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No. 0940876

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

DONALD BULLCOMING,
Petitioner,
v.

STATE OF NEW MEXICO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Confrontation Clause prohibits the admission into evidence of machine-produced raw data that is recorded in an unsworn document by a non-testifying laboratory analyst acting as a "mere scrivener" and is introduced through the live testimony of an expert subject to cross-examination who is knowledgeable about the machine and the laboratory's procedures.

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STATEMENT OF THE CASE

Donald Bullcoming rear-ended Dennis (Randy) Jackson's truck while it was stopped at an intersection in Farmington, New Mexico, late in the afternoon of August 14, 2005. Pet. App. A at 7a. Mr. Jackson asked his wife to call the police when he saw that Mr. Bullcoming smelled of alcohol and had bloodshot eyes. *Id.* The arresting officer also testified Mr. Bullcoming had watery, bloodshot eyes, slurred speech, and smelled of alcohol. *Id.* In response to officer questioning, Mr. Bullcoming responded that he had a drink at 6:00 a.m. but had not been drinking since then. *Id.* The officer administered field sobriety tests, which Mr. Bullcoming failed. *Id.* The officer arrested Mr. Bullcoming for driving while intoxicated ("DWI").'[1] *Id.*

Because Mr. Bullcoming refused to take a breath test, the arresting officer applied to a judge for a search warrant to perform a blood alcohol test. *Id.* New Mexico's Implied Consent Act requires that a test of blood or breath be administered when a law enforcement officer has reasonable grounds to believe a person has been driving a motor vehicle under the influence of intoxicating liquor or drugs. N.M. Stat. Ann. § 66-8-107(B) (Michie 2004).

After a search warrant was issued, the officer took Mr. Bullcoming to the local emergency room. Pet. App. B at 23a. A nurse extracted blood following the

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'Pursuant to Supreme Court Rule 15.2, the State points out that the petition for certiorari, without citation, provides selective factual background information and does not include reference to all evidence presented at trial regarding the events leading to Mr. Bullcoming's arrest after the vehicular accident. With respect to the background information, the State relies on the facts of record at trial, as well as the recitation of facts appearing in the state appellate court opinions. *See* Pet. App. A and B.

instructions contained in a blood collection kit approved by the Scientific Laboratory Division, Toxicology Bureau, of the New Mexico Department of Health ("SLD"). Pet. App. D at 31a.

The arresting officer and the nurse filled out information on a Report of Blood Alcohol Analysis ("BAC report"), showing that Mr. Bullcoming was arrested at 5:00 p.m. on August 14, 2005, and that a specimen of his blood was drawn at 6:25 p.m. that day. Pet. App. D at 31a. The BAC report showed it was received at SLD on August 16, 2005, that the sample seal was received intact, and that the seal was broken in the laboratory on August 17, 2005. *Id.* The analyst certified that chemical analysis of the sample showed a concentration of alcohol in the sample of .21 grams per 100 milliliters of blood. *Id.*

On August 18, 2005, a reviewer certified that the analyst met the qualifications required by the director of the laboratory for conducting the analysis and that the established procedure was followed in the handling and analysis of the sample. *Id.* A laboratory employee certified that a copy of the BAC report was mailed to Mr. Bullcoming on August 22, 2005. *Id.*

At trial, both the nurse who drew Mr. Bullcoming's blood and the arresting officer who prepared a portion of the BAC report testified. Pet. App. A at 8a. The BAC report was admitted into evidence through the testimony of Gerasimos Razatos, an analyst at SLD involved in overseeing the breath and blood alcohol programs throughout New Mexico. *Id.* Mr. Bullcoming objected to the admission of the BAC report on the basis that it violated his right of confrontation because it was

prepared in anticipation of litigation. *Id.* The trial court admitted the BAC report as a business record and held admission of the report was not prohibited by *Crawford v. Washington*, 541 U.S. 36 (2004). Pet. App. A at 8a-9a.

