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Much Ado about Nothing - Prosecutorial Burden and the Sixth Amendment's Impact on Forensic Analysis: Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)

Tyler J. Hudson

CASE COMMENT

MUCH ADO ABOUT NOTHING—PROSECUTORIAL BURDEN AND THE SIXTH AMENDMENT'S IMPACT ON FORENSIC ANALYSIS

Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)

Tyler J. Hudson[*]

Petitioner was arrested for driving while intoxicated (DWI), a charge confirmed by a forensic analysis of his blood.[1] This analysis was documented in a certified lab report signed by an analyst.[2] At trial, the prosecutor introduced the lab report as evidence but called a different analyst as a witness.[3] Petitioner objected, arguing that the surrogate witness violated the Confrontation Clause of the Sixth Amendment[4]; the trial judge overruled the objection.[5] Both the New Mexico Court of Appeals and the New Mexico Supreme Court decision affirmed the trial ruling.[6] The U.S. Supreme Court granted a writ of certiorari to the New Mexico Supreme Court and HELD, that the Sixth Amendment is violated when a defendant is unable to confront the analyst that prepared a forensic report used as evidence against the defendant, unless the analyst is unavailable and there was prior opportunity for cross-examination.[7]

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* The author is a J.D. Candidate at the University of Florida Levin College of Law (2013) and received a B.A. in Philosophy from the George Washington University (2007). The author's piece won the 2012 *Huber C. Hurst* award for best submission in the *University of Florida Journal of Law and Public Policy*'s Summer/Fall Case Comment Writing Competition, hosted annually for second-year law students.

1 Bullcoming v. New Mexico, 131 S. Ct. 2705, 2709 (2011). Petitioner's blood alcohol content (BAC) was determined by an analysis of his blood because he "refused to take a breath test." *Id.* at 2710.

2. *Id.*

3. *Id.* at 2711-12.

4. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

5. *Bullcoming*, 131 S. Ct. at 2712.

6. *Id.*

7. *Id.* at 2713.

against him,"[8] a right applicable to the states as well.[9] Interpreted literally and narrowly, the Confrontation Clause would create an impractical right due to the impossibility of a human declarant accompanying each testimonial statement introduced at trial.[10] Accordingly, common law has permitted exceptions to the traditional rule that hearsay—a statement introduced without accompanying testimony[11]—is inadmissible.[12] In *Ohio v. Roberts*, the U.S. Supreme Court held that a witness statement made at a preliminary hearing, without cross-examination, was admissible during a criminal trial because it bore an "indicia of reliability."[13] This reliability can be determined either by pointing to an established hearsay exception or "guarantees of trustworthiness."[14]

Twenty-four years later, in *Crawford v. Washington*, the U.S. Supreme Court abrogated the *Roberts* decision, holding that 'reliability' was both too broad and too narrow a criterion to protect a defendant's Sixth Amendment rights.[15] In *Crawford*, the defendant was charged with stabbing another man; the defendant's wife witnessed the stabbing and her statement to the police was recorded.[16] The trial court admitted the recorded statement as evidence, without accompanying testimony from the defendant's wife, and held that the statement's reliability was proven by its guarantee of trustworthiness.[17] While the Washington Court of Appeals reversed the trial court's decision, the Washington Supreme Court upheld the conviction, agreeing that the statement did have guarantees of trustworthiness.[18]

The U.S. Supreme Court granted certiorari to decide whether the Washington Supreme Court decision violated the Sixth Amendment.[19] After an extensive historical analysis of the amendment, the Court drew two conclusions: (1) testimonial hearsay is a primary focus of the Sixth Amendment and (2) testimonial statements of absent witnesses were only admissible if the witness was unavailable at trial, but previously available for cross-examination.[20] The Court eschewed the reliability

