Appendix

A and B

MANDATE

S.D.N.Y. – N.Y.C.
97-cr-1105
Preska, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of March, two thousand twenty-two.

Present:

Richard C. Wesley,
Eunice C. Lee,
*Circuit Judges.**

United States of America,

Appellee,

v. 22-316

Miguel Feliz, et al.,

Defendants,

Jose Erbo, AKA Tito, AKA Pinguita,
AKA Miguel Garcia,

Defendant-Appellant.

Appellant, pro se, moves to recall the mandate affirming his conviction and for appointment of counsel. Upon due consideration, it is hereby ORDERED that the motion to recall the mandate is DENIED because Appellant does not present "exceptional circumstances" warranting recall of the mandate and reinstatement of his appeal. *United States v. Redd*, 735 F.3d 88, 90 (2d Cir. 2013) (per curiam); *see also United States v. Fabian*, 555 F.3d 66, 68 (2d Cir. 2009) (per curiam) ("[A] defendant cannot evade the successive petition restrictions of 28 U.S.C. § 2255 by framing his claims as a motion to recall the mandate." (internal quotation marks and ellipsis omitted)).

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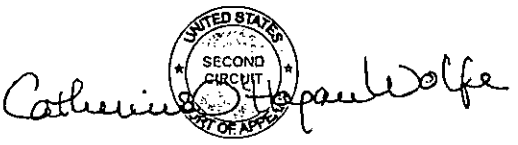
* This motion has been assigned to the same panel that decided the original appeal in this case under docket number 02-1665. Two members of that panel are deceased; Judge Lee was randomly selected to join the panel. The motion has been decided by two panel members pursuant to Second Circuit Internal Operating Procedure E(b).

MANDATE ISSUED ON 04/29/2022

It is further ORDERED that the motion for appointment of counsel is DENIED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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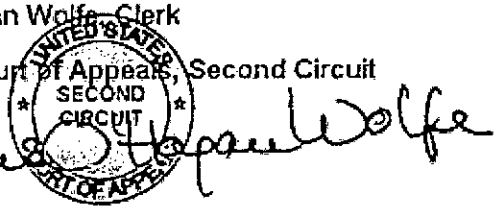
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE ERBO, a/k/a, MIGUEL A. GARCIA-VELEZ,

Defendant/Petitioner,

-vs-

In Re: U.S. v. Feliz, 467 F.3d 227(2d. Cir. 2006)
Related App. Ct. Dkt.# 02-1665-Cr

UNITED STATES OF AMERICA,

Respondent.

DEFENDANT JOSE ERBO'S MOTION TO RECALL THE MANDATE OF THE RULING IN UNITED STATES v. FELIZ, 467 F.3d 227 (2d Cir. 2006) IN LIGHT OF THIS COURT'S RECENT DECISON IN GARLICK v. LEE, DKT. NO.: 20-1796

PRELIMIRARY STATEMENT

This is a Motion to Recall the Mandate and Vacate this Honorable Court's judgment of conviction entered on October 25, 2006, wherein this Court concluded that "Autopsy Reports were not testimonial within the meaning of Crawford, infra; and, thus, did not come within the ambit of the Confrontation Clause. In doing so, this Court rejected the Defendant's argument that the admission of Autopsy Reports against a Defendant who had no opportunity to cross-examine the Author of the Reports violated the Defendant's Sixth Amendment Rights under the United States Constitution and Supreme Court's Precedent and clearly established federal law--Crawford.

REVELANT CONSTITUTIONAL PROVISION AND AUTHORITIES

The questions and arguments presented implicate the following provision of the United States Constitution; Supreme Court Precedent; and Authoritative Decisions of this Court of Appeals.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

"In All Criminal Prosecutions, the accused shall enjoy the Right * * * to be confronted with the witnesses against him[.]"

Supreme Court's Precedent; And Authoritative Decisions Of This Court Of Appeals Involved:

Crawford v. Washington, 541 U.S. 36 (2004); United States v. Feliz, 467 F.3d 227 (2d. Cir. 2006); United States v. James, 712 F.3d 79 (2d. Cir. 2013); and, Garlick v. Lee, Dkt. No.: 20-1796 (June 11, 2021)).

I. STATEMENT AND PROCEDURAL HISTORY

The Defendant assumes this Court's familiarity with the procedural history of this case-however--a brief description of prior submissions is appropriate.

This case presents a straightforward question that has deeply divided this Feferal Court of Appeals' Panels of last result: whether autopsy reports are testimonial statements for purposes of the Confrontation Clause. The current tally stands at 10-9, with this court's recent decision in Garlick v. Lee, supra, siding with the majority in holding that such reports are testimonial statements in light of Crawford, supra.

Nearly every Courts of Appeals and State Courts to have addressed the holding in Feliz, supra, has recognized the conflict, with some expressly suggesting that this Court's intervention is necessary to resolve it.