Mr. Razatos did not perform the analysis of Mr. Bullcoming's blood specimen and was not involved in preparing the BAC report. *Id.* at 8a. The analyst who performed the test did not testify because he had recently been placed on unpaid leave. *Id.*

Mr. Razatos testified as an expert witness about Mr. Bullcoming's blood alcohol content and the standard procedures of the laboratory. *Id.* He testified that the instrument used to analyze Mr. Bullcoming's blood was a gas chromatograph machine and explained that the detectors within the gas chromatograph machine detect the compounds before the computer prints out the results. *Id.* When Mr. Razatos was asked by the prosecutor whether "any human being could look and write and just record the result," he answered, "Correct." *Id.* He also testified that the gas chromatograph machine prints out the result and then the result is transcribed on the BAC report. *Id.*

At the end of the trial, the jury returned a verdict of guilty of DWI. Pet. App. C at 28a. The trial court found this was "at least a fifth DWI conviction," and, pursuant to state law, denominated Mr. Bullcoming's crime a fourth-degree felony, sentencing him to two years of confinement and one year of parole. *Id.*

On appeal to the New Mexico Court of Appeals, Mr. Bullcoming argued that his Sixth Amendment right of confrontation had been violated by the admission of

the BAC report through the testimony of the forensic scientist who did not prepare the report. Pet. App. B at 25a; *State v. Bullcoming,* 189 P.3d 679 (N.M. Ct. App. 2009). The intermediate appellate court rejected the claim based on *State v. Dedman,* 102 P.3d 628 (N.M. 2004), which construed *Crawford* and held state laboratory reports were nontestimonial in nature, not unreliable or untrustworthy, and admissible under the public records exception to the hearsay rule. *Id.*

On discretionary review in the New Mexico Supreme Court, Mr. Bullcoming argued that the BAC report admitted in his case was testimonial as defined by *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009). Pet. App. A at 6a; *State v. Bullcoming,* 226 P.3d 1 (N.M. 2010). Based on its reading of *Melendez-Diaz,* the New Mexico Supreme Court overruled its decision in *Dedman* and held that BAC reports must be considered testimonial. *Id.* at 10a. The court rejected the State's claim that an oath is required before a document may be considered sufficiently formal to qualify as the functional equivalent of live testimony. *Id.* at 10a-11a. The court nonetheless determined that the BAC report could be admitted through the live testimony of a qualified analyst because it merely transcribed results from a machine and, for Confrontation Clause purposes, the machine was the true accuser. *Id.* at 11a.

REASONS FOR DENYING THE WRIT

The issue in this case is, as Mr. Bullcoming contends, unquestionably important to the administration of criminal justice. Pet. at 19. Contrary to his assertion, however, the New Mexico Supreme Court has not decided this important

federal question in a way that conflicts with relevant decisions of this Court. See Sup. Ct. R. 10(c).

Applying the principles set forth in *Melendez-Diaz,* the New Mexico Supreme Court held that a BAC report was testimonial and that its admission into evidence did not violate the Confrontation Clause "because the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine, and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation." Pet. App. A at 6a. In a companion case issued the same day, the court, again applying *Melendez-Diaz,* clarified that a crime laboratory report in which a nontestifying analyst identifies a controlled substance may not be admitted through another analyst who does not present an independent expert opinion as to the nature of the substance. *State v. Aragon,* 225 P.3d 1280, 1290-91 (N.M. 2010). The New Mexico Supreme Court has resolved the Confrontation Clause challenge to the admissibility of state laboratory reports in a manner that is consonant with the guidance set forth in *Melendez-Diaz.*

Further, the New Mexico Supreme Court has not decided this important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. See Sup. Ct. R. 10(b). Rulings of other state courts and of federal courts support the New Mexico Supreme Court's treatment of raw data.

For these reasons, this Court should deny the petition for writ of certiorari. The only potential purpose for granting certiorari in this case would be to give this Court an opportunity to revisit and clarify its decisions in *Crawford, Melendez-Diaz,* and *Davis v. Washington,* 547 U.S. 813 (2006).

I. THE NEW MEXICO SUPREME COURT CORRECTLY HELD THAT *MELENDEZ-DIAZ* DOES NOT APPLY TO THE INTRODUCTION OF RAW DATA RECORDED, WITHOUT INTERPRETATION, BY A NONTESTIFYING ANALYST.

1. The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. This Court has determined that the Sixth Amendment right of confrontation was incorporated into the Fourteenth Amendment, and is thus applicable to the States because it is essential to a fair trial. *Pointer v. Texas,* 380 U.S. 400, 403 (1965); *see also Danforth v. Minnesota,* 552 U.S. 264, 269-70 (2008) (discussing incorporation and concluding that *Crawford* announced a new rule). For incorporation purposes, this Court has looked to the understanding in place at the time the Fourteenth Amendment was adopted in 1868. *See McDonald v. City of Chicago,* 130 S. Ct. 3020, 3038-42 (2010); *Malloy v. Hogan,* 378 U.S. 1, 4-5 (1964).