8. U.S. CONST. amend. VI.
9. Pointer v. Texas, 380 U.S. 400, 406 (1965).
10. Ohio v. Roberts, 448 U.S. 56, 63 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).
11. BLACK'S LAW DICTIONARY 790 (9th ed. 2009).
12. *Roberts*, 448 U.S. at 64-65.
13. *Id.* at 66.
14. *Id.*
15. *Crawford*, 541 U.S. at 60.
16. *Id.* at 40.
17. *Id.*
18. *Id.*
19. *Id.* at 42.
20. *Id.* at 53-54.

criterion announced in *Roberts* and reversed the decision of the Washington Supreme Court, holding that testimonial statements can only be admitted without a witness only if the witness is unavailable and there had been a prior opportunity to cross-examine the witness.[21]

Recently, in *Melendez-Diaz v. Massachusetts*, the U.S. Supreme Court held that laboratory analysts, who sign a report that is admitted as evidence, qualify as witnesses for purposes of the Confrontation Clause.[22] At trial, the state introduced "certificates of analysis" which proved that the white powder seized from the defendant was cocaine.[23] Petitioner objected and argued that the Sixth Amendment required the analysts to testify in person.[24] The Appeals Court of Massachusetts affirmed the conviction,[25] relying on an earlier Massachusetts case[26] which held that forensic analysts are not witnesses under the Sixth Amendment when they merely sign certificates.[27]

The *Melendez-Diaz* majority declined to support the dissent's conception of analysts as automatons who merely convey scientifically-neutral data.[28] To the contrary, the U.S. Supreme Court held that the analysts, as humans, are prone to human error, which may be the basis for a defense and thus qualify the analysts as witnesses under the Confrontation Clause.[29] The Court refused to interpret the analysts' certificates as official business records, which typically enjoy an exception to the rule that hearsay is inadmissible.[30] Finally, the Court noted that its decision did not impose the severe burden on prosecutors that the respondent and dissenting justices claimed it did.[31] By reversing the decision of the Appeals Court of Massachusetts, the Court set in motion an active debate over the prosecutorial burden imposed by its Confrontation Clause jurisprudence.[32]

The instant case reaffirmed the rule that forensic analysts who certify testimonial laboratory reports are witnesses under the Sixth Amendment. Throughout its holding, the instant Court grappled with familiar arguments, including: (1) analysts simply transmit information that is not testimonial in character, (2) a lab report itself is not testimonial, and (3) a nuanced interpretation of the Sixth Amendment is

21. *Id.* at 68.
22. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009).
23. *Id.* at 2531.
24. *Id.*
25. *Id.*
26. Commonwealth v. Verde, 444 Mass. 279 (2005).
27. *Melendez-Diaz*, 129 S. Ct. at 2531.
28. *Id.* at 2536.
29. *Id.* at 2532.
30. *Id.* at 2538.
31. *Id.* at 2541.
32. *Id.* at 2541-42.

required to prevent placing an unfair burden on prosecutors.[33] The New Mexico Supreme Court relied heavily on the first two arguments in holding that the trial judge complied with the demands of the Confrontation Clause.[34]

The majority took issue with all three of these arguments, particularly the first two, which formed the basis of the New Mexico's Supreme Court reasoning. In rejecting the argument that the analyst was a mere transcriber, the instant Court noted that the role of the analyst was to use his judgment, even if in the course of a routine procedure.[35] The Court also noted that if the defense wished to raise questions about the analyst's performance of the procedure, there was no one to ask but the analyst himself.[36] A surrogate analyst simply cannot answer questions about an analysis that he or she performed; therefore, the surrogate analyst in the instant case does not meet the Sixth Amendment standard for 'witness.'[37]

The issue that most divided the instant Court was whether the majority's interpretation of the Sixth Amendment placed an unnecessary burden on prosecutors.[38] The dissenting justices vehemently disagreed with the majority, arguing that the decision eviscerated the states' ability to craft their own evidentiary rules.[39] Noting that the dissent of the instant case is similar to the dissent in *Melendez-Diaz*, the majority anticipated the argument, and offers a simple rejoinder: convenience does not justify infidelity to constitutional demands.[40]

A tension between formalism and functionalism runs through the Court's decision in *Crawford* and its progeny. On the one hand, the majorities in *Melendez-Diaz* and *Bullcoming* construe the questions presented as an inquiry into constitutional demands and conclude that the Sixth Amendment's protections are indeed durable. On the other hand, the dissenting justices in the same two cases view the constitutional demands as less stringent, thus affording the states ample leeway to craft laws that best suit them. Accordingly, *Melendez-Diaz*

33. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2714-17 (2011).