A. In this case, the Defendant took prompt action through direct appeal (Dkt. No.: 02-1665-Cr)-raising a Crawford v. Washington, surpa, claim in the use of Nine Autopsy Reports-violating his Sixth Amendment Right to Confrontation. In denying Defendant's direct appeals this court noted: "We conclude that Autopsy Reports are not testimonial evidence within the meaning of Crawford and thus, do not come within the ambit of the Confrontation Clause. See, e.g., United States v. Feliz, 467 F.3d at 234 (held before Circuit Judges, Wesley, Hall, and Trager, District Judge)).

B. Seven Years later, in the spring of 2013, a different panel of this court-namely: ROBERT D. SACK, RAGGI; and RICHARD K. EATON, decided the case entitled: United States v. James, supra, in which that Panel's decision conflicts with the decision in Feliz, supra; and expressly recognized that Feliz, supra, have been "Call[ed] * * * Into Doubt" by Melendez-Diaz v.

Massachusetts, 557 U.S. 305 (2009); and subsequent Confrontation Clause decisions from the Supreme Court." See, e.g., United States v. James, 712 F.3d at 94, n. 9 (2013)).

C. On September 30, 2015, another panel of this court, namely: JACOBS, LEVAL, Circuit Judges, and District Judge GEOFFREY W. CRAWFORD, took a different approach from the two panel that decided Feliz, supra, and James, supra, and denied the Defendant's Certificate of Appealability and Dismissed his appeal from the denial of his rule 60(b) motion-in which he requested the United States District Court for the Southern District of New York to re-open his initial 2255 habeas corpus-based upon the facts that this court recognized that its precedent decision regarding autopsy reports-which under Crawford were admissible as both Public and Business Record, had been "Call[ed]* * * Into Question" by Supreme Court precedent. The Defendant also argued that the decision in Feliz was inconsistent with authoritative decisions of other United States Courts of Appeals and State Courts that have addressed the same issue.

D. Put simply, there is chaos, and a conflict between this Court's Circuit Judges on the question whether autopsy reports are testimonial for Confrontation purposes, particularly in the wake of this court's recent decision in Garlick v. Lee, supra. The panels are sharply and deeply divided on the question, reflecting broader disagreement and conflict on how to go about determining whether autopsy reports are testimonial statement for Confrontation Clause purposes in the first place. The Panels' conflict on the question actually got worse after the "Reasonable Application" of "clearly Established Federal Law" in Garlick, supra,... but it has only compounded by uncertainty as to which (if any) of the two Panels' decisions in Feliz or in Garlick is controlling.

The Feliz's decision contains one of the most extensive discussions-by numerous defense attorneys, courts, prosecutors; and commentators-of the issue before and after the decision in Garlick, supra; and this Petition is a suitable vehicle in which to resolve the conflict and discussions. The Garlick's Panel wouldn't have held that autopsy reports were testimonial statements unless it was considering overturning the Feliz's decision.

Again, this court of appeals' decision in Feliz-conflicts with the decision of ten courts of appeals and state courts of last result. On the Federal level, the Eleventh, D.C., First; Sixth; and Fifth Circuits have held that forensic pathology reports are testimonial for Confrontation Clause purposes. For over two decades the Defendant, while incarcerated, has not filed pro se

submissions that were dismissed as frivolous, malicious or failing to state a constitutional claim. The Defendant has been "reserving" his Sixth amendment claim upon a "special reason" to respectfully submit a "Recall the Mandate" motion before this appellate court in this entitled action.

Even more troubling to this court is the fact that both cases-Garlick, supra; and Feliz, supra, not only are relatively the same, but this court must note that the Defendant may have no other available procedures through which he may challenge being incarcerated, for over two decades, in violation to his Sixth amendment Rights to the U.S. Const. IV. In fact, this court in Garlick, supra, did not indicate[d] if the new "reasonable adjudication" of Crawford in that case could not be applied for the purposes of a motion to Recall the Mandate in a earlier inconsistent decision such as Feliz, supra.

Remarkably, in Garlick, this court with an eye toward not creating even more disagreements within its Panels; and how to go about determining whether statements are testimonial for Confrontation Clause purposes in the first place, it's held that: "The Constitution prescribes a procedure for determining the 'reliability' of testimonial in criminal trial"-Cross-examination-" and we, no less than the states Courts, lack authority to replace it with one of our own devising." See, e.g., Galick at Pg. 25 (quoting Crawford, 541 U.S. at 67)).

All this indicates that the only, arguably, better result would be for this court to declare its 2006 jurisprudence [the Feliz decision] unconstitutionally vague-'because'- before; and, after Garlick, supra-no one could tell what it means in light of Crawford, supra. It is constitutionally appropriate for the court[s] to maintain uniformity of the courts' decisions, or in proceedings that presents a question of exceptional importance if it involves an issue on which the Panel's decision conflicts with "clearly established federal law' as determined by the Supreme Court of the United States, and within its own Circuit Panels of Judges. Compare, Feliz, supra; James, supra; Garlick, supra; and, Crawford. By any measure, that Conflict cries out for immediate review and resolution.