Protecting the confrontation rights of an accused through cross-examination of a witness consists "not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United*

States, 156 U.S. 237, 242-43 (1895). The Confrontation Clause is satisfied by "the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor," and "has long been read as securing an adequate opportunity to cross-examine adverse witnesses." *United States u. Owens,* 484 U.S. 554, 557, 560 (1988) (citing *California v. Green,* 399 U.S. 149, 158-61 (1970)). The "particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." *Green,* 399 U.S. at 156; *accord Crawford,* 541 U.S. at 50.

In *Crawford,* this Court determined that the Confrontation Clause forbids "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54. The Court departed from the approach approved in *Ohio v. Roberts,* 448 U.S. 56, 66 (1980), which assessed whether an outof-court statement had adequate indicia of reliability. Opposing this shift in Confrontation Clause interpretation, Chief Justice Rehnquist opined that *Crawford* stepped away from the view that "[e]xceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made." *Crawford,* 541 U.S. at 69, 74 (Rehnquist, C.J., concurring in the judgment).

In overruling *Roberts*, *Crawford* triggered a new exploration by lower courts into what out-of-court statements might be considered "testimonial." *Crawford,* and the meaning of "testimonial," has generated an enormous amount of lower-court examination. [2]

This Court provided additional guidance on the scope of the term "testimonial" in *Melendez-Diaz.* A majority of the Court held that affidavits of forensic analysis were testimonial statements that implicate the Confrontation Clause. 129 S. Ct. at 2532. Because the sworn documents entered into evidence in *Melendez-Diaz* were considered testimonial statements, the accused had the right to confront the analysts at trial. *Id.*

2. Here, the New Mexico Supreme Court followed the instruction of *Crawford* and *Melendez-Diaz.* It upheld the BAC report prepared by a nontestifying analyst acting as "a mere scrivener who simply transcribed the results generated by a gas chromatograph machine." Pet. App. A at 6a. Emphasizing the need for live, in-court testimony that allowed meaningful cross-examination regarding the substance of the BAC report, the court determined that the testimony of another qualified analyst was sufficient to satisfy Mr. Bullcoming's right of confrontation. *Id.* at 12a. Because Mr. Razatos was available for cross-examination and because the results of the gas chromatograph machine constitute facts or data of the type

[2]For a very rough indication of *Crawford's* impact, a Shepard's analysis on August 13, 2010, shows that 8,168 cases have cited *Crawford,* well over double—in a six-year span—the number of cases (3,095) that cited *Roberts* in the twenty-four years before its overruling.

reasonably relied upon by experts in the field, the New Mexico Supreme Court rejected Mr. Bullcoming's confrontation claim. *Id.* at 12a-13a.

In reaching this conclusion, the New Mexico Supreme Court pointed to its simultaneously-issued holding in the companion case. In *Aragon,* the court held that an analyst could not simply present an out-of-court statement of another analyst that a substance was a specific narcotic and that it had a specific level of purity because those determinations required an expert conclusion. 225 P.3d at 1290-91. The testifying analyst in *Aragon* did not offer an independent opinion regarding the nature and purity level of the substance, so the views and report of the nontestifying analyst were therefore inadmissible under the Confrontation Clause. *Id.*

In the present case, the New Mexico Supreme Court contrasted the out-of-court expert opinion in *Aragon* with the raw data generated by the gas chromatograph machine admitted at Mr. Bullcoming's trial. Pet. App. A at 11a. The court emphasized the nontestimonial nature of the data derived from the gas chromatograph by urging that, in future cases, the State seek admission of the raw data produced by the gas chromatograph machine to supplement the live, in-court testimony of the forensic analyst and to assist the jury in ascertaining "the accuracy and reliability of the analyst's testimony regarding a defendant's BAC." Pet. App. A at 13a.

The court's holding properly construes and applies this Court's decision in *Melendez-Diaz.* Although it viewed the report as testimonial under *Melendez-Diaz,*

the court perceived the raw data reflected in the report as amounting to testimony from a machine that could not be examined as a witness. *See* Pet. App. A at 11a. The analyst who transcribed the data generated by the machine acted in a manner similar to a copyist in the early 1800s who certified the truth and accuracy of the copy. *See Melendez-Diaz,* 129 S. Ct. at 2553 (Kennedy, J., dissenting) (citing *United States v. Percheman,* 32 U.S. (7 Pet.) 51, 85 (1833)). Introducing a report with transcribed raw data through the live testimony of a qualified expert did not violate Mr. Bullcoming's right of confrontation.

II. NO CONFLICT EXISTS AMONG FEDERAL CIRCUITS AND STATE COURTS OF LAST RESORT REGARDING THE ADMISSION OF A LABORATORY REPORT CONTAINING RAW DATA.

