

BULLCOMING v. NEW MEXICO: REVISITING ANALYST TESTIMONY AFTER *MELLENDEZ-DIAZ*

ALEX HERSKOWITZ*

I. INTRODUCTION

*Bullcoming v. New Mexico*¹ presents the Supreme Court with an opportunity to revisit its controversial holding in *Melendez-Diaz v. Massachusetts*.² In *Melendez-Diaz*, the Court considered whether a defendant's right to confront his accuser was violated when the state introduced the reports of a laboratory analyst, but not the analyst who produced them.³ By a 5-4 majority, the *Melendez-Diaz* Court held that because the affidavit was an out-of-court statement intended for trial, in other words "testimonial," the state violated a defendant's constitutional right to confront his accuser by not putting the analyst on the stand.⁴ *Bullcoming* poses the question left open by *Melendez-Diaz*: Does the State still violate the Confrontation Clause if it calls to testify an analyst other than the one who actually performed or observed the laboratory test at issue?⁵ Thus, *Bullcoming* is the Court's most recent case in a jurisprudential line addressing the scope of a defendant's procedural right to confrontation.

The Sixth Amendment's Confrontation Clause guarantees a defendant the right "to be confronted with the witnesses against him."⁶ Defendants benefit from this right through the exclusion of inculpatory evidence absent an opportunity to confront an accusatory witness.⁷ The recent appointment of Justices Sotomayor and Kagan to

* 2011 J.D. Candidate, Duke University School of Law.

1. *Bullcoming v. New Mexico*, No. 09-10876 (U.S. argued Mar. 2, 2010).

2. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

3. *Id.* at 2530.

4. *Id.* at 2532.

5. Petition for Writ of Certiorari at i, *Bullcoming*, No. 09-10876 (U.S. May 2, 2010).

6. U.S. CONST. amend. VI.

7. *See Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("Where testimonial statements are

the Court calls into question not only whether the holding of *Melendez-Diaz* requires a particular analyst at trial, but also its continuing viability.⁸

II. FACTS

In the late afternoon of August 14, 2005, Donald Bullcoming was arrested for driving while intoxicated (DWI) after a minor traffic accident in which he rear-ended another vehicle.⁹ The other driver suspected that Bullcoming was drunk—while exchanging information he had noted Bullcoming’s eyes were bloodshot and he smelled of alcohol.¹⁰ The other driver’s wife called the police to report the accident.¹¹ By the time the police arrived, Bullcoming had left the scene.¹²

Shortly thereafter, the officer found Bullcoming a short distance from the scene and noted that he appeared to be drunk.¹³ The officer then brought Bullcoming back to the scene of the accident, where a second officer also observed signs of drunkenness.¹⁴ In response to police questioning, Bullcoming claimed not to have had a drink since 6 AM that morning.¹⁵ He failed the field sobriety tests, however, and the police arrested him for DWI.¹⁶ After Bullcoming refused a breath test, the police obtained a search warrant to perform a blood alcohol test.¹⁷ The test indicated that Bullcoming had a blood alcohol content of .21 percent, well over the legal limit of .08 percent.¹⁸

A gas chromatograph machine was used to analyze Bullcoming’s blood alcohol content.¹⁹ New Mexico provides standard laboratory

at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

8. See, e.g., Paul Vinegrad, *Two more bottom-side amicus briefs in Bullcoming*, THE CONFRONTATION BLOG (Jan. 20, 2011, 1:25 AM), <http://confrontationright.blogspot.com/> (commenting on Richard Friedman’s blog post and arguing that the Court may revisit the “relatively new ‘testimonial’ approach of *Crawford v. Washington*, 541 U.S. 36 (2004)”).

9. *State v. Bullcoming*, 226 P.3d 1, 4 (N.M. 2010), cert. granted sub nom. *Bullcoming v. New Mexico*, 131 S. Ct. 62 (2010) (No. 09-10876).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 5.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Brief for Petitioner at 3, *Bullcoming v. New Mexico*, No. 09-10876 (U.S. Nov. 30, 2010).

procedures that analysts must follow when processing blood samples.²⁰ The machines produce data that the analysts interpret and validate.²¹ The laboratory also preserves the unused portion of the blood sample for six months so it is available for retesting.²² Per standard procedure, the analyst who processed Bullcoming's blood sample recorded on the forensic report that he had received the specimen with the seal intact, that he had followed the correct procedures, and that the statements he recorded were correct.²³

