No. 10- ___

IN THE

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DONALD BULLCOMING,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Petition for a Writ of Certiorari
to the New Mexico Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Susan Roth
Assistant Appellate Attorney
New Mexico Public Defender Depai _talent
Attorney of Record
301 N. Guadalupe Street
Santa Fe, New Mexico 87501

QUESTION PRESENTED

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.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald Builcoming respectfully petitions for a writ of certiorari to the New Mexico Supreme Court in *State v. Bulleoming,* No. 31,186 CR-05-937.

OPINIONS BELOW

The opinion of the New Mexico Supreme Court is published at 147 N.M. 487, 226 P.3d 1 (2010). The opinion of the New Mexico Court of Appeals is published at 144 N.M. 546, 189 P.3d 679 (Ct. App. 2008). The trial court's Judgment and Sentence is not published.

JURISDICTION

The opinion of the New Mexico Supreme Court was entered on February 12, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . .. to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

This Court held in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without affording the accused an opportunity to "'be confronted with' the analysts at trial." *Id.* at 2532 (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). *State v. Bullcoming* raises the question of whether the prosecution complies with that holding by introducing forensic reports through the in-court testimony of someone, such as a supervisor, who did not perform or observe the testing discussed in the reports. In this case, the New Mexico Supreme Court upheld the practice.

This same question is raised in *Pendergrass v. Indiana,* 913 N.E.2d 703 (Ind. 2009), Supreme Court Docket No. 09-866 (Petition for Writ of Certiorari filed in this Court on Feb. 22, 2010).

1. At 4:24 p.m., when Mr. Bullcoming was driving his brother's truck, he bumped the back of another truck at a stop sign. There was only extremely slight damage to the other vehicle, and no damage to his truck. When this happened, he exchanged insurance infounation with Dennis Jackson, the other driver. Jackson noticed that Mr. Bullcoming smelled of alcohol and that his eyes were bloodshot.

Mr. Bullcoming walked away (left his passengers and the truck) when Jackson told him that the police had been called.

According to Mr. Jackson, shortly after an officer arrived at the scene, Mr. Bullcoming was returned to the accident scene in another patrol car. Mr. Jackson admitted he was not timing the events that day and that "time means nothing." He did notice, however, that due to the minor accident, he was fifty (50) minutes late meeting his family in Durango, Colorado.

Mr. Bullcoming testified that he was *not* drunk when he was driving. There may have been an odor of alcohol in the car he said, but the odor was not from him. He said that he left the accident scene before the police arrived because he had a warrant out for his arrest in Oklahoma. He said that he walked across the street going north, and went down a hill where there was a creek and trees. He met up with some Native American rnen, and he drank heavily with them—they finished off a half-gallon of vodka. When the officer on the motorcycle found him, it was about forty-five minutes after the accident.

Mr. Bullcoming was given his field sobriety tests when he was brought back to the scene in a patrol car, which he failed, and a blood alcohol test, two hours after the point in time when he was driving. At 6:35 p.m., when his blood alcohol was tested, it was .21. *(See Appendix D:* State's Exhibit 1--Report of Blood Alcohol Analysis) _

2. The State charged petitioner with one count of aggravated Driving While Intoxicated (DWI), a fourth degree felony, contrary to NMSA 1978, Section 66-8-102 (2005, prior to amendments through 2008). Petitioner denied the charge and sought to prove that he drank after he was driving.

The day before the trial defense counsel filed a written motion to exclude State's witnesses because she had only been notified that morning by facsimile that the State intended to call three new witnesses: 1) Dennis Jackson, 2) a blood analyst, and 3) the nurse who withdrew Mr. Bullcoming's blood. Defense counsel believed the State was only going to call the three officers that were listed in the State's Notice of Disclosure filed 10/27/05. The court refused to exclude the witnesses who were disclosed that day, but offered her a continuance to interview them. Mr. Bullcoming chose to go to trial the next day.

Defense counsel again moved to exclude the testimony of the blood analyst at trial the next day, stating that she had made her record the day before about the late disclosure of this witness. Defense counsel also objected to the blood analysis evidence because the analyst who performed the test was not at trial to testify about the test. Defense counsel argued that she did not want another analyst to testify about the test, and about a report he had not prepared, because it would violate Mr. Bullcoming's constitutional right to confrontation. The court found that the lab result of Mr. Bullcoming's blood/alcohol test was a business record that

was not prohibited by *Crawford v. Washington,* 541 U.S. 36 (2004).

Defense counsel disagreed with the court and countered that it was a "business record prepared in anticipation of litigation." Counsel added that she did not know that the analyst who had performed the test was not available. If she had known this, she said, her defense would have been different.