1. Mr. Bullcoming describes state high courts and federal courts of appeals as being "deeply and intractably divided over whether the Confrontation Clause . . . allows the government to introduce testimonial statements of a nontestifying forensic analyst" through the testimony of another analyst. Pet. at 7. A survey of federal and state authorities, however, reveals a strikingly coherent and uniform application of *Melendez-Diaz* to scientific reports and no conflict in cases like the present case involving the introduction of raw data generated by a machine.

The majority of cases cited by Mr. Bullcoming address the admission of scientific information requiring expert determinations and conclusions. Those cases, and similar later cases, address the introduction of evidence reflecting scientific findings and conclusions drawn by nontestifying analysts performing autopsies, DNA analysis, narcotics identification, and other complex analyses.

Unlike cases involving the introduction of simple raw data through an expert witness, the cases involving greater complexity in forensic analysis present more challenging confrontation issues.

Even in the more complex cases, there are only limited areas of conflict. Courts agree that an expert cannot serve as a mere conduit or transmitter of a nontestifying expert's opinions and conclusions; courts also agree, with one possible exception,[3] that an expert may testify at trial as to the expert's own independent opinions that rely on laboratory tests conducted by a nontestifying_ analyst or on other external factual findings. *See United States v. Turner,* 591 F.3d 928, 932-33 (7th Cir. 2010); Vann *v. State,* 229 P.3d 197, 203-211 (Alaska Ct. App. 2010); *State v. Snelling,* No. CR-08-0164-AP, 2010 Ariz. Lexis 38, at *9-11 (Ariz. Aug. 9, 2010); *Smith v. State,* 28 So. 3d 838, 855 & n.12 (Fla. 2010) (per curiam), *petition for cert. filed,* No. 09-10755 (May 10, 2010); *Rector v. State,* 681 S.E.2d 157, 160 (Ga.), *cert. denied,* 130 S. Ct. 807 (2009); *People v. Williams,* No. 107550, 2010 Ill. Lexis 971, at *30, 36 (Iii. July 15, 2010); *Pendergrass v. State,* 913 N.E.2d 703, 707-08 (Ind. 2009), *cert. denied,* 130 S. Ct. 3409 (June 14, 2010); *People v. Webster,* No. 287478, 2010 Mich. App. Lexis 1195, at *7-9 (Mich. Ct. App. June 29, 2010) (unpublished); *State v. Dilboy,* 160 N.H. 135, 149 (2010); *State v. Hough,* 690 S.E.2d 285, 290-91 (N.C. Ct. App. 2010); *State v. Estrada-Lopez,* 927 N.E.2d 1147, 1159-60 (Ohio Ct. App.), *review granted,* 930 N.E.2d 331 (Ohio July 21, 2010). The New Mexico Supreme Court's analysis of narcotics identification fits squarely within the "mere conduit"

[3] *See Gardner v. United States,* No. 07-CF-573, 2010 D.C. App. Lexis 351, at *1548 & n.11 (D.C. July 8, 2010) (reserving judgment on the point and declining to "disaggregate" a testifying expert's independent assessment from testimony about the content of DNA analyst reports).

approach uniformly adopted in the wake of *Melendez-Diaz. See Aragon,* 225 P.3d at 1290-91.

2. In his petition, Mr. Bullcoming does not address the fact that the "testimonial statement" appearing in the SLD laboratory report in his case came from a machine and consisted of transcribed raw data, a factor not at play in the majority of cases he cites. In the relevant cases decided so far, there is no conflict in addressing the admissibility of raw data; courts have held that its admission does not violate the Confrontation Clause.

Mr. Razatos, the SLD analyst who reviewed Mr. Bullcoming's blood alcohol analysis, testified and was cross-examined at trial. He explained the standard operating procedures used at SLD and described the function and internal processes of the gas chromatograph machine used by SLD to analyze blood samples and to detect the levels of compounds in a sample. He agreed that in order to use the gas chromatograph machine there is nothing a human has to do other than look at the machine and record the result. The machine prints out the result, and it is recorded on the BAC report. In this instance, the result of Mr. Bullconiing's blood alcohol test was .21 grams of alcohol per 100 milliliters of blood.

In stating the results generated by the gas chromatograph machine, Mr. Razatos did not look to or rely on an expert scientific conclusion of another. In other words, he was not a mere conduit of another's expert opinion. Instead, he simply communicated the transcribed raw data emitted by the machine. The raw data as to the level of alcohol in the blood specimen spoke for itself.