At Bullcoming's trial for aggravated drunk driving, the State did not call the testing analyst to the stand.²⁴ Although the State did not claim that particular analyst was unavailable, the State called a different analyst from the laboratory—one who did not have any connection to Bullcoming's sample.²⁵ Bullcoming objected to this analyst's testimony as a violation of his confrontation rights.²⁶ He also objected to the introduction of the laboratory report as a business record.²⁷ Ordinarily, hearsay statements made during the regular course of business are admissible at trial and are not subject to the requirements of the Confrontation Clause.²⁸ Where, however, the business conducted specifically is done in anticipation of trial, admission without opportunity for cross-examination violates the Confrontation Clause.²⁹ The trial court nonetheless admitted both the laboratory report and the analyst's testimony.³⁰ Bullcoming subsequently was convicted and sentenced to serve two years in prison.³¹ On appeal, the New Mexico Court of Appeals affirmed, holding that the reports were "prepared routinely with guarantees of trustworthiness" and were nontestimonial.³²

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 5.

24. *Id.*

25. *State v. Bullcoming*, 189 P.3d 679, 684 (N.M. Ct. App. 2008), *aff'd*, 226 P.3d 1 (N.M. 2010), *cert. granted sub nom. Bullcoming v. New Mexico*, 131 S. Ct. 62 (2010) (No. 09-10876).

26. *Id.*

27. *Id.*

28. *See Crawford v. Washington*, 541 U.S. 36, 43 (2004) (describing business records as nontestimonial).

29. *See Palmer v. Hoffman*, 318 U.S. 109, 115 (1943) (holding that a report made by a railroad in anticipation of litigation was not a "business record" for purposes of the hearsay rule).

30. *Bullcoming*, 189 P.3d at 684.

31. Brief for Petitioner, *supra* note 19, at 6–7.

32. *Bullcoming*, 189 P.3d at 685.

III. LEGAL BACKGROUND

The Confrontation Clause guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”³³ Much of the debate surrounding this guarantee concerns who is a “witness against” the defendant.³⁴ In 1980, the Court decided *Ohio v. Roberts*,³⁵ which replaced the Court’s then-existing case-by-case approach with a new Confrontation Clause doctrine.³⁶ In *Roberts*, the Court held that hearsay statements are admissible if the defendant was unavailable and the statements “b[ore] adequate indicia of reliability.”³⁷ Such “indicia of reliability” could be inferred if a statement fell within a “firmly rooted hearsay exception” or showed “particularized guarantees of trustworthiness.”³⁸

In 2004, *Crawford v. Washington*³⁹ overruled *Roberts* and its progeny. In an opinion authored by Justice Scalia, seven members of the Court established a new framework for interpreting alleged violations of the Confrontation Clause.⁴⁰ Under *Crawford*, a “witness against” a defendant is one who “bear[s] testimony.”⁴¹ The Court defined testimony as being “typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁴² While declining to identify all classes of testimonial statements, the *Crawford* Court noted several important examples that indisputably would fall into this category, including⁴³:

ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . statements that were made

33. U.S. CONST. amend. VI.

34. See *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (finding it necessary to examine the historical background to resolve which of the various plausible theories about who is a “witness against” a defendant under the Confrontation Clause is correct).

35. *Ohio v. Roberts*, 448 U.S. 56 (1980), overruled by *Crawford*, 541 U.S. 36.

36. GEORGE FISHER, EVIDENCE 567 (2d ed. 2008).

37. *Id.* at 66.

38. *Id.*

39. *Crawford*, 541 U.S. 36.

40. *Id.* at 43.

41. *Id.* at 51.

42. *Id.*

43. *Id.* at 51–52.

under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial⁴⁴

After making Confrontation Clause violations contingent on a testimonial hearsay statement,⁴⁵ the *Crawford* Court permitted “only those exceptions established at the time of the founding.”⁴⁶ Thus, the Confrontation Clause had morphed from a substantive reliability rule into a procedural guarantee.⁴⁷

Following *Crawford*, the Court granted certiorari in *Davis v. Washington*⁴⁸ to further define “testimonial” statements.⁴⁹ *Davis* consolidated two cases involving statements made to police during, or immediately after, an emergency.⁵⁰ In an 8-1 decision, with only Justice Thomas dissenting in part, the *Davis* Court formulated a new “primary-purpose” test for determining whether a statement is testimonial in situations involving police interrogations.⁵¹ Under *Davis*, “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”⁵²

Recently decided *Michigan v. Bryant*⁵³ addressed a question left open by *Davis*: Is an emergency ongoing if the perpetrator of a violent crime may still be in the area?⁵⁴ In *Michigan*, the police questioned a mortally wounded victim half an hour after he had been shot.⁵⁵ The Court held that the victim’s statements had been made during the course of an ongoing emergency and therefore were nontestimonial

44. *Id.*

45. *Id.* at 68 (exempting nontestimonial statements from the Confrontation Clause regardless of their reliability).

