISTRICT
RED RIVER PARISH

MEMORANDUM IN SUPPORT:
MOTION IN LIMINE TO EXCLUDE AUTOPSY REPORT

NOW INTO COURT comes the defendant, RYAN D. RUSSELL, SR., who files the following memorandum in support of his motion in limine to exclude Dr. George M. McCormick, II's September 2, 2004 autopsy report from the trial of this matter:

I. Summary of relevant facts.

Defendant is charged with murdering John Shoebroek on or about August 21, 2004 in violation of La. R.S. 14:30.1 ("Second degree murder"). Dr. George M. McCormick, II performed an autopsy of the deceased on September 2, 2004 under the authority of the Red River Parish Coroner's Office.¹ Dr. McCormick died on September 20, 2005. Prior to his death, Dr. McCormick did not testify in any preliminary exam or any other similar court proceeding in this matter (the defendant was indicted by the Grand Jury; therefore, no preliminary exam was held in this matter).

II. Summary of argument.

Dr. McCormick's autopsy report should be excluded for all purposes from the trial of this matter because its introduction would violate the defendant's right to confront the witnesses against him pursuant to the Sixth Amendment's Confrontation Clause, as interpreted by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

ARGUMENT

Autopsies for the purposes of criminal investigations in Louisiana are governed by La. C.Cr.P. arts. 101-106. Article 102 provides that the coroner shall perform an autopsy, or cause one to be performed by a competent physician, "[w]hen there is a

¹ Red River Parish contracts such autopsies, which are mandated by La. C.Cr.P. art. 102, to Dr. McCormick's firm, Forensic Pathology, Inc. According to other discovery documents, Dr. McCormick was assisted during the autopsy examination by another employee of Forensic Pathology, Inc., Ms. Lisa Hayes. Ms. Hayes is not a medical doctor.

reasonable probability that the violation of a criminal statute has contributed to the death[.]” Under such circumstances, the coroner shall “make a written report of his investigation to the district attorney” La. C.Cr.P. art. 105.

According to the Louisiana Code of Evidence, Dr. McCormick’s autopsy report would constitute hearsay at the trial of this matter under La. C.E. art. 801(C). Hearsay is not admissible except as otherwise provided by the Code of Evidence or other legislation. La. C.E. art. 802. None of the exceptions listed in either La. C.E. art. 804 (“declarant unavailable”) or La. C.E. art. 803 (“availability of declarant immaterial”) would apply to this case. In particular, article 803(8)(b) specifically excludes investigative reports prepared by or for law enforcement personnel. Because no applicable exceptions exist within articles 803 or 804, the hearsay autopsy report would have to be excluded unless some “other legislation” would permit its introduction.

The Code of Criminal Procedure provides that the coroner’s report and a proces verbal of an autopsy “shall be competent evidence of death and the cause of death thereof, but not of any other fact.” La. C.Cr.P. art. 105.² The Louisiana Supreme Court has held that Article 105 operates as an exception to the hearsay rule, but only to prove the fact of “death and cause of death.” *State v. Monroe*, 345 So.2d 1185 (La. 1977). The court has further held that an assistant coroner or other agent may testify as to these facts. *State v. Kelly*, 375 So.2d 1344, 1348 (La. 1979). The viability of these holdings is questionable following the United States Supreme Court’s decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *Crawford* would prohibit the introduction of the autopsy report and its conclusions in the current instance because Dr. McCormick is unavailable to testify, and the defendant has not had the opportunity to cross-examine the statements contained in the report.

² Although Article 105 is entitled “Coroner’s report; admissibility in evidence,” its text does not provide that the coroner’s report shall be an exception to the hearsay rule, and the headings of the articles of the Code do not constitute parts of the law. La. C.Cr.P. art. 10. In fact, when the Legislature intends for a statute to be an “exception to the hearsay rule,” it typically makes its intention clear within the *text* of the statute: See e.g., La. R.S. 9:394 (hospitals bills in paternity action/ “. . . genetic testing shall be admissible as an exception to the hearsay rule”); La. R.S. 15:430.1 (criminal procedure/ “This section is declared to be an exception to the hearsay rule.”); La. Ch.C. art. 325 (closed circuit television/ “The videotape authorized by this Chapter is hereby admissible in evidence as an exception to the hearsay rule.”).

Statutes are presumed to be constitutional, and any doubt should be resolved in the statute's favor. *State v. Cunningham*, 2004-2200 (La. 6/13/05), 903 So.2d 1110 (citations omitted). The party challenging the constitutionality of a statute bears a heavy burden in proving that the statute is unconstitutional. *Id.*, (citations omitted). A court may avoid constitutional problems by adopting a narrowing construction of the statute as long as that interpretation remains consistent with the overall purposes behind the legislation. *Id.*, (citations omitted).