Mr. Bullcoming claims a confrontation right against a machine. The New Mexico Supreme Court rejected this claim because the report was admitted through the testimony of an analyst who was available for cross-examination. Pet. App. A at 11a-12a. As the New Mexico Supreme Court held, Mr. Bullcoming's "true 'accuser' was the gas chromatograph machine which detected the presence of alcohol in [Mr. Bullcoming's] blood, assessed [Mr. Bullcoming's] BAC, and generated a computer print-out listing its results." Pet. App. A at 11a.

The New Mexico court's interpretation of the Confrontation Clause as it applies to raw data is in accord with that of other jurisdictions. Prior to *MelendezDiaz,* both the Fourth Circuit and the Seventh Circuit Courts of Appeals addressed the Confrontation Clause implications of raw data. In *United States v. Washington,* 498 F.3d 225, 229 (4th Cir. 2007), *cert. denied,* 129 S. Ct. 2856 (2009), the defendant challenged an expert's reliance on raw data obtained by lab technicians using machines to determine levels of alcohol and PCP in a blood sample the defendant gave after he was arrested for DWI. The Fourth Circuit held that the raw data generated by the diagnostic machines were not "statements" of the machines' operators, but rather of the machines themselves. *Id.* at 230. As a result, the Court concluded that the raw data from the machines were not out-of-court statements by declarants that are subject to the Confrontation Clause. *Id.*

In *United States v. Moon,* 512 F.3d 359, 361-62 (7th Cir.), *cert. denied,* 129 S. Ct. 39, *and cert. denied,* 129 S. Ct. 40 (2008), reports prepared by a nontestifying analyst were admitted without objection through the testimony of another analyst.

The reports contained both readings from instruments and the conclusion of the nontestifying analyst regarding the nature of the substance. *Id.* The Court addressed the defendants' challenge to the admission of the raw data as follows:

> A physician may order a blood test for a patient and infer from the levels of sugar and insulin that the patient has diabetes. The physician's diagnosis is testimonial, but the lab's raw results are not, because data are not "statements" in any useful sense. Nor is a machine a "witness against" anyone. If the readings are "statements" by a "witness against" the defendants, then the machine must be the declarant. Yet how could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests.

Id. at 362.

Other courts have followed the principles set forth in *Moon* and *Washington* not only in cases limited to the admission of raw data, but also in cases involving more complex forensic analysis. In *Smith*, the Florida Supreme Court adopted the reasoning of *Moon* and *Washington* and held that the Confrontation Clause does not require laboratory technicians who actually perform DNA tests to testify at trial when their supervisor testifies about the test results in conjunction with her interpretations and conclusions drawn from the data. 28 So. 3d at 855. A petition for writ of certiorari in that case is currently pending in this Court under Docket Number 09-10755.

Similarly, in *State v. Appleby*, 221 P.3d 525, 551-52 (Kan. 2009), the Kansas Supreme Court concluded that population frequency data relating to specific DNA profiles was nontestimonial and, therefore, did not require that the person who compiled the data be subject to cross-examination in order for it to be used by a

testifying DNA expert in presenting a testimonial opinion. Because the database and the statistical program are accepted sources of information generally relied on by DNA experts, they could be relied on by a testifying analyst in offering an expert opinion. *Id.*

And in *People v. Brown,* 918 N.E.2d 927, 931 (N.Y. 2009), the New York Court of Appeals concluded that a DNA report was nontestimonial "because it consisted of merely machine-generated graphs, charts and numerical data." A technician's "use of the typing machine" did not involve conclusions, interpretations, comparisons, or any form of subjective analysis. *Id.*

Trial and intermediate appellate courts have also had no difficulty concluding that the Confrontation Clause does not preclude the admission of raw data or machine print-outs even without the live testimony of the analyst involved in producing the machine results. *United States v. Darden,* 656 F. Supp. 2d 560, 563 (D. Md. 2009) ("printed data [concerning blood alcohol concentration] generated by testing machines"); *Vann,* 229 P.3d at 210 (DNA expert's independent analysis "of the printed test results produced by the machine"); *State v. Tindell,* No. E2008-02635-CCA-R3-CD, 2010 Tenn. Crim. App. Lexis 528, at * 38 (Tenn. Crim. App. June 22, 2010) ("[T]he Intoximeter simply produced a print-out of its results. Neither that print-out nor the Intoximeter is a 'witness' within the meaning of the Confrontation Clause."); *Hamilton v. State,* 300 S.W.3d 14, 22 (Tex. App. 2009) ("The Confrontation Clause implicates statements made by persons, not machines.").

