

STATE OF MARYLAND

*

IN THE

2016 MAY 31 P 4 01

Plaintiff

*

CIRCUIT COURT

CRIMINAL DIVISION

v.

*

FOR

CAESAR GOODSON

*

BALTIMORE CITY

Defendant

*

Case No. 115141032

* * * * *

OFFICER GOODSON'S REPLY IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE THE ADMISSION OF THE AUTOPSY REPORT OF CAROL H. ALLAN, M.D. IN UNREDACTED FORM

The State presents a single argument in response to Officer Caesar Goodson's motion *in limine* to preclude the admission of the portion of Dr. Allan's autopsy report that refers to, and relies on, witness statements. According to the State, "Rule 5-703(b) plainly permits out-of-court statements, such as the challenged witness statements in Dr. Allan's report, to be disclosed to the jury for the limited purpose of helping to illuminate and evaluate Dr. Allan's expert opinion." Opp. at 3. In making such an argument, the State asserts that the testimonial statements are not being offered for their truth, and, by extension, were not relied on by Dr. Allan as "true" facts. The State's position is without merit. Not only has this very argument been rejected by courts around the country, one need go no further than the Committee Note to Md. Rule 5-703 (which the State makes no effort to grapple with in its opposition papers) to learn that an expert cannot relay to the jury out-of-court statements that are "testimonial" in nature under Md. Rule 5-703. In addition, the State's opposition also ignores Md. Code Ann., Health-Gen. § 5-311(d), which establishes that official autopsy records do "not include a statement of a witness or other individual." As shown below, § 5-311(d) provides a reason independent of the Confrontation Clause to preclude the admission of the out-of-court witness statements embedded

in Dr. Allan's autopsy report. For these and the other reasons presented below, if this Court is inclined to admit Dr. Allan's report at Officer Goodson's trial, it should order that the portion of the report that reflects witness statements must first be redacted.

ARGUMENT

A. The State does not dispute that the witness statements embedded in Dr. Allan's report are "testimonial" in nature.

In its three-page opposition, the State does not dispute that the out-of-court witness statements embedded in Dr. Allan's report are "testimonial" under *Crawford* and its progeny. Nor could it. As Officer Goodson made clear in his initial motion, the witness statements reflected in Dr. Allan's report resulted from "formalized dialogue," *i.e.*, they were made in the context of interrogation of witnesses by law enforcement who were investigating a potential crime, and are therefore testimonial as a matter of law. *See* Officer Goodson's "Motion *in Limine* to Preclude the Admission of the Autopsy Report of Carol H. Allan, M.D., in Unredacted Form" at 5-9; *see also Crawford*, 541 U.S. 36, 68 (2004) ("Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations.*") (emphasis added); *Taylor v. State*, 226 Md. App. 317, 336-37 (2016) (acknowledging post-*Crawford* cases holding that statements in police interrogations made for the primary purpose of creating evidence are testimonial).

B. The State fails to address the evidentiary and statutory rules that limit its ability to admit testimonial hearsay through expert testimony.

The State's opposition ignores the evidentiary and statutory limitations that Maryland law imposes on the State's ability to admit testimonial hearsay through Dr. Allan or her report.

The first such limitation comes from the very evidentiary rule that, according to the State, permits it to admit testimonial hearsay under the guise of expert testimony. That rule is Md. Rule 5-703, which governs the facts or data that an expert may rely on. It provides:

(a) In General. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) Disclosure to Jury. If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert pursuant to section (a) may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence. Upon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

Md. Rule 5-703.

The Committee Note to Md. Rule 5-703, however, expressly recognizes that hearsay cannot be disclosed to the jury by way of an expert when doing so would violate a defendant's right of confrontation: "Subject to Rule 5-403, *and in criminal cases the confrontation clause*, experts who rely on information from others may relate that information in their testimony if it is of a type reasonably relied upon by experts in the field." (Emphasis added). In its opposition, the State makes no effort to square the Committee Note (which makes clear that the State cannot avoid the Confrontation Clause by admitting testimonial hearsay under Md. Rule 5-403) with Dr. Allan's report (which contains testimonial hearsay that implicates Officer Goodson's rights under the Confrontation Clause). This alone is fatal to the State's opposition because the Committee Note plainly reflects that as between Md. Rule 5-703 and the Confrontation Clause, the Confrontation Clause trumps. Md. Rule 5-703 simply does not allow what the State seeks to do here.