With only one exception—the First Circuit's *State v. Leonard*³—all of the reported Louisiana cases interpreting Article 105 were decided prior to the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). That fact is significant, because *Crawford* completely changed the Supreme Court's Confrontation Clause analysis for out-of-court statements. Under the old test provided by *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), out-of-court statements could be admissible if the trial court deemed them to be "reliable" according to certain factors (a substantive safeguard); under *Crawford*, the appropriate test is whether a defendant has had the right to cross-examine the evidence in question (a procedural safeguard).

In *Crawford*, the defendant was arrested and charged with stabbing a man who had allegedly tried to rape the defendant's wife. 541 U.S. at 39; 124 S.Ct. at 1357. Shortly following his arrest, both the defendant and his wife gave an account of the incident to the police. *Id.* The wife refused to testify during the trial pursuant to a state-law marital privilege, so the State introduced her prior statement to the police over the defendant's objection. 541 U.S. at 40; 124 S.Ct. at 1357. The jury convicted the defendant of assault, but the appellate court reversed, finding under *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) that the wife's statement bore "adequate 'indicia of reliability'" to meet the burden of the Confrontation Clause. 541 U.S. at 41; 124 S.Ct. at 1358. The Washington Supreme Court reversed the court of appeals and reinstated the defendant's conviction after reaching a contrary conclusion under the

³ (La.App. 1 Cir. 4/27/05), ___ So.2d ___, 2005 WL 1039635, not yet released for final publication.

Roberts test. *Id.* The United States Supreme Court granted writs and reversed, setting aside the defendant's conviction and holding that the wife's statement was inadmissible under the Confrontation Clause—regardless of its *Roberts* "reliability"—solely because the defendant had not had the opportunity to cross-examine the statement. "Where testimonial statements are at issue," said the Court, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69; 124 S.Ct. at 1374.

The Sixth Amendment to the Constitution provides in part that the accused shall "enjoy the right . . . to be confronted with the witnesses against him" Writing for the Court in *Crawford*, Justice Scalia explained that the right of confrontation developed in English common law as a reaction to the 1603 trial of Sir Walter Raleigh, during which certain written statements were introduced over Raleigh's objection, leading to his conviction for treason. 541 U.S. at 44; 124 S.Ct. at 3160. Raleigh had objected to the introduction of the statements, consisting of transcripts of the pretrial examinations of his alleged accomplices, because he was not afforded the opportunity to cross-examine them. 541 U.S. at 44; 124 S.Ct. at 1360. In reaction (at least in part) to this decision, English law thereafter developed "a right of confrontation that limited these abuses." 541 U.S. at 44; 124 S.Ct. at 1360. By 1696, the English courts had determined that a witness' pretrial statement could not be used if the defendant had not had the opportunity to cross-examine the witness, "even [if the] witness was dead" 541 U.S. at 45; 124 S.Ct. at 1360, discussing *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584.⁴

Despite this historical basis for the Sixth Amendment, the United States Supreme Court did not always interpret the Confrontation Clause to require the opportunity for *actual* confrontation prior to *Crawford*. See 541 U.S. at 60; 124 S.Ct. at 1369. Beginning in 1980, the analysis of hearsay evidence for Confrontation Clause purposes was governed by *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980),

⁴ Some doubts remained over whether certain *statutes* would provide an exception to that rule in felony cases. 541 U.S. at 46; 124 S.Ct. at 1361. These doubts had dissipated by 1791 when the Sixth Amendment was ratified, during which time all of the English courts applied the cross-examination rule in felony cases. 541 U.S. at 46-47; 124 S.Ct. at 1361.

which conditioned the admissibility of all hearsay evidence on “whether it [fell] under a ‘firmly rooted hearsay exception’ or [bore] ‘particularized guarantees of trustworthiness.’” 541 U.S. at 60; 124 S.Ct. at 1369, citing *Roberts*, 448 U.S. at 66, 100 S.Ct. at 2531. The *Roberts* test focused on the “reliability” of the evidence—a substantive consideration—rather than on *the process* of whether the defendant had been afforded the opportunity to test the evidence. 541 U.S. at 61; 124 S.Ct. at 1370. The Supreme Court determined in *Crawford* that the *Roberts* test departed from the historical basis for the Sixth Amendment because: (a) it improperly admitted statements that consisted of *ex parte* testimony upon “a mere finding of reliability[;]” and (b) it improperly applied the same mode of analysis “whether or not the hearsay consist[ed] of *ex parte* testimony.” 541 U.S. at 60; 124 S.Ct. at 1369. In response, the *Crawford* court concluded that the States might continue to govern “*nontestimonial* hearsay” by their respective rules of evidence; however, “[w]here *testimonial* evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”⁵ 541 U.S. at 68; 124 S.Ct. at 1374 (emphasis added). The appropriate analysis would therefore turn on whether a particular statement was “testimonial,” the specific definition of which the *Crawford* court deliberately left unresolved. 541 U.S. at 68; 124 S.Ct. at 1374.