Courts are not divided on the subject of raw data. Its admission does not violate the Confrontation Clause. Mr. Bullcoming, therefore, cannot establish a conflict between the New Mexico Supreme Court's holding and decisions of other state high courts or federal circuit courts of appeal.

3. With respect to the types of cases relied upon by Mr. Bullcoming addressing forensic reports prepared with a higher level of professional judgment than raw data, courts generally agree that a testifying expert cannot communicate to the jury the opinion or conclusion of a nontestifying expert.[4] At the same time, however, courts have had more difficulty addressing the admissibility of a nontestifying expert's scientific findings and observations.

The majority of courts permit an expert to testify about the factual findings and observations of a nontestifying analyst in order to explain the basis for the testifying expert's opinion. *See Snelling,* 2010 Ariz. Lexis 38, at *9-10; *Rector,* 681 S.E.2d at 160; *Williams,* 2010 Ill. Lexis 971, at *30-31; *Pendergrass,* 913 N.E.2d at 704, 708; *Dilboy,* 160 N.H. at 150; *see also Vann,* 229 P.3d at 207-08; *People v. Rutterschmidt,* 98 Cal. Rptr. 3d 390, 411-13 (Ct. App.), *review granted,* 220 P.3d 239 (Cal. 2009); *Estrada-Lopez,* 927 N.E.2d at 1159. Under the minority view, expert testimony regarding findings generated by another expert are prohibited on direct examination. *See Commonwealth v. Avila,* 912 N.E.2d 1014, 1029 (Mass. 2009); *Marshall v. State,* 232 P.3d 467, 475 (Okla. Crim. App. 2010); *see also People v.*

[4] *But see Rector,* 681 S.E.2d at 160 (finding no error in the testifying expert's agreement with the conclusion of the nontestifying expert).

Dungo, 98 Cal. Rptr. 3d 702, 713-14 (Ct. App.), *review granted,* 220 P.3d 240 (Cal. 2009); *Martinez v. State,* 311 S.W.3d 104, 110-11 (Tex. App. 2010).[5]

Thus, a nascent conflict may well be emerging on the narrow question of whether scientific findings and observations underlying an expert's opinion may be admitted in cases involving complex scientific testing like that conducted in autopsies or drug identification. *See Dilboy,* 160 N.H. at 149-50 (describing the conflict). At this time, the conflict has not yet fully taken root in state courts of last resort or federal circuit courts of appeal.

Regardless of whether such a conflict is ripening, however, it is not applicable in this case. The BAC report admitted into evidence at Mr. Bullcoming's trial did not contain subjective findings or conclusions reached by a nontestifying examiner. It contained the type of raw data uniformly admitted by courts both before and after *Melendez-Diaz.*

III. THE DOCUMENT IN THIS CASE IS NOT TESTIMONIAL BECAUSE IT WAS NOT PREPARED UNDER OATH.

The foregoing analysis explains why the petition should be denied. If the petition were granted, however, the State would not limit its argument to the grounds relied upon by the New Mexico Supreme Court. The State would also advance the argument that the right of confrontation extends no further than the core class of testimonial statements comprised of affidavits, depositions, prior

[5] Although Mr. Bullcoming points to *State u. Locklear,* 681 S.E.2d 293, 304 (N.C. 2009), Pet. at 12, North Carolina has not resolved whether there is a distinction between the factual findings and the expert opinions of a nontestifying analyst. *See Hough,* 690 S.E.2d at 290-91 (interpreting *Locklear* as permitting testimony from a report about the weights of drugs and tests performed by another analyst).

testimony, testimony at trial, and police interrogations having the degree of formality associated with the inquisitorial examinations used in England in the 16th century. All other statements, including the unsworn statement in this case, would be better examined in constitutional terms under the framework of due process.

The BAC report is not—as the New Mexico Supreme Court found it to be—testimonial. *See* Pet. App. A at 11a. As an unsworn document containing raw data, its admission does not violate the Confrontation Clause.

1. The text of the Sixth Amendment applies the right of confrontation to "witnesses." By definition, a "witness" makes a testimonial statement by taking an oath. *Black's Law Dictionary* 1740 (9th ed. 2009).

There is no mistake or ambiguity in the Framers' choice of words. At common law, unsworn statements did not typically serve as "substantive evidence upon which a conviction could be based." *Crawford,* 541 U.S. at 69 (Rehnquist, C.J., concurring in the judgment). When offered as substantive evidence, "unsworn testimonial statements were treated no differently at common law than were nontestimonial statements." *Id.* at 71. Tit is unlikely that the Framers intended the word 'witness' to be read so broadly" as to include statements lacking the formality of those at issue under the Marian bail and committal statutes of the 16th century. *Davis,* 547 U.S. at 836 (Thomas, J., concurring in the judgment in part and dissenting in part).