46. *Id.* at 54 (accepting admissibility of hearsay statements conditioned on “unavailability and a prior opportunity to cross-examine”).

47. *Id.* at 67 (“To be sure, the [Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

48. *Davis v. Washington*, 547 U.S. 813 (2006).

49. *Id.* at 817.

50. *Id.*

51. *Id.* at 822.

52. *Id.*

53. *Michigan v. Bryant*, 131 S. Ct. 1143 (2010).

54. *Id.* at 1150.

55. *Id.*

under *Crawford*.⁵⁶ In reaching this decision, the Court emphasized that the “primary purpose” inquiry is an objective one and does not seek to determine the “subjective or actual purpose” of the parties involved.⁵⁷

Melendez-Diaz addressed a separate question concerning the admissibility of laboratory certificates of analysis when the testing analyst does not appear at trial.⁵⁸ In a 5-4 decision, the Court held that the “analysts’ affidavits were testimonial statements, and the analysts were ‘witnesses’ for the purposes of the Sixth Amendment.”⁵⁹ The analysts’ reports therefore clearly were subject to the Confrontation Clause under the reasoning of *Crawford* and *Davis*.⁶⁰ The Court stated that the reports fell into the “core class of testimonial statements” described in *Crawford* because they “are quite plainly affidavits.”⁶¹ The affidavits were “incontrovertibly a ‘solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”⁶² They served the same purpose as having a live witness testify.⁶³ In fact, because the affidavits’ only purpose was for use at trial, under Massachusetts law the affidavits unquestionably were testimonial.⁶⁴ Although denying that pragmatic effects have constitutional relevance, the Court nonetheless vehemently contested the dissenters’ assertions that applying the *Crawford* doctrine to laboratory analysts would wreak havoc on an overburdened state prosecution system.⁶⁵

The dissent distinguished the analysts in *Melendez-Diaz* who had “witnessed nothing to give them personal knowledge of the defendant’s guilt” from the “conventional witness[es]” at issue in *Crawford* and *Davis* who were witnesses to a crime.⁶⁶ The dissenters feared the majority opinion’s “vast potential to disrupt criminal

56. *Id.* at 1164.

57. *Id.* at 1156.

58. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

59. *Id.* at 2532.

60. *Id.* (stating that “this case involves little more than the application of our holding in *Crawford v. Washington*”).

61. *Id.*

62. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

63. *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

64. *Id.*

65. *Id.* at 2536 (acknowledging that, while other methods may exist for challenging forensic reports, the Constitution guarantees only confrontation).

66. *Id.* (Kennedy, J., dissenting).

procedures” and argued that Confrontation Clause doctrine was becoming “a body of formalistic and wooden rules.”⁶⁷

In *Bullcoming*, the Court will reconcile conflicting state supreme court and federal circuit court precedents concerning the admissibility of a non-testifying witness’s statement through the in-court testimony of a substitute expert witness.⁶⁸ In addition to New Mexico, two state supreme courts⁶⁹ have held that a forensic analyst’s statement, introduced into court by another forensic analyst, does not violate the Confrontation Clause.⁷⁰ Two other state supreme courts⁷¹ and two federal circuit courts⁷² have ruled in the opposite direction, holding that a surrogate analyst’s testimony does violate a defendant’s confrontation rights.⁷³ Though the Court’s decision in *Bullcoming* may represent a slight refinement of a doctrinal issue regarding the sufficiency of substitute procedural safeguards, the practical implications for law enforcement and defendants could be significant.

IV. HOLDING

In *State v. Bullcoming*,⁷⁴ the New Mexico Supreme Court held that the introduction of the blood alcohol report did not violate *Bullcoming*’s Confrontation Clause rights even though the analyst

67. *Id.* at 2544.

68. Petition for Writ of Certiorari, *supra* note 5, at 17.

69. See *Rector v. State*, 285 Ga. 714, 715–16 (2009) (holding that substitute forensic analyst’s testimony was valid under the Confrontation Clause where that witness was not a “mere conduit” for the laboratory report, and that in any event, such error would have been harmless); *Pendergrass v. Indiana*, 913 N.E.2d 703, 708 (Ind. 2009), petition for cert. filed (U.S. Feb. 22, 2010) (No. 09-866) (holding that a lab supervisor knowledgeable of laboratory procedures may testify in place of a nontestifying forensic analyst employee).

