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Who Must Testify to the Results of a Forensic Laboratory Test? Bullcoming v. New Mexico

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Who Must Testify to the Results of a Forensic Laboratory Test?

CASE AT A GLANCE

At the trial of Donald Bullcoming on DUI charges, the laboratory analyst who had performed a test indicating elevated blood alcohol content did not testify; instead, the prosecution presented the testimony of a supervisor who had not observed or performed the test. Bullcoming contends that this procedure violated his rights under the Confrontation Clause of the Sixth Amendment.

Bullcoming v. New Mexico
Docket No. 09-10876

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From: The Supreme Court of New Mexico

by Richard D. Friedman
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ISSUE

Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report through the in-court testimony of a supervisor or other person who did not perform or observe the reported test?

FACTS

In *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009), the Supreme Court held by a 5-4 vote that a forensic laboratory report stating that a suspect substance was cocaine must be deemed testimonial for purposes of the Confrontation Clause of the Sixth Amendment to the Constitution. Accordingly, absent stipulation, the prosecution cannot introduce such a report without offering a live witness competent to testify to the substance of the report. Four days after that decision, the Court granted certiorari in *Briscoe v. Virginia* (in which the author of this essay represented the petitioners), which presented the question of whether, assuming the lab report was testimonial, the prosecution could introduce the report and invite the defendant, if he so chose, to call the analyst who prepared it to the stand as his witness. The grant was rather mysterious, for Massachusetts had raised that subsidiary issue in briefing the case, it was addressed at argument, and *Melendez-Diaz* had resolved the question in the negative. Because Justice Souter, a member of the *Melendez-Diaz* majority, had already announced his retirement, many observers speculated that the four members of the minority had caused the Court to grant certiorari in hopes that Sonia Sotomayor, whose nomination to replace him was then pending, would join them in cutting back on *Melendez-Diaz.* But two weeks after the argument of *Briscoe* in January 2010, the Court remanded the case for further proceedings consistent with *Melendez-Diaz.* 130 S.Ct. 1316 (2010).

Now *Bullcoming v. New Mexico* presents another follow-up issue to *Melendez-Diaz,* and once again the case raises speculation about how the replacement of a member of the *Melendez-Diaz* majority—this time, Justice Kagan for Justice Stevens—will affect the Court's jurisprudence in this area.

After a minor auto accident, Donald Bullcoming was arrested on charges of driving while intoxicated (DWI). After booking, the arresting officer drove him to a hospital, where a nurse drew a blood sample and sent it to the New Mexico Department of Health Scientific Laboratory Division. That lab uses gas chromatograph machines to analyze blood alcohol content (BAC). An analyst, Curtis Caylor, completed a report asserting that he had tested the blood sample according to prescribed procedures and that the test showed a BAC of .16 percent, well above New Mexico's threshold for aggravated DWI.

On the day of trial, the prosecutor announced that Caylor—who had been placed on unpaid administrative leave—would not give live testimony. Instead the report would be introduced through the testimony of Gerasimos Razatos, a supervisor who had not participated in or observed the test on Bullcoming's sample. Over Bullcoming's objection, the court allowed this procedure on the ground—not yet precluded at the time by *Melendez-Diaz*—that the report was not testimonial. Bullcoming was convicted and sentenced to two years in prison. The New Mexico Court of Appeals affirmed; like the trial court, it concluded that the report was not testimonial.

The New Mexico Supreme Court granted review, and while the review was pending, the *Melendez-Diaz* decision came down. Accordingly, the New Mexico court acknowledged that the report was testimonial for purposes of the Confrontation Clause. Nevertheless, it held that the testimony of Razatos was sufficient to introduce the report. The court held that, even though Razatos did not observe the test, he was a "qualified analyst" who could testify about the lab and its protocols, and thus his testimony gave Bullcoming "the opportunity to meaningfully cross-examine a qualified witness regarding the substance of [Caylor's report]." Moreover, because Caylor had "simply transcribed the results generated by the gas chromatograph machine," the machine was the "true 'accuser'" and Caylor was "a mere scrivener."

The United States Supreme Court granted Bullcoming's petition for certiorari.