The second limitation comes from Md. Code Ann., Health-Gen. § 5-311(d). That statute defines "record" as "the result of an external examination of or an autopsy on a body" but "[d]oes not include a statement of a witness or other individual." *Id.* at § 5-311(d)(1) (emphasis added). Under this statute, to the extent that Dr. Allan's report contains a "statement of a witness or other individual," the report is not a business record as a matter of Maryland law. Again, the State makes no effort to explain how allowing Dr. Allan's report to come into evidence in unredacted form would not run afoul of § 5-311(d). This too is fatal to the State's opposition, albeit for a reason that has nothing to do with the Confrontation Clause. The key point here is that in addition to *containing* hearsay, Dr. Allan's report is *itself* hearsay. And the Maryland Rules of Evidence require that an independent exception to the hearsay rule must exist for each "level" of hearsay in an out-of-court statement for that statement to be admissible.¹ Section 5-311(d) establishes, however, that no such independent exception exists for autopsy reports to the extent such reports contain witness statements. For this separate and additional reason, the Court should preclude the admission of Dr. Allan's report in unredacted form.

C. The State cannot avoid the Confrontation Clause by arguing that Dr. Allan does not rely on out-of-court, testimonial witness statements for the truth of the matters asserted in those statements.

The State's sole attempt to avoid the Confrontation Clause problems raised by Dr. Allan's report involves appealing to Md. Rule 5-703, which permits an expert to rely on "facts" that "need not be admissible in evidence" under certain circumstances.² That attempt, however, fails

¹ See Md. Rule 5-805 ("If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule.").

² The State argues that the inadmissible hearsay statements should be disclosed to "illuminate and evaluate" Dr. Allan's expert opinion. Opp. at 3. The State does not assert, however, that the statements are also "trustworthy," as is required under Md. Rule 5-703(b). This omission

for at least three reasons, the most obvious of which is that the Confrontation Clause would be effectively gutted if the State's view of the law were correct.

First, the State's simplistic argument has been rejected by courts around the country. *See, e.g., Williams v. Illinois*, 567 U.S. ____ , 132 S.Ct. 2221, 2241 (2012) (Alito, J., plurality) (noting that an expert cannot express an opinion based on factual premises not supported by any admissible evidence and also reveal the out-of-court testimonial statements on which the expert relied without violating the Confrontation Clause); *United States v. Pablo*, 696 F.3d 1280, 1288 (10th Cir. 2012) ("If an expert simply parrots another individual's out-of-court statement, rather than conveying an independent judgment that only incidentally discloses the statement to assist the jury in evaluating the expert's opinion, then the expert is, in effect, disclosing that out-of-court statement for its substantive truth; the expert thereby becomes little more than a backdoor conduit for an otherwise inadmissible statement."); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) ("Allowing a witness simply to parrot out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion would provide an end run around *Crawford*." (quotations omitted)); *United States v. Lombardozi*, 491 F.3d 61, 72 (2d Cir. 2007) (explaining that because an expert witness may "form an opinion by applying her expertise to otherwise inadmissible evidence," including out-of-court statements, and convey that information to the jury for purposes of evaluating the expert's opinion, the admission of the out-of-court statement deprives a defendant of his confrontation rights only if the expert conveys the statement "directly to the jury in the guise of an expert opinion").

suggests that the State itself does not consider the out-of-court statements relied on by Dr. Allan to be trustworthy. For this reason alone, those statements should not be disclosed to the jury.

Allowing the admission of Dr. Allan's report in unredacted form would do exactly what the above courts have concluded violates the Confrontation Clause: provide a conduit for otherwise inadmissible testimonial hearsay to be presented to the jury in the guise of expert testimony.