70. *Id.*

71. *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009) (holding that substitute medical examiner is “not permitted on direct examination to recite or otherwise testify about the underlying factual findings of the unavailable medical examiner as contained in the autopsy report”); *State v. Locklear*, 363 N.C. 438, 451–53 (2009) (holding that the trial court erred in admitting testimony of a nontestifying analyst, but that such error was “harmless beyond a reasonable doubt.”).

72. *United States v. Moon*, 512 F.3d 359, 361–62 (7th Cir.) cert. denied, 129 S. Ct. 40 (2008) (holding that a testing chemist’s conclusions were testimonial and therefore subject to the Confrontation Clause); *United States v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010) (holding that it violated the Confrontation Clause to admit a certificate of nonexistence of record through an agent who reviewed the defendant’s file but did not conduct the records search).

73. *Id.*

74. *State v. Bullcoming*, 226 P.3d 1, 9 (N.M. 2010), cert. granted *sub nom.* *Bullcoming v. New Mexico*, 131 S. Ct. 62 (2010) (No. 09-10876).

who performed the test did not testify at trial.⁷⁵ The court held that the defendant's Confrontation Clause rights were not violated because another laboratory employee was available for cross-examination.⁷⁶

To assess whether a violation of the Confrontation Clause took place, the New Mexico Supreme Court first examined the question of whether the report at issue was testimonial.⁷⁷ Under the State's theory, *Melendez-Diaz* was limited to Justice Thomas's concurring opinion because it reflected the narrowest grounds of agreement for a majority of the Court.⁷⁸ Justice Thomas concurred in *Melendez-Diaz* only because the "reports in question were 'plainly affidavits,' and thus were clearly 'formalized testimonial materials' governed by the Confrontation Clause."⁷⁹ The State claimed that because the certificate at issue in *Bullcoming* was not a sworn affidavit—the sticking point for Justice Thomas—there was no Confrontation Clause violation.⁸⁰ The court also noted that under *Crawford*, "the absence of oath was not dispositive."⁸¹ The New Mexico court held these arguments unpersuasive, citing the fact that an affidavit is only one example of "formalized testimonial materials" and its absence therefore is not dispositive.⁸² The report here, like the certificates in *Melendez-Diaz*, was "'formalized testimonial material[]' in that [it was] made 'for the purpose of establishing or proving some fact.'"⁸³

Thus, the court held that the laboratory report was testimonial, but the court did not stop there. The court then considered whether the defendant's Confrontation Clause rights had nonetheless been preserved through the testimony and opportunity to cross-examine a laboratory analyst not directly involved in testing the defendant's sample.⁸⁴ Calling the analyst who performed the test a "mere

75. *Id.* at 14.

76. *Id.* at 9.

77. *Id.* at 6–9.

78. *Id.* at 8. In *Marks v. United States*, the Court issued guidance on interpreting plurality opinions by stating that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977).

79. *Bullcoming*, 226 P.3d at 8.

80. *Id.*

81. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)).

82. *Id.*

83. *Id.* (quoting *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009)).

84. *Id.* at 8–9.

scrivener” and labeling the gas chromatograph machine as the defendant’s “true accuser[,]” the court held that the “live, in-court testimony of a separate qualified analyst [was] sufficient to fulfill [the] defendant’s right to confrontation.”⁸⁵ Under the court’s reasoning, because the analysis of the sample required neither interpretation nor independent judgment, the test results essentially were the equivalent of raw data.⁸⁶ The court therefore deemed the testimony of the non-testing analyst a sufficient safeguard of the Confrontation Clause’s protections.⁸⁷

V. ARGUMENTS

A. *Bullcoming’s (Petitioner’s) Arguments*

Petitioner Bullcoming argues that the Confrontation Clause encompasses a defendant’s right to confront the “particular witness” that is the source of an inculpatory testimonial statement.⁸⁸ Bullcoming finds support for this constitutional requirement—which he calls the “particular-witness rule”—in the text, purpose, and jurisprudential history of the Confrontation Clause.⁸⁹ Thus, the State may not carve out an exception to this rule by substituting, for example, one laboratory analyst for another, at trial.⁹⁰

1. *The Particular-Witness Rule*

Bullcoming argues that the Framers’ use of the definite article—“the”—in the Sixth Amendment’s right “to be confronted with *the* witnesses,” read in conjunction with *Crawford’s* similar use of the definite article in expounding the exclusionary rule, is a clear indication that the witness in question is “the particular creator of that evidence.”⁹¹ Similarly, in *Melendez-Diaz*—“[t]he analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation”—indicates that the

85. *Id.* at 9.

