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Hearsay in New Mexico

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Hearsay in New Mexico

Chief Judge Linda Vanzi

Veronica C. Gonzales-Zamora

October 4, 2018

The
Aftermath

U.S.
Supreme
Court

INTRO


NM
Court of
Appeals

NM
Supreme
Court





INTRO



Hearsay &
Exceptions



Bullying:
The Facts

What does the New Mexico rule against hearsay generally prohibit and allow?

For today's discussion, see Rule 11-803 NMRA
Exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness.

11-803(6)

(6) Records of a regularly conducted activity.

A record of an act, event, condition, opinion, or diagnosis if

- (a) the record was made at or near the time by—or from information transmitted by—someone with knowledge,
- (b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit,
- (c) making the record was a regular practice of that activity, and
- (d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 11-902(11) or (12) NMRA or with a statute permitting certification.

This exception does not apply if the opponent shows that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

11-803(8)

(8) Public records.

A record or statement of a public office if it sets out

- (a) the office's activities,
- (b) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel, or
- (c) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.

This exception does not apply if the opponent shows that the source of information or other circumstances indicate a lack of trustworthiness.

State v. Bullcoming

Defendant was sentenced to 2 years for felony aggravated DWI after refusing to take a blood-alcohol test. Police obtained a search warrant and Defendant's blood was drawn.

At trial, defense counsel objects to the admission of the blood alcohol report on hearsay grounds. (Why is it important to timely object? How do you prepare?)

The district court had to determine:

- Is it inadmissible hearsay?**
- Or is it admissible under an exception?**



NM Court of Appeals

**State v. Bullcoming,
2008-NMCA-097**

The
Inquiry

Melendez
Case

On appeal, the Court of Appeals considered whether the district court erred in allowing the State to introduce the blood analysis report as a business record exception.

The Court had to determine:

- Is the report "testimonial" evidence subject to the Confrontation Clause?**
- Does it fall within an exception to the hearsay prohibition?**

Would the business record analysis change if this were a civil Dram Shop case? Would the public record analysis change if the record were a Google map, weather, or other criminal cases?

**Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009) (5-4 decision)**

Held that certificates reporting the results of forensic analysis were "quite plainly affidavits" and thus "there [was] little doubt that [they] fall within the 'core class of testimonial statements' governed by the Confrontation Clause."

How does this affect the NM Court of Appeals analysis?