II. GOVERNING LEGAL STANDARDS

A. Under The Four Factors To Be Considered Sparingly In Order To Protect The Finality Of Judicial Proceeding-This Court Has The Inherent Power To Recall Its Mandate In Feliz.

As a preliminary matter, this court of appeals have already recognized that Feliz, supra, its earlier decision on which district courts and states courts have relied upon that autopsy reports are non-testimonial, had been "Call[ed] * * * Into Question" by Melendez-Diaz vs. Massachusetts, 557 U.S. 305 (2009); and subsequent Confrontation Clause decisions. See, James, 712 f.3d at 94 (2013). As a result of the doubt, eight years later, this court held that autopsy reports are testimonial statements for purposes of the Confrontation Clause. See, e.g., Garlick, supra at Pg. 25 (2021)).

The Court of Appeals' power to recall a mandate is unquestionable... but this power is to be exercised sparingly in order to protect the finality of judicial proceedings and is "reserved for exceptional circumstances." Sargent v. Columbia Forest Prods, 75 F.3d 86 89 (2d Cir. 1996) (citation omitted). The court consider "Four Factors" in evaluating whether to recall a mandate, including, but not limited: (1) whether the governing law is unquestionably inconsistent with the earlier decision; (2) whether the movant brought to the court's attention that a dispositive decision was pending in another court; (3) whether there was a substantial lapse in time between the issuing of the mandate and the motion to recall the mandate; and, (4) whether the equities strongly favor relief.: See, e.g., Steven v. Miller 676 F.3d 62, 69 (2d Cir. 2012)(internal quotation marks and citation omitted)).

It is undisputed that these factors weigh in favor of recalling this court's mandate in Feliz, supra. The Defendant was clearly unable to bring the Garlick's decision -dated June 11, 2021-to this court's attention when its decided his appeal One and a Half decade ago, Feliz, supra, (2006). Nevertheless, Garlick-now the governing law in this Circuit-unquestionably contradicts this court's earlier unconstitutional holding in Feliz-upholding that "autopsy reports are analogous to business records, which under Crawford, supra, are non-testimonial statements." See, Feliz, 467 F.3d at 236-37.

Garlick held that the same autopsy report[s] at issue in Feliz was testimonial statement and was erroneously admitted without an opportunity to cross-examination. That holding clearly is inconsistent with this court's 2006 jurisprudence-Feliz, supra.

B. Under The Present Exceptional Circumstances This Court should Not Reserve Any Longer Its Inherent Power For Another Two

Decades; And Recall The Mandate In Feliz.

In assessing the Four factors, equities strongly favor the relief that the Defendant seeks-the Defendants [Garlick and Feliz] in both cases were similarly situated in light of the Supreme Court's Precedent. Garlick requested the same adjudication, under Crawford, as Feliz did, from the same Circuit who decided over Feliz's direct appeal (Dkt No.: 02-1665-Cr), and as in Feliz's, the Garlick defendant's "unreasonable application" was relevant to the disputed issue of whether the autopsy report[s] was testimonial for purposes of the Confrontation Clause.

It is well settled that the Garlick's decision Is unquestionably inconsistent with this Court's 2006 pathmarked decision in Feliz-warranting the Defendant's motion to be granted and recalling the mandate in Feliz, supra. Finally, it is undisputed that in the Garlick's holding, this court effectively repudiated the regiment in Feliz. [T]heretofore accepted formulation[s] of admission of the autopsy report[s] violated the Confrontation Clause 'because' the report[s] are testimonial statements.

III. DISCUSION

A. The Feliz's Decision On The Testimonial Nature Of Autopsy Reports Is Compounded By Broader Confusion In The Wake Of This Court's Recent Reasonable Application Of Supreme Court's Precedent In Garllick v. Lee.

The sheer number of Panels to have weigh[ed] in on each side of the conflict on whether autopsy reports are testimonial should be sufficient, standing alone to justify recalling the mandate in this case. This contested matter presents four legal questions: First, has the Defendant demonstrated cause for this court to reconsider its earlier interpretation of Crawdford as set out in Feliz? Second, if so, why the Supreme Court's precedent interpretation was applied differently in two similar cases[Garlick/Feliz]? Third, which decision best aligns with the Supreme Court's precedent-Crawford?; finally, four, what impact these two inconsistent decisions, based on identical situated position, would have on other Federal Courts of Appeals, District Courts; and State Courts which would be addressing the same issue in the near future?

Again, the conflict on that specific issue-however- is only compounded by the pervasive uncertainty among the Panels of this court as to how to go about determining whether autopsy

reports statements are testimonial in the wake of this court's recent decision in Garlick, supra. For example, compare Feliz, supra, James, supra, with the Garlick's decision. Compare also Crawford, 541 U.S. at 51-52 n. 9, to view the problem of identifying a fresh governing law and secure and maintain uniformity within the Panels of this court.