86. *Id.*

87. *Id.*

88. Brief for Petitioner, *supra* note 19, at 13.

89. *Id.* at 10–22.

90. *Id.* at 14.

91. *Id.* at 13 (emphasis added).

Court was referring to the same analyst providing the forensic report.⁹²

The particular-witness rule is necessary to serve the four purposes of confrontation previously identified by the Court: cross-examination, testifying under oath, observation by a jury, and “physical presence” of the witness.⁹³ These aspects are thwarted when the State refuses to provide the particular witness whose testimony is at issue, but instead relies on a surrogate witness.⁹⁴ Invoking Wigmore’s adage that cross-examination is the “greatest legal engine ever invented for the discovery of truth,” Bullcoming contends that its functions are undermined by surrogate testimony because personal knowledge, confrontation under oath, and the jury’s ability to observe the accuser’s demeanor are all missing.⁹⁵

2. *No Exceptions to the Particular-Witness Rule*

Bullcoming contends that the New Mexico Supreme Court erred in creating an exception to the particular-witness rule.⁹⁶ The New Mexico court’s exception was based on its characterization of the defendant’s opportunity to cross-examine the surrogate analyst as meaningful.⁹⁷ Where testimonial statements made by an out-of-court declarant are at issue, however, the Confrontation Clause allows no exceptions to this rule.⁹⁸ The Confrontation Clause does not permit surrogate witnesses because even if a surrogate witness might satisfy a defendant’s cross-examination rights, this still would not address the other three aspects of confrontation—oath, observation, and “physical presence.”⁹⁹ Underscoring the importance of these aspects of confrontation is *Crawford*’s directive that “[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.”¹⁰⁰ A litany of “good sense” reasons to preclude a forensic-evidence exception to

92. *Id.* at 27 (quoting *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 n.6 (2009)).

93. *Id.* at 15.

94. *Id.*

95. *Id.* at 16.

96. *Id.* at 22.

97. *Id.* at 23.

98. *Id.* at 25 (“If a ‘particular guarantee’ of the Sixth Amendment is violated, no substitute procedure can cure the violation . . .”).

99. *Id.* at 23–24.

100. Brief for Petitioner, *supra* note 19, at 24 (alteration in original) (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)) (quotation marks omitted).

the particular-witness rule also indicates why surrogate witnesses do not satisfy the Confrontation Clause.¹⁰¹ Particularly compelling reasons include the risk of error, falsification, poor judgment, and improper training of forensic analysts.¹⁰²

For these reasons, Bullcoming disputes that the Constitution allows any exceptions to the particular-witness rule. If the Court disagrees, however, an exception would not be warranted under the facts of this case.¹⁰³ The analyst who performed Bullcoming's test was later placed on administrative leave without pay.¹⁰⁴ Had that analyst testified the State would have been forced to disclose the reasons for this disciplinary action—reasons that may have cast doubt on his credibility as a witness.¹⁰⁵ As Justice Scalia noted during oral arguments, “boy, it smells bad to me.”¹⁰⁶

Bullcoming also rejects the New Mexico Supreme Court's rationale that the analyst who conducted the test was a “mere scrivener,” making the testimony of the surrogate witness a sufficient protection of his confrontation rights.¹⁰⁷ The Confrontation Clause is a procedural guarantee; it applies even if the analyst was nothing more than a transcriptionist.¹⁰⁸ In this case, however, that the declarations in the analyst's forensic report went far beyond mere transcriptions.¹⁰⁹

B. New Mexico's (Respondent's) Argument

Respondent New Mexico vigorously disputes the New Mexico Supreme Court's concession that the analyst's report in *Bullcoming* is testimonial.¹¹⁰ Justice Thomas's opinion in *Melendez-Diaz* constrained the type of statements that could be considered testimonial to extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.¹¹¹ As a contemporaneous, unsworn, non-adversarial

101. *Id.* at 28–31.

102. *Id.*

103. *Id.* at 26.

104. *Id.* at 31.

105. *Id.*

106. Transcript of Oral Argument at 38, *Bullcoming v. New Mexico*, No. 09-10876 (U.S. Mar. 2, 2010).

107. *Id.* at 35–36.