At first glance, the coroner’s autopsy report might not appear to be “testimony,” because it is a written form of evidence, and not “evidence that comes to [the] tribunal through [a] live witness[] speaking under oath”⁶ The autopsy report should not be lumped into the category of ordinary written evidence, however, because—unlike land titles, business contracts, marriage records, invoices, and other documentary evidence (many of which have their own hearsay exceptions under the Code of Evidence)—the coroner’s report consists of the *direct statement* of the coroner to the district attorney for the purposes of assisting or initiating a particular criminal investigation. The coroner’s report is specifically intended to serve as a prosecutorial tool, as evidenced by its

⁵ The Court stated: “[w]herever testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” 541 U.S. at 61; 124 S.Ct. at 1370.

⁶ See Black’s Law Dictionary, Sixth Edition (1990), citation omitted, defining “testimony.”

inclusion within the Code of Criminal Procedure. It is not merely the record of some transaction, such as a contract or invoice, but a finding and statement of criminal responsibility. In a homicide case, it ultimately constitutes the statement of the coroner's office against the accused with respect to the fact and cause of death, a statement which will be repeated on the witness stand by the coroner or his agent⁷ during the trial. See 541 U.S. at 59, note 9; 124 S.Ct. at 1369, note 9. If such a statement would be "testimony" at trial—and surely it would be—then the same statement must likewise be "testimony" in advance of the trial. The statements would be the same; only the timing and manner of delivery would change.

This conclusion is supported by *Crawford's* reasoning, the construction of the relevant Louisiana statutes, and the Legislature's own findings and comments. Louisiana law specifically provides that the coroner's report and conclusions shall be used by the prosecution; in fact, the report is prepared for that purpose. See La. C.Cr.P. arts. 101, 105. If the coroner concludes that a homicide has occurred, the coroner even has the power to arrest the person who has committed the crime. La. C.Cr.P. art. 106. The coroner is by statute an arm of the prosecution, and his statements and conclusions—whether in court or out-of-court—are necessarily directed at the accused when he concludes that a crime has been committed. See La. C.Cr.P. arts. 101-106. In such a case, the coroner would clearly be a witness against the accused.

The Legislature specifically acknowledged the Confrontation Clause problem presented by Article 105 when the Code of Evidence was promulgated in 1988, directing the analysis of the issue to the *then*-controlling Sixth Amendment jurisprudence: *Ohio v. Roberts*, 448 U.S. 56 (1980). In the draft version of the legislative comments to Act No. 515, addressing the promulgation of La. C.E. art. 803(9) ("Hearsay exceptions/Records of vital statistics"), the Legislature noted that Article 105 was one of three other statutory provisions "pertaining to death." (See exhibit 1) The Legislature recognized that a "problem ha[d] arisen in some states regarding opinions in coroners' reports and death

⁷ In this case, for instance, Dr. McCormick was commissioned to perform the autopsy on behalf of the Red River Parish coroner's office.

certificates in criminal cases, especially when the coroner d[id] not testify and the defendant ha[d] no opportunity to exercise his right of confrontation as to him.” Id., comment (d), citing *People v. Holder*, 230 Cal.App.2d 50-53-55, 40 Cal.Rptr. 655 (1964). Quoting from *Holder*, the Legislature concluded that *Ohio v. Roberts*, 448 U.S. 56 (1980) would “require, at least when critical conclusions [had] been drawn from an autopsy or investigation, proof of *unavailability* of the expert whose conclusion is at issue and of *reliability* of the statements contained in the document.” Comment (d)(emphasis added). This comment correctly reflected the appropriate test when the Legislature drafted it in 1988; however, *Crawford* rejected the *Roberts* ‘reliability’ test as a litmus for constitutionality. Under the new test, any “statements contained in the document” would have to be subject to cross-examination by the accused⁸.

The Legislature could have—but did not—suggest that such reports could simply fall under a “business records” exception, or some other exception. Likewise, the Legislature did not suggest that the problem could be solved by another witness’ simply reading the report into the record (and such an approach would violate *Crawford* anyway; the Supreme Court acknowledged that “Raleigh was, after all, perfectly free to confront those who read Cobham’s confession in court.” 541 U.S. at 51; 124 S.Ct. at 1364). The Legislature’s discussion of the problem in the context of *Roberts* suggests that it considered such “documents” to be more than mere written records; in fact, it specifically found that such records warranted Sixth Amendment scrutiny, a position reserved after *Crawford* for “testimony” against the accused.