Second, the State's suggestion that Dr. Allan does not rely on the out-of-court witness statements in her report to prove the truth of the matter asserted in those statements—*i.e.*, to establish what, in fact, happened to Mr. Gray on April 12, 2015—is meritless. Dr. Allan acknowledged as much in Officer Porter's trial when she testified that "medical examiners are kind of like medical detectives" who "put together the evidence -- or the material that is presented to us, whether -- *in this case it was witness statements* with the examination that we find when we do the autopsy." 12/7/15 Trial Testimony of Dr. Allan, attached as Ex. A to Officer Goodson's initial motion at 60:6-10 (emphasis added). When asked by the State the bases for her opinion, Dr. Allan testified that she relied upon, among other things, "the information gathered from the circumstances surrounding the death..." 12/4/15 Trial Testimony of Dr. Allan, attached as **Exhibit 1** at 102:14-16. Finally, Dr. Allan relied on the statements of Mr. Gray, Officer Porter, and the other officers as true in making her determination as to the timing of Mr. Gray's injuries and that Mr. Gray's death was a homicide:

Q. . . . [Y]our opinion is whatever happened [happened] between Stops 2 and 4, correct?

A. Based on the witness statements and knowledge of what the ultimate injury was, what his physical -- and response would be to it.

12/7/15 Trial Testimony, Ex. A to Officer Goodson's initial motion at 80:18-23.

Q. So if Officer Goodson had followed the request of Officer Porter, and had driven directly to the hospital, then you wouldn't have considered this a homicide, correct?

A. That's correct.

12/7/15 Trial Testimony, Ex. A to Officer Goodson's initial motion at 78:2-6.

Q. But you've developed a theory about how it happened, right? [. . .]

A. A theory based on the witness statements of Mr. Gray's behavior and the medical evidence of his injury.

12/7/15 Trial Testimony, Ex. A to Officer Goodson's initial motion at 102:12-15. It is insincere at best for the State to suggest that Dr. Allan does not rely on the out-of-court witness statements embedded in her report for the truth of the matters asserted in those statements.³

In sum, just as it did at Officer Porter's trial, the State will elicit at Officer Goodson's trial Dr. Allan's theory as the truth regarding what actually happened to Mr. Gray on April 12, 2015 and not for any other purpose. This Court should not accept the State's *ipse dixit* that Dr. Allan will not rely on the subject hearsay statements to prove the truth of the matters asserted therein.⁴ And with respect to each and every such hearsay statement, Officer Goodson is entitled to confront and challenge the declarant at trial.

The above two points—that the out-of-court statements in Dr. Allan's report are testimonial and relied on by Dr. Allan for the truth of the matters asserted therein—explain why,

³ The State's suggestion that Dr. Allan does not rely on the out-of-court witness statements for their truth is also inconsistent with a recent description by the State of how it and its experts rely on that same evidence:

MR. SCHATZOW: And there is a dispute, as you're well aware, that -- between the State, which contends that the fatal injuries took place between the second stop and fourth stop, and the Defense, which contends that the injuries took place between the fifth stop and the sixth stop. *And part of what the State relies on and part of what the State's experts rely on are Officer Porter's description of what occurred at the fourth stop.*

Transcript of 1/20/16 hearing, attached as **Exhibit 2**, at 23:9-17 (emphasis added).

⁴ If Dr. Allan were not relying on the out-of-court witness statements in her report substantively, *i.e.*, for the truth of the matters asserted in those statements, her opinions would lack a sufficient factual basis under Md. Rule 5-702 and, for that reason, should be excluded.

Cooper v. State, 434 Md. 209 (2013), the decision relied on by the State in its opposition, has no bearing here. The Confrontation Clause issue in *Cooper* involved whether the State could admit forensic test results (memorialized in a DNA report) through the testimony of an expert witness who did not conduct the tests producing those results. After acknowledging that the DNA report had been admitted at trial for its truth and was, therefore, hearsay, the Court of Appeals pointed out that even "if evidence constitutes inadmissible hearsay [and] . . . cannot be admitted as substantive evidence, Maryland Rule 5-703(b) permits a trial judge, in his or her discretion, to admit evidence as the factual basis for the expert's opinion if the evidence is unprivileged, trustworthy, reasonably relied upon by the expert, and necessary to 'illuminate' the expert's testimony." *Id.* at 230.