The witness, Gerasimos Razatos, testified that he is an analyst and that he helps to oversee the breath and blood alcohol programs for the New Mexico Department of Health Scientific Laboratory Division, Toxicology Bureau. He stated that the analyst who had performed the test was on unpaid leave. Razatos did not perform the test in this case, nor was he the "reviewer" on the report. *See Appendix D:* State 's Exhibit 1.

When Razatos testified about Mr. Bullcoming's blood analysis, defense counsel objected again to the admission of the report and to his testimony. Over objection, he testified about the lab's standard operating procedures and, based on the written report, he discussed the chain of custody in this case. When the witness was asked about alcohol metabolism and whether he had expertise in that area, defense counsel objected again. The witness stated his opinion that a blood test and a breath test were equally accurate. Based on the other analyst's report, the witness stated that Mr. Bullcoming had .21 grams of alcohol per one hundred milliliters of blood in his system at 6:25 p.m. The jury convicted petitioner of

aggravated DWI. The trial court sentenced him to two years in prison.

3. The New Mexico Court of Appeals affirmed. It upheld the trial court's ruling that the forensic report was a business record that was not prohibited by *Crawford v. Washington,* 536 U.S. 36 (2004). It decided that a blood alcohol report is admissible as a public record and that it presented no issue under the Confrontation Clause because the report was non-testimonial.

4. The New Mexico Supreme Court granted discretionary certiorari review. While the case was pending, this Court issued its decision in *Melendez-Diaz v. Massachusetts;* 129 S. Ct. 2527 (2009), clarifying that forensic laboratory reports are testimonial under *Crawford* Eight months later, the New Mexico Supreme Court held that the blood alcohol report was testimonial evidence, but it was admissible even though the forensic analyst who performed the test did not testify.

Relying on the rule that "the Confrontation Clause permits the admission of testimonial evidence so long as *'the declarant* is present at trial to defend or explain it,' If 19 (quoting *Crawford v. Washington,* 541 U.S. 36, 59 n.9 (2004) (emphasis added)), the New Mexico Supreme Court held that the prosecution's surrogate forensic testimony satisfied the Clause. *State v. Bullcoming,* 147 N.M. 487, 226 P.3d 1 (2010). In the New Mexico Supreme Court's view, the prosecution may introduce a forensic report authored by a nontestifying analyst so long as a different "qualified" forensic witness is "available for cross-examination"

regarding the operation of the forensic machine at issue, the laboratory's procedures, and the results reported in the forensic report.

According the New Mexico Supreme Court, the supervisor who had no involvement in the specific test could testify because the analyst who prepared the blood alcohol report was a mere scrivener and Petitioner's true accuser was the gas chromatograph machine which detected the presence of alcohol in Petitioner's blood, accessed Petitioners BAC level, and generated a computer print-out listing its results. *Bullcoming,* 19-20.

REASONS FOR GRANTING THE WRIT

State high courts and federal courts of appeals are deeply and intractably divided over whether the Confrontation Clause, as explicated in *Crawford v. Washington,* 536 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts,* 129 S. a 2527 (2009), allows the government to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst who did not perform or observe the laboratory analysis described in the statements. This Court should use this case to resolve this escalating conflict. Forensic evidence plays a central role in many criminal prosecutions. Allowing surrogate analyst testimony prevents scrutiny of the actual analyst's "honesty, proficiency, and methodology," *Me iendez-Diaz,* 129 S. Ct. at 2538, in the form guaranteed by the

Sixth Amendment: live testimony in front of the accused and the trier of fact, with an opportunity for cross-examination. As such, the New Mexico Supreme Court's holding below – that the Confrontation Clause was satisfied by allowing the defendant to cross-examine someone other than the author of the report the prosecution introduced – is incorrect.

I. The New Mexico Supreme Court's Decision Deepens The Conflict Over The Question Presented.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant, or unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. Five years later, in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009), this Court clarified that forensic laboratory reports are testimonial evidence. *Id.* at 2532. Accordingly, this Court held that the prosecution violates the Confrontation Clause when it introduces a nontestifying analyst's forensic laboratory report through the testimony of a police officer.

This Court further indicated that two important, but distinct, questions concerning forensic evidence must be resolved to implement *Melendez-Diaz.* The

first is whether a state satisfies the Confrontation Clause if it requires defendants to do more than simply demand that the prosecution put an analyst on the stand in order to introduce the contents of a forensic report. *See MelendezDiaz,* 129 S. Ct. at 2541 n.12. When this Court decided *Melendez-Diaz,* one case touching on this issue was pending on a petition for a writ of certiorari, *Briscoe v. Virginia*, 657 S.E.2d 113 (Va. 2008), *cert. granted,* 129 S. Ct. 2858. This Court immediately granted the petition and is hearing the case this Term.