The broader confusion provides an additional reason-if one were need[ed] for recalling the mandate in Feliz. Upon judicial review of this petition, each of this court's panels would be in the same page as Circuit Judges: Menashi, and the two coauthors circuit's Judges that decided Garlick, supra, in light of Crawford, supra.

B. This Court's Recent Decision In Garlicks Embodies On Approach To Determine Which Of The Various Opinions From This Court Will Control Future Cases Involving Autopsy Reports.

To no one's surprise, and to prevent Federal District Courts and State Courts from additional "Unreasonable Application[s]" of "Clearly Established Federal Law," Garlick's rejection of the regime of Feliz, supra, seemed to have one and "only" one constitutional objective: 'cross-examination'" See, e.g., Crawford, 541 U.S. at 67.

It is undisputed that the infective decision in Feliz, for over sixteen years did not fractured or infected many Federal and State cases holdings in connection to autopsy reports. One thing the Defendant is sure of: the Feliz case is the most common unreasonable cancerous decision in this Court of Appeals in light of Crawford, supra. More significantly for this court is that the factual causes of the "unreasonable application" in the Garlick's case based on Feliz have been identified by various Courts of Appeals. See, e.g., United States v. Ramos-Gonzales, 664 F.3d 1 (ist Cir. 2011); United States v. Duron-Caldena, 737 F.3d 988, 999 n. 4 (5th Cir. 2013; Common Wealth v. Avila, 454 Mass. 744, 912 N.E. 2d 1014 (Mass. 2009); State v. Locklear, 363 N.C. 438, 681 S.E. 2d 293 (N.C. 2009); Cuesta-Rodriguez v. State, 2010 Ok Cr 23, 241 P.3d 214 (Okla. Crim. App. 2010); Wood v. Texas, 299 S.W. 3d 200, 209-10 (Tex. Crim. App. 2009); United States v. Moore, 651 F.3d 30 (D.C. Cir. 2011); State v. Medina, 306 P.3d 48, 63-64 (Ariz. 2013); People v. Ieach, 980 N.E. 2d 570 (Ill. 2012); State v. Mitchell, 4 A.3d 478, 489 (Mc. 2010)). Compare the decisions above with United States v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012) (holding: "The Feliz's case came before Melendez-Diaz, which as discussed below rejected that same business record argument as applied to the forensic evidence at issue in that

case... as such, we conclude that Feliz has little persuasive value on this issue") (quotation omitted)).

Using medical terms, metaphorically, the Feliz's decision can only be compared with a Kidney Failure, the decision does not function normally and there is a build-up of waste of unnecessary briefing and confusion in this issue, disrupting this court's Honorable Judges' uniformity in maintaining and deciding consistent decision[s] in connection to the same matter asserted. For example, whether autopsy reports are testimonial statements for purposes of the Confrontation Clause. Of course, the damage occurred as a result of the misreading of the "Data Cure" of the Crawford treatments. More significantly, if the infection in Feliz is left untreated after the successful treatment in Garlick in light of the Crawford's medications-the infection in Feliz may be Life-threatening not only to Feliz but to future patients as well. Accordingly, the Germ in Feliz must be treated with the same medications that was prescribe[d] to Garlick, for example, the Crawford's treatment in order to clean up [overturn] the infection. The Doctors [circuit judges] in Garlick essentially adopted the same treatment and medications [Crawford's treatment] that Feliz requested for his sickness in 2006-and in doing so, this court avoided a large number of occupied beds for future infected patients from the cancerous disease [decision] in Feliz.

Back to legal terms, the big questions remains: After this court's 2021 pathmarking decision in Garlick–would the Defendant have to wait another two decades for his case to be overturned and Reversed as in Ohio v. Robert, 448 U.S. 56 (1980)? See, e.g., Crawford, supra, effectively overruling Ohio v. Robert, supra after twenty four years. It is respectfully submitted that this court should not let this exceptional circumstance go unanswered. The conflict, and inconsistent decisions in this issue are too serious and too numerous to be left for another court of appeals that has no inside accountability or jurisdiction in this case. This Court has the inherent power; and independent obligation to ensure that any conflicting decision[s] is fully considered by the full court to secure and maintain informity of the court's decisions, proceedings, or questions of exceptional importance. Compare Feliz, supra, with Garlick, supra.

Remarkably, Defendants, numerous attorneys, and commentators in this jurisdiction are elated that this court have finally dealt with this sixteen year old problem of a decision [Feliz] so vague no reasonable Jurist could tell what it meant in light of the Supreme Court Precedent-Crawford. A little under two decades, the Feliz's decision had been wrongly used by overly

aggressive, headline-seeking, or politically motivated prosecutors to send defendant[s] to prison in violation to the[ir] IV. Amendment Right to U.S. Const.

At least as matter currently stand; however, four panels [twelve Circuit Judges from this Court] have taken separately different positions to Defendant's Confrontation Clause claim. In fact, if this court declines to exercise its inherent power to recall the mandate in Feliz, supra, the Defendant is legislatively stripped and deprived of the privilege guaranteed by the Sixth Amendment of the United States Constitution.