The Confrontation Clause serves a limited purpose within the Bill of Rights. It is not designed to assure what the Due Process Clause protects, "that fundamental fairness essential to the very concept of justice." *Lisenba u. California,* 314 U.S. 219,

236 (1941). Confrontation "is a procedural rather than a substantive guarantee." *Crawford*, 541 U.S. at 61; *accord White v. Illinois*, 502 U.S. 346, 358 (1992) ("The admissibility of hearsay statements raises concerns lying at the periphery of those at which the Confrontation Clause is designed to address."). By its terms, the Confrontation Clause applies to sworn statements and provides a right to cross-examine witnesses making those sworn statements against the accused.

In *Crawford*, this Court carved out a narrow exception to the oath requirement for formalized police interrogations. 541 U.S. at 52. However, this narrow exception was a direct product of the Sixth Amendment serving as the Framers' response to the historical abuses under the Marian statutes. Formalized police interrogations "bear a striking resemblance to examinations by justices of the peace in England." *Id.*

Davis, however, expanded the right of confrontation beyond this narrow exception. In *Davis*, this Court held that statements made during an ongoing domestic emergency were not testimonial, while a woman's statements to a police officer as "part of an investigation into possibly criminal past conduct" were, by contrast, testimonial. 547 U.S. at 826-830. The difference in the statements lay in whether "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822.[6]

Justice Thomas described the purpose-based definition of "testimonial" adopted in the majority opinion as "needlessly over-inclusive" and "unpredictable." *Davis*, 547 U.S. at 834, 838 (Thomas, J., concurring in the judgment in part and

[6] The meaning of the "primary purpose" test and the degree of subjectivity involved in its application is currently before the Court in *Michigan v. Bryant,* No. 09-150, scheduled for argument on October 5, 2010.

dissenting in part). He also observed that the *Davis* test is not grounded in the historical context of the Sixth Amendment's ratification. *Id.* at 835-38.

If, unmoored from historical bases, all out-of-court statements were viewed as "testimonial" based on the purpose for which they were made, then the term "testimonial" would extend far beyond the procedural interpretation of the Confrontation Clause adopted in *Crawford.* By focusing on such concepts as motive and purpose, the test from *Davis* could in effect become a weak substitute for the substantive reliability test of *Roberts. See Crawford,* 541 U.S. at 71 (Rehnquist, C.J., concurring in the judgment) ("[Amny classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.").

After *Crawford,* however, "[r]eliability is more properly a due process concern." *White,* 502 U.S. at 363-64 (Thomas, J., concurring in part and concurring in the judgment). The question under the Confrontation Clause, as opposed to the due process question of fundamental fairness, is not the extent to which cross-examination would be beneficial or the overall reliability of an out-of-court statement based on a declarant's purpose, *see Melendez-Diaz,* 129 S. Ct. at 2537 n.6, but instead whether the declarant is acting as a "witness" and makes a statement that is "testimonial." *See Crawford,* 541 U.S. at 51. With the single exception of Marian-type examinations, a "witness" does not testify without taking an oath.

2. The majority opinion in *Melendez-Diaz* designated the certificates of analysis as testimonial because they were prepared under oath in the form of an affidavit and therefore fell "within the 'core class of testimonial statements.'" 129 S. Ct. at 2532. Writing for the majority, Justice Scalia's opinion also characterized the documents as testimonial because "the *sole purpose* of the affidavits" was to establish prima facie evidence against an accused. *Id.*

Justice Thomas, however, concurred on the limited ground that the affidavits fell within the core class of testimonial statements implicating the Confrontation Clause, citing the partial dissent in *Davis. Melendez-Diaz,* 129 S. Ct. at 2543 (Thomas, J., concurring). Justice Kennedy's dissenting opinion in *Melendez-Diaz* similarly took issue with the use of a purpose-based approach to the term "testimonial" in the context of laboratory reports. 129 S. Ct. at 2552 (rejecting the proposition "that anyone who makes a formal statement for the purpose of later prosecution—no matter how removed from the crime—must be considered a 'witness against' the defendant"). As a result, it appears that five Justices in *Melendez-Diaz* did not agree with application of *Davis's* purpose-based definition of testimonial to laboratory reports. *See Gregg v. Georgia,* 428 U.S. 153, 169 n.15 (1976) (observing that the Court's holdings are defined by "that position taken by those Members who concurred in the judgments on the narrowest grounds"); *see also Dilboy,* 160 N.H. at 151 ("Justice Thomas's concurring opinion . . . underscores the limited reach of *Melendez-Diaz.").*