The Court of Appeals noted that this Court had determined during the underlying trial that the subject DNA report was "trustworthy," and that the testifying expert had at trial satisfactorily explained why the DNA report was reliable. *Id.* at 230-31. By contrast, in this case, there is no basis for concluding that the out-of-court statements relied on by Dr. Allan are "trustworthy" or "reasonably relied upon" by Dr. Allan. The Court of Appeals also determined that the DNA report was not "testimonial" in nature. *Id.* at 236 ("[A]pplying Justice Thomas's reasoning we conclude that the Shields report lacks the formality to be testimonial."). By contrast, in this case, there is no reasonable dispute that the hearsay statements relied on by Dr. Allan are testimonial. *See* ARGUMENT § A, *supra*. In sum, the controverted issue in *Cooper*, *i.e.*, whether statements in a report are testimonial, is not being disputed by the State in Officer Goodson's case. Further, the State argues that the statements embedded in Dr. Allan's report are not being relied on for their truth, a position not argued by the State in *Cooper*. *Cooper*, therefore, is inapposite.

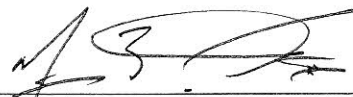
Finally, the State suggests that any problems with the admission of Dr. Allan's report in unredacted form could be cured by instructing the jury "that they must use the witness statements only for the purpose of evaluating the validity and probative value of Dr. Allan's opinion." Opp. at 3. But any such instruction is no substitute for a constitutional provision and evidentiary rule that have already struck the balance in favor of cross-examination. *See Crawford*, 541 U.S., at 61 ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination"); *see also* Md. Rule 5-703, Committee Note ("Subject to Rule 5-403, *and in criminal cases the confrontation clause*, experts who rely on information from others may relate that information in their testimony if it is of a type reasonably relied upon by experts in the field.") (emphasis added).

CONCLUSION

For the reasons presented above, Officer Caesar Goodson respectfully requests that this Court issue an Order providing that if Dr. Allan's autopsy report is to be admitted into evidence at Officer Goodson's trial, the three-page "Opinion" section of that report must be redacted.

Dated: May 31, 2016

Respectfully submitted,



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Counsel for Officer Caesar Goodson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May 2016, a copy of Defendant Caesar Goodson's Reply in Support of Motion *In Limine* to Preclude the Admission of the Autopsy Report of Carol H. Allan, M.D. in Unredacted Form was served via first class mail, postage prepaid upon:

Michael Schatzow, Esquire
Chief Deputy State's Attorney for Baltimore City
120 E. Baltimore Street
9th Floor
Baltimore, Maryland 21202



Amy E. Askew

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

STATE OF MARYLAND

vs.

Case Number:
115141037

WILLIAM PORTER,

DEFENDANT.
_____ /

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Excerpt - Testimony of Carol Allan, M.D.)

Baltimore, Maryland

Friday, December 4, 2015

BEFORE:

HONORABLE BARRY G. WILLIAM, Associate Judge
And a jury

APPEARANCES:

For the State:

JANICE BLEDSOE, ESQUIRE

MICHAEL SCHATZOW, ESQUIRE

MATTHEW PILLION, ESQUIRE

JOHN BUTLER, ESQUIRE

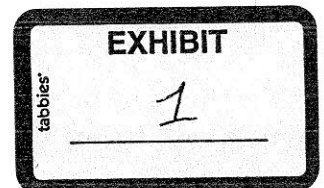
For the Defendant:

JOSEPH MURTHA, ESQUIRE

GARY PROCTOR, ESQUIRE

* Proceedings Digitally Recorded *

Transcribed by:
Patricia Trikeriotis, CVR
Official Court Reporter
111 N. Calvert Street
Suite 515, Courthouse East
Baltimore, Maryland 21202



1 THE COURT: Sustained.

2 BY MS. BLEDSOE:

3 Q. Are those opinions to a reasonable --

4 MR. MURTHA: Objection.

5 THE COURT: Sustained.

6 As to form. Simply as to form.

7 BY MS. BLEDSOE:

8 Q. What do you base your opinions on?

9 MR. MURTHA: Objection.

10 THE COURT: Overruled.

11 THE WITNESS: Education and training.

12 BY MS. BLEDSOE:

13 Q. Okay. What else?

14 A. The autopsy itself. And the circumstances, the

15 information gathered from the circumstances surrounding

16 the death, as well as the autopsy findings.