It is undisputed that the conflict within this court on Defendant's Confrontation Clause issue is one that can be effectively resolved by this court alone. See, e.g., United States v. Tenzer, 213 F.3d 34 (2d Cir. 2000)(holding that "it is appropriate to reconsider an earlier decision when confronted with an intervening change of controlling law...or the need to correct clear error or prevent manifest injustice")).

Moreover, this court's opinion in Garlick, has undercut the unreasonable legal reasoning underlying Feliz, in such a way that the cases are clearly irreconcilable. According to these factual errors and conflict-what happens when this court of appeals, as it not infrequently does, gives a new interpretation of "clearly established federal law" and constitutionally rejects an earlier interpretation [Feliz]? From this perspective just outlined, and on the law, the interpretation must be as a correction as in Feliz, with the reasonable adjudication that Garlick received in light of Crawford. Accordingly, the admission of the Nine autopsy reports' statements violated Defendant's Sixth amendment Rights to Confrontation.

IV. IN LIGHT OF THE SUPREME COURT'S PRECEDENT-CRAWFORD THIS COURT WAS CORRECT TO HOLD IN GARLICK THAT AUTOPSY REPORTS ARE TESTIMOMIAL STATEMENT FOR PURPOSES OF THE CONFRONTATION CLAUSE.

A. The Effect Of This Court's Decision In Garlick Was To Prevent Enforcement Of The Unconstitutional Decision Of Feliz As It Was Violatively Designed Because The Misreading Of Crawford v. Washington.

The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. VI. "Witnesses against the accused are those who 'bear

testimony.'" Crawford v. Washington, 541 U.S. 36, 51 (2004) (citation omitted)). Testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. (citation omitted)).

Further, testimonial statements include both a "core class" of documents, "such as affidavits, custodial examination, prior testimony..., or similar pretrial statements," and other "statements that 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." Melendez Diaz-Massachusetts, 557 U.S. 305, 310 (2009) (quoting Crawford, 541 U.S. at 51-52); see also, Bullcoming v. New Mexico, 564 U.S. 647 (2011) (quoting Crawford, 541 U.S. at 52 n.3)(same)).

It is undisputed that Crawford is above in ranking of any Supreme Court's decision regarding the Confrontation Clause. Put differently, and as illustrated by the Supreme Court in every post-Crawford decision, Crawford is the Lord or "His Heir" in connection to defendants' Sixth amendment rights to confront their witnesses-the Crawford decision is the vessel from whom Melendez-Diaz, supra; and Bullcoming, supra, received their fee and whom they own allegiance and tributes.

The Supreme Court Precedent-Crawford-surpasses both Precedents [Bullcoming and Melendez-Diaz] in quality, merit, or excellences. Not only should the Crawford's decision should be accepted widely or generally... but as a trustworthy decision in applying or teaching the Confrontation Clause. See, e.g., Garlick, supra, at pg. 11-18. Paternally speaking-however-Crawford arrogance illustrates that the Supreme Court's language in it suggest the relationship of Crawford being the Father decision to Melendez-Diaz, and Bullcoming. The Crawford's decision is so arrogant regarding the Confrontation Clause that the Supreme Court necessarily cited and quoted it at least 25 to 30 times when its decided both Crawford's children's opinions.

Apparently, Crawford's superiority was not the "secret" author of in both birthdays. Put simply, the significance of the language in both of those two Supreme Court's cases derives almost entirely from Crawford's precise holding. It is hard to imagine how those two redacted decisions could have been created without the significance, superiority, arrogance and language of Crawford. That is the same case here, in which the Defendant have been, for a little under two decades, relying upon [Supreme Court's Precedent-Crawford] predating Bullcoming

an Melendez-Diaz. Two subsequent Confrontation Clause decisions which were "reasonably decided" based upon the useful holding of Crawford.

In fact, this 'reasonable application' of the constitution or law-which was adjudicated in Melendez-Diaz, and Bullcoming, was the same constitutional or lawful adjudications that the Defendant requested on his Direct Appeal (Dkt. No. 02-1665-Cr). See. e.g., Feliz, supra, at 232.

In short, the Defendant hereby respectfully requests the same 'reasonable application' of 'clearly established federal law' which was adjudicated in Garlick-under which Judge MENASHI held that: "autopsy report[s] are testimonial statements and admissible only with Confrontation... because autopsy reports "[a]re solemn declarations or affirmations made for purposes of establishing or proving some fact." (quoting Crawford, 541 U.S. at 52)).

B. At A Minimum The Autopsy Reports At Issue In Feliz Are Testimonial Statements Under The Approaches Of The Three Circuit Judges In Garlick.

