STRATEGIES in Brief

ÆQUITAS

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Supreme Court Continues to Expand the Sixth Amendment Confrontation Clause: *Bullcoming v. New Mexico*

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On June 23, 2011, the Supreme Court decided *Bullcoming v. New Mexico,* 131 S.Ct. 2705 (2011), in which it held that the Confrontation Clause prohibits the prosecution from introducing a forensic laboratory report through the testimony of an analyst who did not sign the certification or personally perform or observe the testing. The opinion follows the *Crawford v. Washington*[1] line of cases that have interpreted the Sixth Amendment to the United States Constitution's Confrontation Clause[2] to require confrontation of testimonial out-of-court statements. *Bullcoming* was decided after *Melendez-Diaz v. Massachusetts*,[3] and follows closely the holding in that case, which prohibited the introduction of a laboratory drug analysis affidavit without the in-court testimony of the laboratory technician or analyst who certified the report.

CASE FACTS

In August 2005, the defendant was driving a car that rear-ended a pick-up truck. When the other driver tried to exchange insurance information, he realized that the defendant was intoxicated. The other driver asked his wife to call the police; the defendant then walked away from his car and across the street. Approximately ten minutes later, he was apprehended by the police and brought back to the scene, where he refused to take a breath test. The defendant was arrested and charged with driving while intoxicated (DWI).

The police obtained a warrant for a blood alcohol test, and the defendant's blood was drawn and submitted to a laboratory, where it was tested by a forensic analyst using a gas chromatograph machine. A specially-trained analyst must operate the testing equipment, and its operation involves a several-step process requiring human interaction with the data, which creates the possibility of human error at each step. After the test indicated that the defendant's blood alcohol concentration was 0.21, the laboratory submitted a certified report of the test, which was completed and signed by a forensic analyst.

After receiving the blood alcohol results, the prosecution increased the defendant's charge to aggravated DWI, and he was tried in November 2005.[4] At trial, the prosecution did not call the certifying analyst who conducted the test and wrote the report. The prosecution stated that he had been put on unpaid leave for an unknown reason without providing any other reason for his unavailability. The prosecution instead called as a witness another forensic analyst from the same laboratory who had neither observed nor reviewed the analysis. Defense counsel objected to the other analyst's testimony on the grounds that, without the testimony of the certifying analyst, introduction of the report would violate the defendant's right to confrontation. The other analyst then testified about the general procedures involved in conducting a blood alcohol analysis test and operating a gas chromatography machine. The prosecution was permitted to introduce the report as a business record.

The defendant was convicted of aggravated DWI. On appeal, the New Mexico Court of Appeals upheld the conviction and stated that the blood alcohol report was non-testimonial and prepared routinely with guarantees of trustworthiness. On further appeal, while this case was pending before the New Mexico Supreme Court, *Melendez-Diaz* was decided by the United States Supreme Court. In *Melendez-Diaz*, the Court held that affidavits from a forensic laboratory report stating that a substance was a controlled substance were testimonial. The report in *Melendez-Diaz* had been created specifically to be evidence in a criminal proceeding, and the Court held that the prosecution could not introduce such a report without offering a live witness competent to testify to the truth of the statements made in the report.

The New Mexico Supreme Court held that in the present case, the certified laboratory report was testimonial but that its admission did not violate the Confrontation Clause for two reasons - first, that the certifying analyst was a "mere scrivener"[5] transcribing results and not interacting with the data, and second, that the other analyst's live testimony as to procedures involved in the testing was sufficient to protect the defendant's confrontation rights.

HOLDING

The United States Supreme Court granted certiorari to decide whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification of test results through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. Justice Ginsberg delivered the opinion of the court,[6] which held that testimony from a forensic analyst who did not perform the test does not meet the constitutional requirement. In a 5 to 4 decision, the Court agreed with the New Mexico Supreme Court's conclusion that the blood alcohol analysis report was testimonial, but the Court held that the testimony of another forensic analyst, who did not perform or supervise the testing, was not an adequate substitution simply because he qualified as an expert with respect to the machine and procedures.

In reaching its decision, the Court stated that the analyst who performed the testing was not a "mere scrivener" of the machine-generated data as the New Mexico Supreme Court had concluded, but rather, his role required specialized knowledge and training, and several steps that allowed for human error were involved at more than one point in the process. The other analyst who testified was not involved in the testing of the defendant's blood sample either as an analyst, reviewer, or supervisor. He had neither seen the sample nor spoken to the certifying analyst about it. Additionally, the Court noted that neither the analyst who testified nor any other witness was able to provide information as to why the certifying analyst was unavailable to testify, beyond that he was on unpaid leave.

The Court concluded that because of the unexplained unavailability of the certifying analyst and the risk of human error in this type of test, the other analyst could not answer questions regarding potential inaccuracies in the report, the certifying analyst's competency to perform the testing, the quality of his work, and the reasons he was placed on unpaid leave. Accordingly, the Court held that the defendant had a right to confront the certifying analyst at trial and that the certification of the laboratory report should not have been admitted through the other analyst's testimony.