34. *Id.* at 2712-13. In holding that the trial court complied with the demands of the Confrontation Clause, the New Mexico Supreme Court reasoned that the unavailable analyst "'was a mere scrivener,' who 'simply transcribed the results generated by the gas chromatograph machine.'" Further, the New Mexico Supreme Court reasoned that "although [the surrogate analyst] did not participate in testing [Petitioner]'s blood," the surrogate analyst "'qualified as an expert witness with respect to the gas chromatograph machine.'" *Id.* at 2713.

35. *Id.* at 2715.

36. *Id.*

37. *Id.*

38. *Id.* at 2717-18.

39. *Id.* at 2727 (Kennedy, J., dissenting).

40. *Id.* at 2717-18 (majority opinion).

and *Bullcoming* reveal a conflict between formalism and functionalism that is already familiar to the Court.

The analysis of the majority and dissent begin, and diverge, with the decision in *Crawford* seven years earlier. While the majority sees a decision confirming the durability and reach of the Confrontation Clause, the dissent sees an embrace of federalism and judicial modesty. The two sides also view the forensic technology differently, with the majority emphasizing the human analyst's role in *guiding* the machine, and the dissent characterizing the analyst's role as more ancillary and subordinate. These differing viewpoints on the technology are significant because they shape one's analysis of the chain of custody questions presented by evidentiary issues.

Whether the majority opinion of the instant case will burden prosecutors is a clear point of disagreement. The majority raises one issue that sheds doubt on the dissent's prediction of prosecutorial burden: re-testing.[41] Noting that New Mexico, like many states, preserves original forensic samples, the majority implies that the states' ability to re-test samples with a different analyst, one presumably capable of testifying at trial, significantly reduces any burden.[42] Thus, by re-testing the sample with an analyst who will be available for cross-examination either before or at trial, the prosecution will probably meet the requirements announced in *Crawford.*

Leaning heavily on multiple amicius briefs filed by state prosecutors, the dissenting justices' repeat attacks were first directed at the majority opinion in *Melendez-Diaz*. The dissenting opinion of the instant case predicts a world in which defense attorneys will object to each forensic report, and the analysts – beset by other trial obligations – will be unable to testify.[43] This fear of prosecutorial burden seems to rest largely on the belief that there are too few analysts to deal with the demands created by the majority opinion. The dissenting justices do not mention that the determination of the number of analysts on staff is a state function of budgetary allocations.

Both the majority and dissenting opinions in *Bullcoming* reveal genuine concerns about the constitutional and practical implications of each decision. Yet, by creating a paper tiger in the form of prosecutorial burden, the dissent overestimates the amount of convenience that the majority opinion actually precludes. This overreach gives the impression, perhaps unintentionally, that prosecutorial convenience is an aim, rather than a consequence, of the Sixth Amendment. The *Crawford* decision stands for the proposition that the Confrontation

41. *Id.*
42. *Id.*
43. *Id.* at 2728 (Kennedy, J., dissenting).

Clause of the Sixth Amendment imparts durable and substantial protections to criminal defendants and that prosecutorial convenience is a secondary concern.

While the Court's decision in *Bullcoming* establishes that forensic analysts are witnesses for purposes of the Confrontation Clause, the future of forensic analysis is less clear. It is not difficult to imagine that innovation could produce a device or process that yields immediate results, eliminating the chain of custody issues that bedevil current Sixth Amendment jurisprudence. Technological progress, like prosecutorial convenience, is not a primary factor in Sixth Amendment analysis, a fact not lost in the *Bullcoming* majority.