108. *Id.* at 36.

109. *Id.* at 36–37.

110. Brief for Respondent at 7, *Bullcoming v. New Mexico*, No. 09-10876 (U.S. Jan. 10, 2011).

111. *Id.* at 12.

public record it is not “formalized testimonial materials” that would violate the Confrontation Clause.¹¹²

New Mexico also distinguishes the *Melendez-Diaz* affidavit from the report in *Bullcoming* because of the “inquisitorial” nature of the former.¹¹³ The Confrontation Clause was a response to the “common-law abuse of admitting at trial statements made to magistrates during pre-trial *ex parte* examinations.”¹¹⁴ By focusing on the development of the Clause as a response to these abusive investigatory procedures,” the confrontation right is implicated only when the inquisitorial investigation substitutes for the adversarial examination of witnesses at trial.”¹¹⁵

The affidavit in *Melendez-Diaz* was “inquisitorial” because its purpose was to incriminate the defendant, it was prepared at the request of a police officer, and the analyst did not swear to the affidavit until a week after the laboratory test was performed.¹¹⁶ In contrast, New Mexico characterizes the statement at issue in *Bullcoming* as a non-inquisitorial public record because it “contain[ed] routine scientific observations by public officials who are independent of law enforcement, even if they are made at the arm’s length request of a police officer.”¹¹⁷

New Mexico invites the Court to overrule the *Davis* primary-purpose test as “unworkable, flawed, and overly broad in relation to the purposes of the Confrontation Clause.”¹¹⁸ Limiting the protections of the Confrontation Clause to “inquisitorial abuses” aligns most closely with the Framers’ original intent to protect against prosecutorial abuse.¹¹⁹ Under this view, noncustodial police investigations—whether or not they are conducted during the course of an emergency—are non-adversarial and therefore would not be subject to the exclusionary rule.¹²⁰ Likewise, “scientific analysis is not an interrogation and does not present a danger of prosecutorial abuse.”¹²¹

112. *Id.* at 13–14.

113. *Id.* at 27–28.

114. *Id.* at 24.

115. *Id.* at 25.

116. *Id.* at 23.

117. *Id.*

118. *Id.* at 41.

119. *Id.* at 37, 41–42.

120. *Id.* at 39.

121. *Id.* at 35.

New Mexico proposes that the Court should adopt a rule first announced in *United States v. Inadi*.¹²² Under this rule, testimonial statements would be narrowly defined as those statements made to prosecutorial or judicial authorities that lack any “independent evidentiary significance.”¹²³ A testimonial statement would have no “independent evidentiary significance” if that statement could be “replicated by in-court testimony.”¹²⁴ This proposed rule best responds to the Framers’ concerns.¹²⁵

Even if the Court determines that the laboratory report at issue in *Bullcoming* is testimonial, New Mexico argues that Bullcoming’s Sixth Amendment rights were protected by the opportunity to retest the sample.¹²⁶ Retesting the sample would serve the same purposes as cross-examination by testing the laboratory analyst’s recollection, veracity, skill, ambiguity of result and any possible transcription error.¹²⁷ Thus, if there was an error, it was harmless.¹²⁸

VI. LIKELY DISPOSITION

Bullcoming presents an opportunity for the Court to modify its approach to Confrontation Clause jurisprudence with regard to forensic evidence.¹²⁹ Since *Melendez-Diaz* was decided (by a 5-4 vote), two members of the majority—Justices Souter and Stevens—have left the Court. Thus, if either Justices Sotomayor or Kagan aligns with the *Melendez-Diaz* minority that precedent could be overturned or significantly narrowed. During her confirmation hearing, then-Solicitor General Elena Kagan openly discussed her concerns about the practical effects of the Court’s opinions, specifically citing the impact of *Melendez-Diaz* on the criminal justice system.¹³⁰ Justice Sotomayor, as a former prosecutor and trial judge, may also be sympathetic to the concerns of state prosecutors and law enforcement.¹³¹ Additionally, Justice Sotomayor’s record as an

122. *United States v. Inadi*, 475 U.S. 387 (1986).

123. Brief for Respondent, *supra* note 110, at 51 (quoting *Inadi*, 475 U.S. at 394).

124. *Id.* at 49.

125. *Id.* at 47.

126. *Id.* at 52.

127. *Id.* at 52–56.

128. *Id.* at 59.

129. Vinegrad, *supra* note 8.

130. Andrew Ramonas & Channing Turner, *Kagan Hearings—Live Hearings*, MAIN JUSTICE (June 29, 2010, 9:15 AM), <http://www.mainjustice.com/2010/06/29/kagan-hearing-live-updates/>.