**New Mexico
Supreme Court**

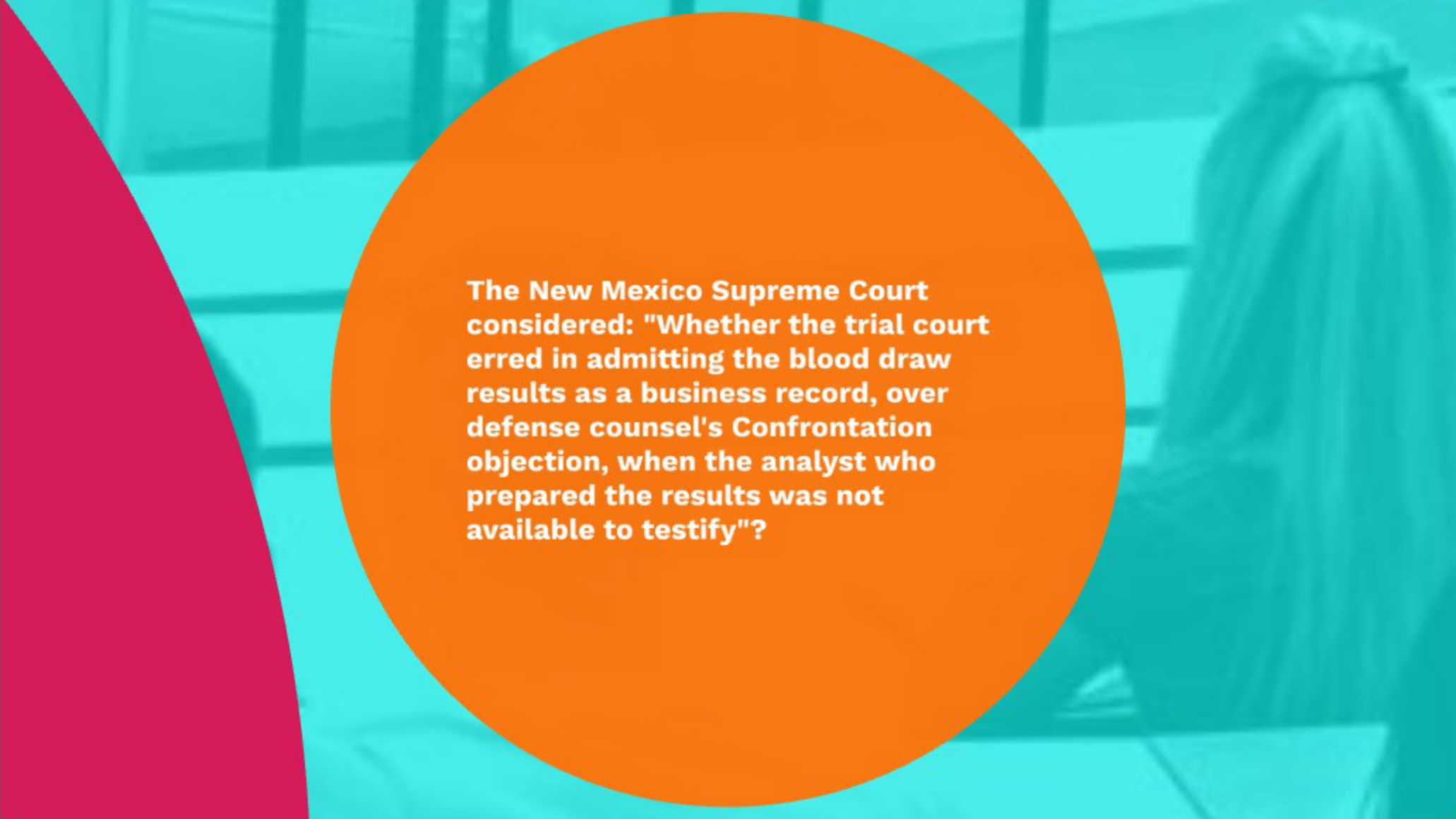
**State v. Bullcoming,
2010-NMSC-007**



**The
Inquiry**



**The
Holding**



The New Mexico Supreme Court considered: "Whether the trial court erred in admitting the blood draw results as a business record, over defense counsel's Confrontation objection, when the analyst who prepared the results was not available to testify"?

Additional relevant facts:

The analyst who testified had no involvement in preparing the blood analysis report testified about standard procedures (the gas chromatograph detects the compounds and prints a result, and then staff person transcribes).

The nurse who drew the blood and the officer who observed the blood draw and prepared and sent the kit to the lab testified at trial and were available for cross-examination.

The lab report is not a sworn document.

U.S. Supreme Court

**Bullcoming v. New Mexico,
564 U.S. 647 (2011)**

**District Court:
admissible as
business record**

CONVICTED

**NMCA:
non-testimonial,
admissible as
public record**

**CONVICTION
UPHELD**

**NMSC:
testimonial,
admissible via
substitute analyst**

**AFFIRMED ON
OTHER GROUNDS**

**The
Inquiry**

**The
Holding**

The U.S. Supreme Court considered:

- **Is the blood test report testimonial despite being unsworn?**
- **Who is the person who "makes the statement" for purposes of Defendant's right to cross-examine?**
- **What if the witness is unavailable?**

Oral Argument clip: <https://www.oyez.org/cases/2010/09-10876>

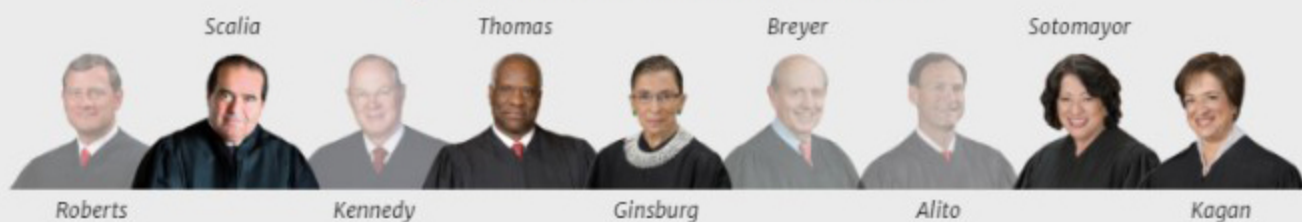
"The absence of notarization does not remove the performing analyst's certification from Confrontation Clause governance."

"The Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification."

The Court reversed the NM Supreme Court.

5-4 DECISION FOR DONALD BULLCOMING

MAJORITY OPINION BY RUTH BADER GINSBURG



Source: "Bullcoming v. New Mexico." Oyez, 1 Oct. 2018, www.oyez.org/cases/2010/09-10876.



Issues after Bullcoming

Autopsy Reports
Autopsy Photographs
Breathalyzer Reports
Substitute Experts



NM
Cases



Questions?

What do you think?

Are autopsy reports testimonial?

Are autopsy photographs testimonial?

- **See State v. Smith, 2016-NMSC-007**

Are breathalyzer readings testimonial?

Can substitute experts testify about or rely on another expert's report?

- **See State v. Huettl, 2013-NMCA-038**



Questions?

Thank you!