The *Crawford* court concluded that the Confrontation Clause would apply to all “witnesses’ against the accused—in other words, those who [would] ‘bear testimony.’” 541 U.S. at 51; 124 S.Ct. at 1364, citation omitted. “Testimony,” according to the Court, would “typically” consist of “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Id., citation omitted. According to the Louisiana Code of Criminal Procedure, that is the exact reason for the coroner’s report—proving

⁸ In the final version of the comments, the Legislature retained the reference to *Roberts*, shifting the comment to La C.E. art 803 (8), comment (g).

the fact and cause of death. See e.g. La. C.Cr.P. arts. 101, 105. The *Crawford* court stated that: “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.* The Supreme Court listed the following examples of “testimony” in *Crawford*: “ex parte in-court testimony or its functional equivalent—that is, *material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially* . . . [and] extrajudicial statements contained in formalized testimonial materials, such as *affidavits* . . .” *Id.*, citing *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116, L.Ed.2d 848 (1992)(emphasis added).⁹

Despite *Crawford*'s conclusions, the Louisiana First Circuit Court of Appeal recently held in the case of *State v. Leonard*, 2004-1609 (La.App. 1 Cir. 4/27/05), __So.2d__, 2005 WL 1039635 (not yet released for final publication) that an autopsy report was not *Crawford* “testimony” because: (a) *Crawford* left some “hearsay exceptions, such as business records and official records” untouched by the Confrontation Clause; and (b) the autopsy was (apparently) a business record and/or official report (the First Circuit never explicitly made this conclusion, but implied the conclusion). See *Leonard*, 2005 WL at *7, citing *Crawford* at 541 U.S. at 76; 124 S.Ct. at 1378 (REHNQUIST and O’CONNOR, concurring). This circular analysis—finding that *Crawford* did not prohibit the autopsy because the autopsy report was a business record and because some business records were untouched by *Crawford*—ignored the rationale for the *Crawford* decision, and ran contrary to the Legislature’s own comments to Article 105 (discussed above). The First Circuit misinterpreted *Crawford* by improperly compressing the question of whether the document was “testimony” into the question of whether it might fit into a standard hearsay exception—an analysis explicitly rejected by *Crawford*.¹⁰

⁹ (THOMAS, joined by SCALIA, concurring in part and concurring in judgment).

¹⁰ In another context, the Louisiana Supreme Court concluded that *Crawford* did not control the admissibility of certificates of laboratory analysis because La. R.S. 15:499, et seq. provided a suitable scheme that would allow the defendant to stipulate to their admissibility. See *State v. Cunningham*, 2004-2200 (La. 6/13/05), 903 So.2d 1110, 1119-20.

It is not possible to square Article 105 with *Crawford's* holding if the conclusions in the autopsy report constitute “testimony,” because Article 105 would—under Louisiana Supreme Court precedent¹¹—allow the introduction of the conclusions. For that reason, it does not appear that the Court can avoid the constitutional problem by narrowing the construction of the statute. *State v. Cunningham*, 2004-2200 (La. 6/13/05), 903 So.2d 1110 (citations omitted). Constitutional objections must be raised in the trial court. *Vallo v. Gayloe Oil Co.*, 94-1238 (La. 11/30/94), 646 So.2d 859. For the reasons discussed above, the defendant asserts that Dr. McCormick’s report would constitute “testimony” for the purposes of *Crawford*, and that Article 105 is therefore unconstitutional and a violation of the Confrontation Clause to the extent that it provides an exception to the hearsay rule for Dr. McCormick’s report and the statements contained therein.

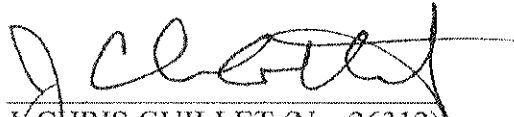
CONCLUSION and REQUEST FOR RELIEF

A criminal defendant’s case might be crushed by the death of his sole alibi witness. In such an instance, no court would allow the defendant to substitute the witness’ handwritten note for his testimony. Although some might consider the report of a doctor to be more “reliable” than such a note, reliability is no longer enough to survive Sixth Amendment scrutiny following *Crawford*. Because the defendant did not and will not have the opportunity to cross-examine the statements contained in Dr. McCormick’s report, the report and its contents must be excluded for all purposes at the trial of this matter.

¹¹ *State v. Monroe*, 345 So.2d 1185 (La. 1977).

WHEREFORE, defendant, RYAN J. RUSSEL, SR. moves to exclude from the trial of this matter the September 2, 2004 autopsy report performed by Dr. George McCormick, II on any and all grounds, including the grounds that La. C.Cr.P. art. 105 is unconstitutional and in violation of the Confrontation Clause; defendant further seeks an order prohibiting all witness at trial from reading from or otherwise referring to Dr. McCormick's report, and for all other relief allowed by the law, facts, and equity.

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