In Part IV of the Majority Opinion, Justice Ginsberg responded to the prosecution's argument that requiring the government to produce the actual scientist who conducted, supervised, or viewed the testing would place an undue burden on prosecutors and laboratories across the country by crushing an already over-scheduled and chaotic system. She wrote that only a small portion of cases actually go to trial and thus the burden would not be too great.[7] The opinion also asserted that many prosecutors already place laboratory analysts on call when seeking to introduce this type of evidence.

Justice Sotomayor filed a concurring opinion that sought to limit the reach of the holding of the majority opinion. She agreed that the report in this case was properly excluded because it was testimonial, and stated that if the "primary purpose" of creating the report had not been as evidence for trial, the Confrontation Clause would not have been triggered, and state and federal rules of evidence would have determined admissibility.[8] Justice Sotomayor also suggested that a blood-alcohol concentration test might be non-testimonial if its primary purpose was to provide medical treatment. She also stated that the testimony of another analyst might satisfy the confrontation requirement if the other analyst had a personal connection to the test as a supervisor or reviewer. In addition, she noted that the majority opinion did not address the admissibility of the computer-generated test results from the chromatograph machine or the admissibility of expert testimony from a witness who reached his or her own conclusion about the defendant's blood alcohol concentration based on underlying testimonial reports not admitted into evidence.

Justice Kennedy's dissent articulated the dangers of extending the *Melendez-Diaz* holding to the facts of this case and stated that principles of federalism should allow states to decide these evidentiary and criminal procedural issues on their own. Justice Kennedy wrote that the majority opinion would exacerbate an already-existing logistical nightmare for scientific and forensic laboratories. Further, he pointed out a contradiction between *Bullcoming* and recent precedent. Specifically referring to *Michigan v. Bryant*, 562 U.S. 131 (2010), he wrote that where *Bullcoming* was grounded in the idea that reliability was not a confrontation issue, just one year ago in *Bryant*, the Court held that reliability *was* a confrontation issue. The dissent also stated that the rule in the holding was not clear as to whose live testimony would be sufficient to introduce reliable evidence without violating the Confrontation Clause. Justice Kennedy discussed confusion in the courts regarding confrontation rights and noted that even the justices themselves have been unable to come to a consensus as to the scope and appropriate application of the Confrontation Clause in the context of live testimony.

IMPACT

In truth, this case is very similar to the Court's holding in *Melendez-Diaz*, and clarifies that live testimony regarding a laboratory analysis certification cannot satisfy an accused's confrontation rights unless the witness has personal knowledge of the facts contained in the certification. The Supreme Court continues to expand the rights of defendants under the Confrontation Clause in the area of required live testimony.[9] This expansion began with *Crawford* and the identification of "testimonial" evidence, and has continued with the clause's strict application in *Melendez-Diaz*. As Justice Kennedy's dissent points out, the effect of this line of cases in domestic violence prosecutions, in the absence of evidence of forfeiture by wrongdoing, may be to abrogate other tools for introducing a victim's out-of-court statements when that victim is unavailable.

While *Bullcoming* does appear to limit the prosecution's ability to present physical evidence when laboratory analysis is involved, the majority opinion notes that if another forensic analyst had personally re-tested the sample or been somehow involved in the process of testing, his testimony may have been admissible. The concurrence also narrows the scope of the holding and provides prosecutors with solid ground to distinguish their cases and use other available evidentiary tools, such as hearsay exceptions. Had the prosecution called to the stand another lab technician involved in accepting the blood sample, a supervisor in charge of reviewing it, or any other analyst who had touched or seen the sample, the holding may have been different.

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ENDNOTES

[1] 541 U.S. 36 (2004).

[2] *Davis v. Washington,* 547 U.S. 813 (2006); *Giles v. California*, 554 U.S. 353 (2008); *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009); *Michigan v. Bryant*, 131 S.Ct. 1143 (2011).

[3] *Melendez-Diaz,* 129 S.Ct. 2527.

[4] Bullcoming's trial occurred after the United States Supreme Court decided *Crawford*, but before it decided *Melendez-Diaz*.

[5] *Bullcoming*, 131 S.Ct. at 2713.

[6] Justice Ginsburg authored the opinion; Part IV and FN 6 were not signed by a majority of justices and thus are not the considered the opinion of the Court.

[7] *Bullcoming*, 131 S.Ct. at 2719 (citing *Melendez-Diaz*, 129 S.Ct. at 2540)(Justices Ginsburg, Sotomayor, Kagan, and Thomas did not join this portion of the opinion).

[8] Justice Sotomayor's concurrence included a detailed list of circumstances in which the *Bullcoming* holding should *not* apply, including when: The prosecution has provided an alternate purpose for the introduction of a report, e.g., a business or public record, which would circumvent the Confrontation Clause; the individual testifying at trial is a supervisor, reviewer, or someone else with personal experience, even where limited, of or with the scientific test at issue; an expert who is testifying about his or her independent professional opinion regarding underlying testimonial reports that were not admitted into evidence; and the prosecution has only introduced machine-generated results from a print-out.

[9] This continued expansion was limited by the decision in *Bryant*, 131 S.Ct. 1143, which reaffirmed the primary purpose test and emphasized an objective test when looking at the circumstances of a police-witness interaction, treating the "ongoing emergency" scenario as a critical but not exclusive factor in determining admissibility.

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