Nevertheless, the New Mexico Supreme Court determined that the BAC report was testimonial, despite the absence of an oath and despite being comprised of nontestimonial raw data, because it was "made 'for the purpose of establishing or proving some fact.'" Pet. App. A at Ha (quoting *Melendez-Diaz,* 129 S. Ct. at 2532); *see Aragon,* 225 P.3d at 1285 (expressly relying on *Davis).* Courts in other jurisdictions have also continued to apply the *Davis* purpose-based definition of "testimonial" to scientific reports. *Compare, e.g., Avila,* 912 N.E.2d at 1029 n.20 (concluding an autopsy report was testimonial because a reasonable person in the medical examiner's position would anticipate its use in a criminal prosecution), *and Marshall,* 232 P.3d at 475 (similar), *with State v. Lui,* 221 P.3d 948, 956 n.14 (Wash. Ct. App. 2009) (assuming a lab report to be testimonial but observing, with respect to purpose-based definition of testimonial, that "it is not clear that a majority of the Court supports this broad definition"), *review granted,* 228 P.3d 17 (Wash. 2010).[7]

3. The BAC report is not a sworn document. Pet. App. D at 31a. Although it contains a signed certification by a number of individuals, this certification is no different from other self-authenticating public records. *See* Fed. R. Evid. 902(4) (applying to "data compilations in any form"). Unless virtually all public records are

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'Avila and *Marshall,* the two state supreme court cases in the minority of the burgeoning conflict described above, addressed autopsy reports. In *Melendez-Diaz,* this Court mentioned *Crawford's* discussion of coroner's reports. 129 S. Ct. at 2538. However, this discussion in *Crawford* focused on "statements taken by a coroner," *Crawford,* 541 U.S. at 47 n.2, and the common law practice of taking "sworn statements of witnesses before coroners," *id.* at 73 (Rehnquist, C.J., concurring in the judgment), rather than on the medical examiner's findings and conclusions. *See Giles u. California,* 128 S. Ct. 2678, 2701 (2008) (Breyer, *J.,* dissenting) (describing "a Marian deposition" as "a deposition taken by a coroner or magistrate"). As recently noted by one state supreme court, "in light of Justice Thomas's concurrence in *Melendez-Diaz,* it appears unlikely that the majority of the Supreme Court intended to include autopsy information underlying expert testimony in the same category" as the evidence in *Melendez-Diaz. State v. Mitchell,* 2010 ME 73, 9147, 2010 Me. Lexis 76 (Aug. 5, 2010).

to be considered testimonial, the certification in the BAC report does not supply the requisite level of solemnity to be a formalized testimonial statement. *See Crawford,* 541 U.S. at 76 (Rehnquist, C.J., concurring in the judgment) (stating that the application of the Confrontation Clause to official records "would require numerous additional witnesses without any apparent gain in the truth-seeking process").

Because the BAC report was not sworn under oath and is not the product of a Marian-type examination, it should not be considered testimonial under *Melendez-Diaz,* regardless of the purpose for which it was made. The preparer of the document did not function as a "witness" within the meaning of the Sixth Amendment.

The requirement of an oath provides the bright-line certainty needed in the country's application of *Crawford* and serves to protect the right of confrontation as it was understood by the Framers. Beyond the core group of testimonial statements described in *Crawford,* the States must have some flexibility in assuring the reliability of out-of-court statements admitted at trial. *See Pointer,* 380 U.S. at 409 (Harlan, J., concurring in the result) (suggesting that the "Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness `implicit in the concept of ordered liberty"); *see also Medina v. California,* 505 U.S. 437, 445 (1992) (recognizing that "the States have considerable expertise in matters of criminal procedure").

This Court has said, "The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be

preserved to the accused." *Mattox*, 156 U.S. at 243. General rules requiring the opportunity to cross-examine an adverse witness at trial, "however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Id.*

In this case, the New Mexico Supreme Court correctly held that the Confrontation Clause did not prohibit the admission of the BAC report because it contained raw data. This ruling was also correct because the document was not prepared under oath.

CONCLUSION

The petition for writ of certiorari should be denied, or the petition should be granted to reconsider the meaning of the word "witnesses" in the Sixth Amendment.

Respectfully submitted,

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