CASE ANALYSIS

Bullcoming's argument is rather straightforward: Under *Crawford v. Washington,* 541 U.S. 36 (2004), if an out-of-court statement is deemed testimonial in nature, it may not be introduced at trial against an accused unless the witness who made the statement is unavailable and the accused had an opportunity to be confronted with the witness. Under *Melendez-Diaz,* a forensic lab report like the one involved here is testimonial. The state never demonstrated that Caylor was unavailable, nor did Bullcoming have an opportunity to be confronted with him. Accordingly, unless Razatos can be deemed an adequate substitute for Caylor, the introduction of Caylor's report violated the Confrontation Clause. But as Justice Kennedy, writing for the dissent in *Melendez-Diaz,* noted, "[t]he Court made clear in *Davis* [*v. Washington,* 547 U.S. 813 (2006)] that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . ."

Bullcoming also points out that the state could have had Razatos rather than Caylor testify at trial and yet avoided any Confrontation Clause problem by asking Razatos to retest the sample and then testify to the results of the retest rather than to the substance of Caylor's report. (Use of that technique would depend on the state's ability to prove a chain of custody adequately without relying on Caylor.) He further argues that there is "no 'forensic evidence' exception to the Confrontation Clause's ban on surrogate testimony." Bullcoming emphasizes the various ways in which a lab technician can err in performing a test and contends that a surrogate witness who lacks personal knowledge as to how the test was conducted cannot provide satisfactory answers to questions on these matters. And he contends that even if the analyst does not remember the particular test at issue, it is still important that he testify under oath, in part so that he can answer questions in front of the jury about his proficiency.

Bullcoming also challenges the New Mexico Supreme Court's holding that there is no confrontation problem because the lab report details the results of machine-generated evidence. "Almost all witnesses testify about something that they claim to have observed," he points out; even if preparing the report did not require interpretive skill, that is immaterial. Moreover, Caylor's report did more than simply communicate the output of the machine; it attested to the entire procedure leading to the reported results.

The most striking aspect of the state's brief is that it spends very few pages on the Question Presented. Rather, the state focuses primarily on the question of whether the report was testimonial, a point on which the New Mexico Supreme Court held against it. The state contends in the negative by making some very broad arguments that, without saying so explicitly, effectively ask the Court to cut back on *Melendez-Diaz* and *Crawford* itself. For example, much of the brief is an historical discussion aimed at showing that non-adversarial statements by public officials not connected with law enforcement are not within the Confrontation Clause. If the state pursues this theory at argument, the Court may be expected to question it closely both as to whether the report truly can be considered a non-adversarial one by an official not connected with law enforcement and as to whether a report meeting that description is outside the bounds of the Confrontation Clause. This portion of the brief appears to be written in hopes that Justice Kagan will join the four *Melendez-Diaz* dissenters in a decision virtually nullifying the effect of that case.

Alternatively, the state explicitly asks the Court to reject a test for determining whether a statement is testimonial that is based on the statement's "primary purpose." (The author of this essay agrees, but on very different grounds; in his amicus brief he contends that the test should be based not on purpose but on the expectation of a reasonable person in the position of the speaker.) The state offers a standard that it tries to draw from the pre-*Crawford* case of *United States v. Inadi,* 475 U.S. 387 (1986). The state says: "A testimonial statement should be defined as a statement to a prosecuting or judicial officer that has no 'independent evidentiary significance of its own'"; put another way, a statement is testimonial if it "derives no evidentiary significance from the context in which it was made such that its evidentiary value can be wholly replaced by live testimony." This argument, in effect, attempts to restore in part the pre-*Crawford* reliability-based regime of *Ohio v. Roberts,* 448 U.S. 56 (1980); almost any statement has some significance based on its context, if for no other reason that it reflects a fresher memory than does trial testimony.

The state further argues that even if the statement is testimonial, introduction of the report did not violate Bullcoming's rights because the opportunity to retest the blood offered a superior method of challenging the report. This argument seems to be a direct challenge to *Crawford*'s assertion that cross-examination is the means for challenge provided by the Constitution and to *Melendez-Diaz*'s emphasis that the prosecution has the burden of presenting testimony subject to confrontation.

Finally, the state contends that because Razatos was familiar with the lab's procedures and the functioning of the machine, his testimony was sufficient. This argument is based largely on the perception that cross-examination of the testing analyst would be of little use and that the accused has other means of testing his credibility. Adoption of such a test by the Court would signal a return, at least in part, to the pre-*Crawford* era.

