



## New Trial Ordered in Unpublished Melendez-Diaz Autopsy Case

**Author :** Jessica Smith

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Along with the published cases released by the N.C. Court of Appeals on August 3, 2010, was an unpublished case of note. In [State v. Davis](#), \_\_ N.C. App. \_\_ (Aug. 3, 2010), the court ordered a new trial after finding that the trial judge erred by admitting into evidence an autopsy report prepared by a non-testifying pathologist.

In *Davis*, the defendant was charged with killing the victim by setting him on fire. An autopsy of the victim's body was performed by Dr. Garner, of the Medical Examiner's Office in Chapel Hill. Garner did not testify at trial. Instead, over the defendant's objection, the State introduced the autopsy report through the testimony of Dr. Gulledge, an expert in forensic pathology with the Mecklenburg County Medical Examiner's Office. On appeal, the defendant argued that his constitutional rights were violated when the trial court admitted into evidence Garner's testimonial statements without the defendant having been afforded a prior opportunity to cross-examine Garner. Citing *State v. Locklear*, 363 N.C. 438 (2009), the court of appeals agreed. In *Locklear*, the North Carolina Supreme Court held that a *Crawford* violation occurred when the trial court admitted opinion testimony of non-testifying experts regarding a victim's cause of death and identity. The testimony was admitted through the Chief Medical Examiner, who read the non-testifying experts' reports into evidence, rather than testifying to an independent opinion. Since *Locklear*, the court of appeals has issued a number of related opinions, some of which created confusion about the viability of the *Crawford* exception that had been understood to apply when a forensic report is admitted as a basis of a testifying expert's opinion (for a summary of those cases, see my post [here](#)).

The *Davis* court framed the issue as requiring a determination of whether Gulledge "was merely reporting the results of another expert or instead testifying as to his own expert conclusion reached after a technical review of the [report's] underlying data." It noted that Gulledge reviewed the investigation and autopsy reports "for clarity," "for accuracy," and "to determine whether the findings [made] sense in the light of the investigation." The court noted that "[c]onspicuously absent" from the review was any "independent testing" to confirm Garner's conclusions. Furthermore, most of Gulledge's testimony involved reading Garner's report and translating it into layman's terms. For example, Gulledge identified the medical procedures mentioned in the report as having been done on the victim and read portions of the report, including its Pathological Diagnosis. Gulledge testified that the report concluded that cause of death was "Complications of burns" and that the report did not provide a lot of detail about how that conclusion was reached other than the presence of bronchial pneumonia and diffuse alveolar damage, and the fact that the spleen and the kidney were infarcted. After explaining that infarction "happens in burn patients," Gulledge testified that it was a "fair statement" that "but for the burn injuries . . . [the victim] would not have died." When the defense asked Gulledge whether it was possible to determine if the death was accidental or a homicide, he responded: "The only way that I would have to determine what [Garner's] opinion of the manner of death was is that on the report . . . she has checked the box marked homicide[.]" Gulledge further stated, "I don't know where she received the information [relied on to reach this conclusion]. I don't know why she formed that opinion."

Based on the transcript, the court found itself "compelled to hold" that Gulledge did not offer an independent expert opinion based on a review of Garner's report "but was instead, like the witness in *Locklear*, merely reporting the results of Dr. Garner's analysis." It concluded that because Gulledge's review "involved no retesting and instead relied on the accuracy of [Garner's] unconfirmed observations," it was insufficient to establish that Gulledge was testifying to his own expert opinion. The court recognized, in a footnote, that certain types of forensic analysis, such as that done

during an autopsy, “are inherently difficult to reproduce.” It concluded, however, that the “burden on the State of producing the actual analyst is preferable to the denial of Defendant’s constitutional rights, which would occur if our courts permitted an inference of the accuracy of the tests and observations performed during an autopsy.”

One reading of *Davis* is that it involved a simple application of *Locklear*: Because Gullledge did not testify to an independent opinion based information collected by Garner, the basis of the expert’s opinion exception did not apply. Such a reading preserves the basis of the expert’s opinion exception. However, the opinion can be read to mean that the relevant analysis—here an autopsy—must be reproduced and the testifying expert must do “retesting.” Under this view, the basis of the expert’s opinion exception is rejected; in order for forensic testing to be admissible, the testifying expert must reproduce the analysis and do testing. If this is so, some questions that come to mind include:

- What does “retesting” mean in the context of an autopsy? Does it mean something different than reproducing the autopsy?
- What if the victim’s body had been cremated or severely decomposed thus making it impossible—not merely “difficult”—to reproduce the autopsy?
- What if it would have been impossible to reproduce the autopsy and if Garner had died so that it would have been impossible to produce him at trial? Such a scenario is not inconceivable. In a homicide case, years can pass before the matter comes on for trial. If cause of death is essential to the State’s case and the exception does not apply even when it would be impossible to reproduce the autopsy or produce the original analyst, the crime could not be prosecuted.
- What if it would have been impossible to reproduce the autopsy or produce Garner in court but that Garner had taken photographs, slides, video, etc. during the autopsy and Gullledge had based his opinion on those items? Would Garner’s observations have been sufficiently confirmed to serve as the basis of Gullledge’s opinion?

As I previously noted in a blog post [here](#), the N.C. Supreme Court has issued temporary stays in two of the court of appeals’ substitute analyst cases. If the court grants review in those cases, some of these questions may be answered