Under the approach adopted by Circuit Judge Menashi in his opinion in the Garlick's judgment, the nine autopsy reports in Feliz-which were signed, certified, and whitten on the Letter-Head of the New York Police Force, and Fixed with the Stamps reading "Police Forensic Laboratory"--plainly bears the requisite "Formality and Solemnity" to be considered Testimonial Statements for purposes of the Confrontation Clause. More specifically, it is undisputed that this Court, given the evolving foundation upon which the Garlick's claim rested, did not first revisited briefly the current state of its Confrontation Clause jurisprudence-Feliz, supra, before its decided Garlick, supra. See. e.g., James, 712 F.3d at 94.

C. The Panels' Inconsistent Decisions Is An Important One That Warrants The Mandate In Feliz To Be Recalled Following The Evaluation Of The Four Factors.

The need for this Court's immediate intervention should be self-evident. One of the Federal Courts of Appeals' primary functions, of course, is to maintain and provide District Courts, and State Courts [within its jurisdiction] uniformity on questions, conflict, and proceedings involving clearly established constitutional law. It is the rare case, indeed, that comes to the court with a deep and entrenched of a conflict on a question of constitutional law as the one presented here, with no fewer than twelve Circuit Judges from the court of last result having taken conclusive positions on this exceptional important question. What is more, Circuit Judge

MENASHI recognized that "the unreasonably erroneous admission of the autopsy report at Garlick's trial (like the nine autopsy reports in this case) was not harmless." See, Garlick, at Pg. 25.

It cannot seriously be disputed, moreover, that the inconsistent decisions in both cases [Garlick and Feliz] are an recurring one of exceptional practical importance. This petition is a suitable vehicle for resolution of the conflict. To state the obvious, this Court's decision in those cases deepens the conflict that already existed in Feliz in light of Crawford. This Court of Appeals acknowledged that conflict in James, supra, when its concluded that:

> "This Court's decision in United States v. Feliz, 467 F.3d 227 (2d Cir. 2006), as well as this Court's Post-Crawford Jurisprudence in the area of the Confrontation Clause under the Sixth Amendment have been 'Call[ed] * * * Into Question' by the Supreme Court's decision in Melendez-Diaz, 557 U.S. 305 (2009).'"

Perhaps more significantly, this court further concluded that:

> "No conclusion was reached in Feliz as to whether the Nine Autopsy Reports were similarly completed for the purposes of establishing a fact at trial, in part because we did not think that the reasonable expertation of the declarant should be what distinguishes testimonial from non-testimonial statements-Feliz 467 F.3d at 235, rendering that factual inquiry unnecessary."

See, e.g., James, 712 F..3d at 94 n. 4.

In addition, the conflict within this Circuit's Panels on the issue whether its 2006 governing law-Feliz, is unquestionably inconsistent with Garlick's decision is one that can be affectively resolved by this court alone. See, United States v. Tenzer, 213 F.3d 34, 39 (2d Cir. 2000), see also, United States v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012) (holding: "The Second Circuit helf in Feliz, 467 F.3d 227 (2d Cir. 2006) that an autopsy report is admissible as a business record, Id. at 236-37, 'The Feliz case came before Melendez-Diaz, which as discussed below rejected that same business record argument as applied to the forensic evidence at issue in that case...as such, we conclude that Feliz has little persuasive value on this issue") (quotation omitted)).

Finally, the Defendants in both cases [Feliz and Garlick] relatively argued the same issue under Crawford, and this court must note that the Defendant in this case may have no other

available procedures vehicle through which he may challenge the constitutionally of the Sixth amendment violation.

Furthermore, this court's decision in Garlick did not indicate[d] if the "reasonable application" of Crawford could not be applied for the purposes of a motion to recall the mandate on a unquestionable earlier inconsistent decision (like in this case). Thus, again, it is possible that the Defendant would have no other remedy in light of Garlick, of course, unless this court "personally certify" the Defendant with an opportunity to petition for certiorari for the Supreme Court to hear the case-citing this court's split. If so, Defendant strongly believe that Certiorari would be Granted [t]hereto. This case presents no complication "because" this court resolved the admissibility of the evidence solely by reference to the Supreme Court's Confrontation Clause Precedent-Crawford. See, e.g., Garlick, at Pg. 11-12.

In sum, the conflicts and the unquestionable inconsistent decisions are substantial, recurring, and extraordinary. And it is clearly presented here. In all respect, therefore, this petition is an ideal candidate for the court to inherence its power under the constitution and Recall the Mandate in this entitled action.

V. THE ADMISSION OF THE NINE AUTOPSY REPORTS WAS NOT HARMLESS.

A defendant[s] convicted on the basis of evidence introduced in violation of the Constitution is entitled to a new trial unless there is no reasonable possibility that the improperly admitted evidence might have contributed to the conviction. See, Chapman v. California, 383 U.S. 18, 24 (1967); United States v. Tirado-Tirado, 563 F.3d 117, 126 (5th Cir. 2009); United States v. Viola, 35 F.3d 37, 42 (2d Cir. 1994)).