The second issue concerns whether the prosecution satisfies the Confrontation Clause whenever it calls *some* forensic analyst to the stand. *See Melendez-Diaz*, 129 S. Ct. at 2532 n.1; *id* at 2444-46 (Kennedy, J., dissenting). When this Court decided *Melendez-Diaz*, several cases touching on this issue – that is, cases in which the courts found no confrontation violations at least in part because the prosecution had called at least some forensic expert to the stand – were pending on petitions for writs of certiorari.

The cases fell into three categories. First, some cases involved scenarios in which the prosecution introduced forensic reports while an analyst was on the stand, but those reports were simply machine print-outs and thus were nontestimonial. *See United States v. Washington,* 498 F.3d 225 (4th Cir. 2007) (Supreme Court docket No. 07-829 1); *Blaylock v. Texas,* 259 S.W.3d 202 (Tex. Ct. App. 2008) (No. 08-8259). Second, one case involved a scenario in which a

laboratory supervisor testified based in part on someone else's forensic reports, but the supervisor never repeated anything in the reports and the prosecution never introduced them into evidence; instead, the supervisor limited himself to stating his own conclusions without revealing their underlying basis. *State v. 0 'Maley,* 932 A.2d 1 (N.H. 2007) (No. 07-7577). Third, some cases involved scenarios in which the prosecution introduced nontestifying analysts' forensic reports through the in-court testimony of a different forensic analyst. *People v. Barba,* 2007 WL 4125230 (Cal. Ct. App. Dec. 21, 2007) (unpublished) (No. 07-11094); *State v. Crager,* 879 N.E. 2d 745 (Ohio 2007) (No. 07- 10191).

This Court denied certiorari in the first two categories of cases, leaving in place their holdings that the Confrontation Clause had not been violated.' But this Court granted, vacated, and remanded the two cases in the third category – the cases that had held that the prosecution could introduce one forensic analyst's testimonial statements through the in-court testimony of another.[2] A split among state supreme courts and a federal court of appeals has quickly developed

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See Washington v. United States, 129 S. Ct. 2856 (2009); *Blaylnekv. Texas,* 129 S. CL 2861 (2009); *O'Maleyv. New Hampshire,* 129 S. Ct. 2856 (2009).

[2] *See Barba v. CalVarnia,* 129 S. Ct. 2857 (2009); *Crager v. Ohio,* 129 S. Ct. 2856 (2009). This Court denied certiorari in one other case involving this fact pattern: *People v. Geier,* 161 P.3d 104 (Cal. 2007), *cert. denied,* 129 S. Ct. 2856 (2009) (No. 07-7770). However, the California Supreme Court had held that even if a Confrontation Clause violation had occurred, any error was harmless. *Geier,* 161 P.3d. at 140.

concerning this issue, which in fact deepens a preexisting conflict on the question. That is the issue this case presents.

1. In the wake of *Melendez-Diaz,* two state supreme courts and two federal courts of appeals have held that the Confrontation Clause prohibits what might be called "surrogate" forensic testimony – that is, introducing one forensic analyst's testimonial statement through the in-court testimony of another. In *Commonwealth v. Avila,* 912 N.E.2d 1014 (Mass. 2009), the defendant argued that the prosecution violated the Confrontation Clause by permitting one forensic analyst "to recite [another's] findings and conclusions on direct examination." *Id.* at 1027. Drawing on its earlier decision in *Commonwealth v. Nardi,* 893 N.E.2d 1221 (Mass. 2008), which had held that a testifying analyst in such a scenario is "plainly . . . asserting the truth of the nontestifying analyst's findings in a manner that triggers the defendant's constitutional right to confrontation, *id* at 1232-33, the court held that *Melendez-Diaz* and *Crawford* require a testifying "expert witness's testimony [to be] confined to his or her own opinions." *Avila,* 912 N.E.2d at 1029. When a forensic examiner, "as an expert witness . . . recite[s] or otherwise testifies on direct examination] about the underlying factual findings of [an] unavailable [forensic analyst] as contained in [his forensic] report," the prosecution transgresses the Confrontation Clause. *Id.* at 1029.

Similarly, in *State v. Locklear,* 681 S.E.2d 293, 304-305 (N.C. 2009), the prosecution introduced two forensic analysts' reports through the in-court testimony of a third analyst. Reciting *Crawford's* basic rule that "[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless *the declarant* is unavailable to testify and the accused has had a prior opportunity to cross-examine *the declarant,"* the North Carolina Supreme Court held that introducing one forensic analyst's report through the live testimony of a different analyst "violate[s a] defendant's constitutional right to confront the witnesses against him." *Id.* at 304-05 (emphasis added); *see also State v. Galindo,* 683 S.E.2d 785 (N.C. Ct. App. 2009) (finding confrontation violation where supervisor testified concerning someone else's forensic analysis).