Though under *Crawford* the trustworthiness of a statement is not a determinant of its admissibility, several amici debate the reliability of the kind of testing involved in this case. For example, the Innocence Network and a group of organizations led by the National Association of Criminal Defense Lawyers point to the vulnerabilities of forensic science in general and of gas chromatography in particular. The state's Department of Health Scientific Laboratory Division (SLD), by contrast, asserts that the gas chromatograph used in the test on Bullcoming's blood is "a wonderful machine." The state and its supporting amici attempt to portray the machine, rather than a human, as in effect the declarant in the case. Petitioner and his supporting amici (including this author) argue that the output of the machine is an ordinary phenomenon on which a human witness reports, much as a witness might report the color of a traffic light.

SLD, as well as a group of associations of prosecutors, forensic laboratory professionals, and medical examiners led by the National District Attorneys Association (NDAA), also argues that because of the high volume of tests performed by forensic labs, the analyst who performed the test almost certainly will not remember a specific test, and because (at least in the case of SLD) all its analysts follow the same standard operating procedures, any qualified analyst at a lab may testify to the procedures used in a particular case. Thus far in the *Crawford* era a majority of the justices have not been willing to make

distinctions on the basis of how useful cross-examination is likely to be, but this argument will pose the issue again.

Several amicus briefs discuss the question of how burdensome would be a decision that only an analyst who observed performance of the test could testify to its results. SLD's brief, and another filed by thirty-three states and the District of Columbia, led by California, emphasize the practical difficulties of complying with such a procedure. But twenty-six defender organizations, led by the Public Defender Service for the District of Columbia, argue that many jurisdictions already adhere to this procedure and do so without undue difficulty. This author's amicus brief reports on a study of Michigan trials conducted under his supervision, showing that in drug and operating-under-the-influence prosecutions, the average number of lab witnesses per trial is only about one-half; presentation of DNA evidence, which is considerably more complex, still rarely required more than two lab witnesses per case among the relatively small subset of cases that go to trial. According to these amici, fears of floods of witnesses are considerably exaggerated, in large part because defendants often stipulate to admissibility of the report.

The briefs of the NDAA and thirty-three states plus the District of Columbia emphasize that the report in Bullcoming's case provided a valid basis for the opinion offered by Razatos, the expert witness testifying in court. Difficulties with that theory in this case are that the statement transmitting the information on which Razatos relied was itself testimonial in nature and was actually admitted at trial, and that Razatos does not appear to have done anything substantial other than transmit the results reported by Caylor; in fact, Razatos was never actually asked his opinion as to Bullcoming's blood alcohol level.

Five law professors, under the leadership of Jennifer Mnookin, filed a brief that takes an intermediate position. They contend that ordinarily surrogate witnesses should not be allowed but that in "narrowly limited circumstances" testimony by such witnesses offers an adequate second-best solution. In the view of these amici, the practice ought to be permitted if (1) the original expert is genuinely unavailable through no fault of either party; (2) retesting or re-analyzing the materials at issue is not a feasible option; and (3) the original test conditions were documented with sufficient precision to permit the surrogate expert to exercise an independent opinion on the matter. In this case, though, there was no showing that Caylor was unavailable, and retesting was apparently feasible. If the Court were to hold for Bullcoming, there would, of course, be no need for it to determine whether, in circumstances not presented by this case, it would be appropriate to carve out the novel exception to the confrontation right suggested by these amici.

SIGNIFICANCE

If the Court affirms the decision of the New Mexico Supreme Court, it will go a long way towards nullifying the *Melendez-Diaz* decision. Presumably (assuming such a decision were made on relatively narrow grounds) prosecutors would still be precluded, absent consent by the accused, from proving the results of forensic lab results by presenting nothing more than a lab report. But they could satisfy the Confrontation Clause by presenting the live testimony of any qualified witness from the lab, even one who had no personal knowledge of the particular case. States might designate particular lab technicians to carry the bulk of the load of testifying at trial. And potential problems arising from unavailability would be avoided: If for any reason an analyst who was the only person with personal knowledge of a given test could not testify, any other qualified witness from the lab would be able to fill the gap.

If the Court reverses the decision below, states that have been using surrogate witnesses will no longer be able to do so. In the view of Bullcoming and his supporting amici (including this author), the experience of states that have not relied on such surrogates suggests that the burden would not be intolerable.

On a theoretical level, a decision in favor of Bullcoming would not alter the fabric of the law governing the Confrontation Clause. But an affirmance on narrow grounds would require the Court, either in this case or over time, to attempt to establish principles as to when a testimonial statement made by an absent witness may be introduced through the in-court testimony of another person. An affirmance on broader grounds could signal an unraveling of the *Crawford* doctrine.

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PREVIEW of United States Supreme Court Cases, **pages 210–212.**

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