131. Jonathan Adler, *Souter, Sotomayor, & Melendez-Diaz v. Massachusetts*, THE VOLOKH CONSPIRACY (June 29, 2009, 5:55 AM), <http://volokh.com/posts/1246125087.shtml> (arguing that

appellate judge indicates that she could be more attuned to pragmatic rather than doctrinal concerns.¹³²

The remaining members of the *Melendez-Diaz* majority—Justices Scalia, Ginsburg, and Thomas—likely will stay intact as *Bullcoming* appears to be a logical extension of their holding. Justices Scalia and Ginsburg almost certainly will find *Bullcoming*, like *Melendez-Diaz*, to be “a rather straightforward application of *Crawford*.”¹³³ Justice Thomas likely will conclude that *Bullcoming* retains the requisite level of formality for a testimonial statement.¹³⁴

If a majority of the Justices choose to affirm the New Mexico Supreme Court, it is unclear how they would distinguish *Melendez-Diaz*. First, New Mexico’s position that Justice Thomas’s concurrence constrains the holding in *Melendez-Diaz* is undermined by the majority’s opinion in that case. That opinion “flatly reject[s]” the notion that analysts are not “accusatory” witnesses.¹³⁵ Moreover, the “wholesale dismissal of the fundamental underpinnings of the dictum portion of the majority’s opinion necessarily would require a rejection of the holding in *Crawford*.”¹³⁶

Second, the Court is unlikely to give much weight to the argument that both scientific data and the conclusions drawn from it are nontestimonial. In their amicus brief, some of the States’ argue that scientific data or observations “are merely a premise of [scientific conclusions]” because “when considered in isolation” conclusions lack significance.¹³⁷ This argument is unlikely to persuade the *Melendez-Diaz* majority because, as Professor Richard Friedman of the

Justice Sotomayor’s “ascension to the Court could have dramatic consequences for criminal law, as she could create a new Court majority on these issues and roll back recent decisions on the Confrontation Clause”).

132. *Id.* (“[H]er criminal law opinions provide little evidence of a strong civil libertarian streak of the sort that would lead her to apply constitutional protections for criminal defendants in a strict and unyielding manner.”).

133. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2533 (2009).

134. *Id.* at 2543 (Thomas, J., concurring).

135. John Wait, *Another “Straightforward Application”: The Impact of Melendez-Diaz on Forensic Testing and Expert Testimony in Controlled Substance Cases*, 33 CAMPBELL L. REV. 1, 14 (2010).

136. *Id.* at 15.

137. Brief for the States of California, Alabama, Alaska, Arizona, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, Wyoming as *Amici Curiae* Supporting Respondent at 14, *Bullcoming v. New Mexico*, No. 09-10876 (U.S. Jan. 14, 2011) [hereinafter Brief for the States].

University of Michigan notes, “[d]ata and observations are not testimonial . . . [but] a report of them is, if made in anticipation of prosecutorial use.”¹³⁸

Notably, during oral arguments, Justice Scalia, in response to the New Mexico Attorney General’s attempt to distinguish the report in *Bullcoming* from *Melendez-Diaz*, quipped that the *Bullcoming* report “was prepared just for fun, not for use in trial?”¹³⁹ Justice Sotomayor also contested the Attorney General’s “mere scrivener” theory that the New Mexico court had adopted.¹⁴⁰ Sotomayor noted that the analyst was not “simply looking at a number and putting it on a report[,]” but was also certifying a number of other things like the condition the sample was received in and that standard procedures were followed.¹⁴¹ Moreover, citing *Melendez-Diaz*, the New Mexico Supreme Court conceded that “the blood alcohol report was testimonial”¹⁴² and the Supreme Court’s question presented implicitly presumes that the report is testimonial.¹⁴³

Third, the Court’s recent decision in *Bryant* demonstrates that the *Davis* primary-purpose test is alive and well.¹⁴⁴ The *Bryant* decision clarified much of the ambiguity complained of by New Mexico.¹⁴⁵ Under *Bryant*, the “primary purpose of an interrogation” is based on “[a]n objective analysis” of the surrounding circumstances.¹⁴⁶ The Court therefore will inquire into “the purpose that reasonable participants would have had, as ascertained from the individuals’

138. Richard Friedman, *States’ amicus brief in Bullcoming*, THE CONFRONTATION BLOG (Jan. 17, 2011 5:43 PM), <http://confrontationright.blogspot.com/2011/01/states-amicus-brief-in-bullcoming.html>.