At trial, the government introduced the nine autopsy reports as its only material evidence exhibits, the government used them to corroborate the cooperators' testimonial as to the manner in which the murders were committed and as to the non-lethal injuries sustained by Francisco Gonzalez prior to death. Dr. James Gill, who did not conducted, observed, or even participated at any of the nine autopsies in question but testified as a summary witness regarding the procedures and methods that followed in reaching its conclusions or to the qualifications of the nine examiners-clearly amounted to no more than to the Sixth amendment Right Confrontation Clause violation. Further, Dr. Gill's testimony was neither cumulative or nor sufficiently corroborate by alternative evidence. His testimony comprised the only compelling

basis for the jury to conclude a critical element of the government's case. For example, to corroborate (without cross-examinating the nine medical examiners) many aspects of the government's questionable cooperators' testimony. It is undisputed that the government did not heavily relied on the nine autopsy reports during its opening (T. Tr. 58-64); Summary (T. Tr. 117-1124); and Rebuttal (T. Tr. 1133-1140) arguments in order to corroborate its cooperators' testimony.

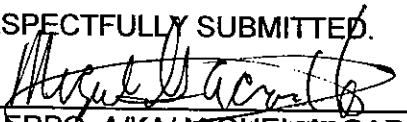
The government has not and cannot provide this court with a "fair assurance" that Dr. Gill's offending testimonial evidence did not substantially influenced the jury. The government did not demonstrate[d] that it was "highly probable" that the admission of the nine autopsy reports did not contributed to the verdict. See, United States v. Bruno, 383 F.3d 66, 79-80 (2d Cir. 2004). As the Defendant pointed out in his Opening Brief (Dkt. No. 02-1665-Cr), the government repeatedly emphasized these autopsy reports testimonial statements in summation because the corroboration of it cooperators was crucial to the government's strategy. See, e.g., Defendant's Opening Brief at 38)).

Lastly, "even rigorous cross-examination of" Dr. Gill "could not have adequately revealed any defects in the" Nine "autopsy's methods, conclusions, and reliability." Garlick, supra, at Pg. 25 (quotation marks in original)). The government argued (on direct appeal) that the statements from Dr. Gill supported each of its cooperators' testimony, and that-that fact bolstered the strength of the evidence. The jury would likely have viewed the government's cooperators' statements, by itself, as weak evidence. Finally, that two seemingly similar statements existed distracted from the fact that none of the nine medical examiners that prepared the autopsies has been put on the stand to explain or elaborate upon the nine autopsy reports' statements. The error in admitting the nine autopsy reports statements through Dr. Gill thus was not harmless under any standard-certainly not under the beyond-a-reasonable doubt standard. Because the government cannot show that admitting the nine autopsy reports was harmless, reversal is required.

CONCLUSION

FOR THESE REASONS, the court should Recall The Mandate in Feliz, and Vacate His Conviction; and, Remand His Case.

RESPECTFULLY SUBMITTED.



JOSE ERBO, ~~A/KA/~~ MIGUEL A. GARCIA-VELEZ
PRO SE INDIGENT PRISONER
Reg. No.: 21134-069
UNITED STATES PENITENTIARY-McCREARY
POST OFFICE BOX 3000
PINE KNOT, KY. 42635

DATED: December 22, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE ERBO, A/K/A MIGUEL A. GARCIA-VELEZ,
Defendant/Petitioner,

-vs-

In Re: U.S. v. Feliz, 467 F.3d 227(2d Cir. 2006)
Related Dkt# App.Ct. 02-1665-Cr.

UNITED STATES OF AMERICA,
Respondent.

---/

CERTIFICATE OF SERVICE

I, Jose Erbo, the Defendant/Petitioner in the above entitled action hereby certify that a copy of: "Motion To Recall The Mandate In United States v. Feliz, 467 F.3d 227 (2d Cir. 2006) In Light Of This Court's Recent Decision In Garlick v. Lee, Dkt. No. 20-1796," was served upon Samzon Enzer, Counsel for United States of America at: 1 Saint Andrew Plaza, New York, New York. 10007, via Institutional Mail on December 22, 2021. It has also been mailed to the Clerk's Office at: United States Court Of Appeals For The Second Circuit, U.S. Court-House, 40 Foley Square, New York, NY. 10007.

Respectfully Submitted,

JOSE ERBO

Appendix - B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of April, two thousand twenty-two.

United States of America,

Appellee,

v.

Miguel Feliz, Jose Cortina Perezo, AKA Jochi, Michael Mungin, AKA Mike, AKA Robert Robinson, Robert Brown, AKA Crazy Rob, AKA Raj,

Defendants,

Jose Erbo, AKA Tito, AKA Pinguita, AKA Miguel Garcia,

Defendant - Appellant.