17 Q. Is there any degree of medical certainty?

18 A. It's commonly known as a reasonable degree of

19 medical certainty, clear and convincing investigative and

20 medical evidence.

21 Q. Do you have an opinion to a reasonable degree

22 of medical certainty concerning the manner of death?

23 MR. MURTHA: Objection.

24 THE COURT: Overruled.

25 THE WITNESS: Yes.

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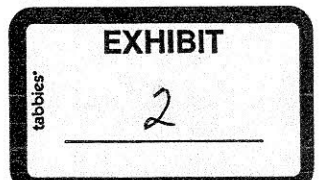
State v. Nero, Miller, Rice, White
January 20, 2016 BEFORE JUDGE BARRY G. WILLIAMS

STATE OF MARYLAND,	*	IN THE
	*	
	*	CIRCUIT COURT
v.	*	
	*	FOR
	*	
EDWARD MICHAEL NERO,	*	BALTIMORE CITY
	*	
Defendant.	*	115141033
	*	
* * * * *	*	* * * * *
	*	
STATE OF MARYLAND,	*	IN THE
	*	
	*	CIRCUIT COURT
v.	*	
	*	FOR
	*	
GARRETT EDWARD MILLER,	*	BALTIMORE CITY
	*	
Defendant.	*	115141034
	*	
* * * * *	*	* * * * *
	*	
STATE OF MARYLAND,	*	IN THE
	*	
	*	CIRCUIT COURT
v.	*	
	*	FOR
	*	
BRIAN RICE,	*	BALTIMORE CITY
	*	
Defendant.	*	115141035
	*	
* * * * *	*	* * * * *
	*	
STATE OF MARYLAND,	*	IN THE
	*	
	*	CIRCUIT COURT
v.	*	
	*	FOR
	*	
ALICIA WHITE,	*	BALTIMORE CITY
	*	
Defendant.	*	115141036
	*	
* * * * *	*	* * * * *

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410-466-2033

410-494-7015



State v. Nero, Miller, Rice, White
January 20, 2016 BEFORE JUDGE BARRY G. WILLIAMS

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TRANSCRIPT OF OFFICIAL PROCEEDINGS
(Motions Hearing)

BEFORE: THE HONORABLE BARRY G. WILLIAMS, JUDGE

HEARING DATE: January 20, 2016

APPEARANCES:

For the State: MICHAEL SCHATZOW, Esquire
JANICE L. BLEDSOE, Esquire
MATTHEW PILLION, Esquire
JOHN BUTLER, Esquire

For Defendant Nero: MARC L. ZAYON, Esquire
ALLISON R. LEVINE, Esquire

For Defendant Miller: CATHERINE FLYNN, Esquire
BRANDON MEAD, Esquire

For Defendant Rice: MICHAEL J. BELSKY, Esquire
CHAZ R. BALL, Esquire

For Defendant White: IVAN I. BATES, Esquire

For Defendant Porter: JOSEPH MURTHA, Esquire

Transcriptionist: Karen Ehatt, CET D-574

Transcription

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transcript produced by transcription service.

State v. Nero, Miller, Rice, White
January 20, 2016 BEFORE JUDGE BARRY G. WILLIAMS

1 MR. SCHATZOW: Yeah. This continues on.

2 THE COURT: Okay.

3 MR. SCHATZOW: Yes.

4 THE COURT: Go ahead.

5 MR. SCHATZOW: Okay. So that's one discrete
6 area. And the second area, Your Honor, the second
7 discrete area involves the place of injury.

8 THE COURT: Okay.

9 MR. SCHATZOW: And there is a dispute, as you're
10 well aware, that -- between the State, which contends
11 that the fatal injuries took place between the second
12 stop and the fourth stop, and the Defense, which contends
13 that the injuries took place between the fifth stop and
14 the sixth stop. And part of what the State relies on and
15 part of what the State's experts rely on are Officer
16 Porter's description of what occurred at the fourth
17 stop --

18 THE COURT: And you're talking about in his
19 statement or in the trial testimony?

20 MR. SCHATZOW: In both.

21 THE COURT: Okay.

22 MR. SCHATZOW: In both. In both. And so we
23 don't contend, Your Honor, that it is legally dispositive
24 of every single charge against each of Mr. -- Messrs.
25 Miller, Nero and Rice. But we do think it's important,