139. Transcript of Oral Argument at 33, *Bullcoming v. New Mexico*, No. 09-10876 (U.S. Mar. 2, 2010).

140. *Id.* at 33–34 (“I’m sorry. He’s not simply looking at a number and putting it on a report. He’s certifying to certain things. He’s certifying to following certain steps, that the evidence wasn’t tampered with. He’s certifying that he’s complied with all the requirements of New Mexico law with respect to the report . . .”).

141. *Id.*

142. *State v. Bullcoming*, 226 P.3d 1, 1 (N.M. 2010), *cert. granted sub nom. Bullcoming v. New Mexico*, 131 S. Ct. 62 (2010) (No. 09-10876).

143. Petition for Writ of Certiorari, *supra* note 5, at i (The question presented reads: “Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.”).

144. *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2010) (holding that the statements at issue were testimonial under the primary purpose test).

145. See Brief for Respondent, *supra* note 110, at 43 (arguing that the primary purpose test “is unworkable because it does not clarify whose purpose must be examined”).

146. *Bryant*, 131 S. Ct. at 1156.

statements and actions and the circumstances in which the encounter occurred.”¹⁴⁷

Attorney General King tried to apply *Davis*’s primary-purpose rule to the analyst’s report in *Bullcoming*.¹⁴⁸ In so doing, he focused on whether an interrogation was taking place, and, if so, the statements would be regarded as testimonial.¹⁴⁹ In *Bullcoming*, because there was no interrogation, Attorney General King argued that the reports are nontestimonial. Justice Scalia responded, however, that whether an interrogation occurs “doesn’t make any difference. That is not the condition for the application of the . . . Confrontation Clause.”¹⁵⁰ The reports in *Bullcoming* were prepared for trial. Given Justice Scalia’s comments the Court is likely to hold that the analyst’s report is testimonial under *Davis*.

Chief Justice Roberts and Justices Kennedy, Alito, and Breyer almost certainly will reject *Bullcoming*’s Confrontation Clause challenge. They dissented in *Melendez-Diaz* and could adopt the reasoning in that dissenting opinion to conclude that analysts are not traditional witnesses with personal knowledge of events.¹⁵¹ At oral argument, questions from Justice Alito reflected reasoning that would support his holding that laboratory reports are nontestimonial under *Crawford*. For example, Justice Alito emphasized that the testimonial information in the analyst’s report could be established by indirect evidence.¹⁵² Justice Alito also asked Attorney General King whether there was any way the police could influence promotions at the laboratory.¹⁵³ This line of questioning could be an attempt to justify holding that the analyst report in *Bullcoming* is nontestimonial—first, because the report is not meant to serve as a substitute for live testimony and second, because the laboratory employees are independent of the police.

The practical implications of ruling in favor of *Bullcoming* also

147. *Id.*

148. Transcript of Oral Argument, *supra* note 139, at 31.

149. *Id.*

150. *Id.* at 42.

151. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2551 (2009) (Kennedy, J., dissenting) (describing a witness as someone who observes an event and therefore has personal knowledge of that event).

152. Transcript of Oral Argument, *supra* note 139, at 35 (asking if the State could prove with indirect evidence the results of the blood alcohol content test, that the sample was *Bullcoming*’s, and that standard procedures were followed).

153. *Id.*

counsel against extending *Melendez-Diaz*. Notably, the States have objected to the additional burdens that *Melendez-Diaz* has imposed on already overburdened and underfunded prosecutorial systems that require forensic laboratory analysts to testify at trial.¹⁵⁴ As Justices Scalia, Ginsburg, and Thomas appear inclined to maintain the views they expressed in *Melendez-Diaz*, the outcome in *Bullcoming* rests largely on the votes of Justices Sotomayor and Kagan—both of whom can be expected to give substantial weight to the states' practical concerns.¹⁵⁵

The *Bullcoming* Court is more likely to reject or distinguish *Melendez-Diaz* than it is to affirm and extend its holding. The *Melendez-Diaz* decision greatly fractured the *Crawford* coalition while leaving open the question of whether a state may substitute analysts at trial. *Bullcoming* therefore is a prime opportunity for the newly constituted Court to refine its Confrontation Clause jurisprudence and resolve a troubling issue of modern-day criminal law.

154. Brief for the States, *supra* note 137, at 5–8.

155. Ramonas & Turner, *supra* note 130; Adler, *supra* note 131.