ORDER

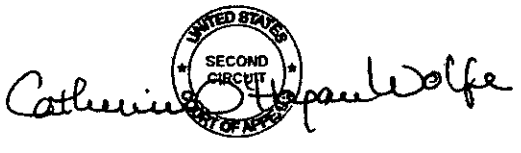
Docket No: 22-316

Appellant, Jose Erbo, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request as a motion for reconsideration, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the motion and petition are denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



AO (8/96) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Southern District of New York

DOC #82

UNITED STATES OF AMERICA
V.
JOSE ERBO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: S3 97 CR 01105-001 (HB)

GEORGE GOLTZER
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, & 17 after a plea of not guilty.

DOCKETED AS A JUDGMENT # 02,2263 ON 10/31/02

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
18 USC 1962 (c)	Racketeering	12/31/1997	1
18 USC 1959 (a) (1)	Violent Crimes In Aid Of Racketeering - Murder	12/31/1997	2, 4, 5, 8, & 12
18 USC 1959 (a) (1)	Violent Crimes In Aid Of Racketeering - Kidnaping	03/01/1993	6
18 USC 1959 (a) (5)	Violent Crimes In Aid Of Racketeering-Murder Conspiracy	12/31/1997	3 & 7
18 USC 924 (c)	Use Of A Firearm In Connection With A Crime Of Violence	04/07/1997	13, 14 & 17

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

X Count(s) UNDERLYING INDICTMENTS ☐ is X are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: XXX-XX-XXXX

Defendant's Date of Birth 11/29/1967

Defendant's USM No.: 21134-069

Defendant's Residence Address:

CALLE 3 NW RESIDENTIAL LUCERNA
NO. 5A
SANTO DOMINGO, DR

Defendant's Mailing Address:

SAME AS ABOVE

MICROFILM
OCT 30 2002 -9 00 AM

10/17/2002
Date of Imposition of Judgment

Signature of Judicial Officer

HAROLD BAER, JR. UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

10/28/02
Date

U.S. DISTRICT COURT FILED
OCT 28 2002
S.D. OF N.Y.

DEFENDANT: JOSE ERBO
CASE NUMBER: S3 97-01105-001 (HB)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total of SIX (6) CONSECUTIVE LIFE IMPRISONMENT TERMS FOR CTS. 1, 2, 4, 5, 8 & 12, FOLLOWED BY MANDATORY AND CONSECUTIVE 45 YEARS ON CTS. 13, 14, & 17

X The court makes the following recommendations to the Bureau of Prisons:
THAT THE DEFENDANT BE PLACED IN A MAXIMUM SECURITY INSTITUTION UNTIL HIS APPEAL COMES BEFORE THIS COURT AND THEY REVERSE THE VERDICT OF THIS JURY.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: JOSE ERBO
CASE NUMBER: S3 97 CR 01105-001 (HB)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of A TOTAL OF 8 YEARS . FIVE YEARS WITH RESPECT TO CTS. 1, 2, 4, 5, 6, 8, & 12 AND BE FOLLOWED BY 3 YEARS ON CTS. 3 ,7, 13, 14 AND 17.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JOSE ERBO
CASE NUMBER: S3 02 CR 01105-001 (HB)

SPECIAL CONDITIONS OF SUPERVISION

1. THE MANDATORY DRUG TESTING CONDITION IS SUSPENDED DUE TOT THE IMPOSITION OF A SPECIAL CONDITION REQUIRING DRUG TREATMENT AND TESTING. THE DEFENDANT WILL PARTICIPATE IN A PROGRAM APPROVED BY THE UNITED STATES PROBATION OFFICE FOR SUBSTANCE ABUSE, WHICH PROGRAM MAY INCLUDE TESTING TO DETERMINE WHETHER THE DEFENDANT HAS REVERTED TO THE USE OF DRUGS OR ALCOHOL. THE DEFENDANT MAY BE REQUIRED TO CONTRIBUTE TO THE COSTS OF SERVICES RENDERED IN AN AMOUNT TO BE DETERMINED BY THE PROBATION OFFICER, BASED ON ABILITY TO PAY OR AVAILABILITY OF THIRD-PARTY PAYMENT.

2. THE DEFENDANT SHALL COMPLY WITH THE DIRECTIVES OF THE IMMIGRATION AND NATURALIZATION SERVICE AND THE IMMIGRATION LAWS.

3. THE DEFENDANT SHALL REPORT TO THE NEAREST PROBATION OFFICER WITHIN 72 HOURS OF HIS RELEASE FROM CUSTODY.

4. ALSO AS A SPECIAL MANDATORY CONDITION THE DEFENDANT SHALL COOPERATE IN THE COLLECTION OF DNA AS DIRECTED BY THE PROBATION OFFICER.

DEFENDANT: JOSE ERBO
CASE NUMBER: S3 97 CR 01105-001 (HB)

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 1200.00	$	$

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ $_____ .

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____ . An Amended Judgment in a Criminal Case will be entered after such determination.

The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$ _____	$ _____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: JOSE ERBO
CASE NUMBER: S3 97 CR 01105-001 (HB)

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] In full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____ ; or

D [ ] in installments to commence _____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g., equal, weekly, monthly, quarterly*) installments of $ _____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.