The Seventh Circuit likewise has held that although a surrogate forensic analyst may testify based on raw Glatt someone else generated, the "conclusions" of the nontestifying analyst who performed the testing are testimonial statements that must be "kept out of evidence." *United States v. Moon,* 512 F.3d 359, 362 (7th Cir.), *cert. denied,* 129 S _ Ct. 40 (2008). Reaffirming that ruling in. a case after *Melendez-Diaz,* the Seventh Circuit held that a forensic analyst's testimony based on forensic tests that another analyst performed did not violate the Confrontation Clause because "[the second analyst's] report was not admitted into evidence." *United*

States v. Turner, F.3d 2010 WL 92489, at *5 (7th Cir. Jan. 12, 2010). The Confrontation Clause would have been violated if the testifying analyst had "not [been] involved in the testing process" at issue and the prosecution had introduced the second analyst's certificate of analysis. *Id.* at *4-*5.

In *United States v. Martinez-Rios,* 595 F.3d 581 (5th Cir. 2010), the prosecution introduced a certificate asserting that the defendant had never received written permission to enter the United States. Instead of putting the person who authored the certificate on the stand, the prosecution presented live testimony from a different "records analyst," who had reviewed the file and who explained on the stand "how [the kind of certificate at issue] is ordinarily prepared." *Id.* at *4. The Fifth Circuit held that such surrogate testimony violated the Confrontation Clause, reasoning that the defendant was "unable to cross-examine the person who had prepared a testimonial statement to be used against him at trial." *Id.*

Intermediate courts in three large states – Texas, Michigan, and California – have likewise held that surrogate forensic testimony violates the Confrontation Clause. *See People v. Payne,* 774 N.W.2d 714 (Mich. Ct. App. 2009); *Wood v. State,* 299 S.W.3d 200 (Tex. Ct. App. *2009); Hamilton v. State,* 300 S.W.3d 14 (Tex. Ct. App. 2009); *People v. Cuadrac-Fernandez,* S.W.3d 2009 WL 2647890 (Tex. Ct. App. Aug. 28, 2009); *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted*

(Cal. Dec. 2, 2009); *People v. Lopez*, 98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009).[3] Moreover, while the Michigan Supreme Court has not ruled on the issue, it has denied review in a case holding that surrogate forensic testimony violated the Confrontation Clause and has vacated and remanded three decisions that condoned such testimony. *Compare People v. Horton*, 2007 WL 2446482 (Mich. Ct. App. 2007), *rev. denied*, 772 N.W.2d 46 (Mich. 2009), *with People v. Raby*, 2009 WL 839109 (Mich. Ct. App. 2009), *vacated and remanded*, 775 N.W.2d 144 (Mich. 2009); *People v. Dendel*, 2008 WL 4180292 (Mich. Ct. App. 2008), *vacated and remanded*, 773 N.W.2d 16 (Mich. 2009); *and People v. Lewis*, 2008 WL 1733718 (Mich. Ct. App. Apr. 15, 2008), *vacated and remanded*, 772 N.W.2d 47 (Mich. 2009). These *post-Melendez-Diaz* orders strongly suggest that the Michigan Supreme Court views the practice of surrogate forensic testimony as

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[3] Two reported California Court of Appeals opinions have reached a contrary result, reasoning that the California Supreme Court's *pre-Melendez-Diaz* decision in *People v. Geier*, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), dictates that "contemporaneously created" forensic reports are not testimonial and that surrogate forensic testimony does not violate the Confrontation Clause. *See People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-12 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People v. Gutierrez*, 99 Cal Rptr. 3d 369 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *accord People v. Bingley*, 2009 WL 3595261 (Cal. Ct. App. Nov. 3, 2009). As explained *supra* in footnote 2, however, this Court's denial of certiorari in *Geier* is readily explainable by the California Supreme Court's alternative harmless-error holding. Indeed, the State of California itself conceded in *Dungy* that "the reasoning in *Melendez-Diaz* undermines some of the rationale of *People v. Geier*," and the State withdrew its "argument that the autopsy report [was] not testimonial because it constitutes a 'contemporaneous recordation of observable events.' 98 Cal. Rptr. 3d at 711 n.11 (quoting state's supplemental letter brief).

untenable.

2. In direct contrast, three state high courts have held that introducing one forensic analyst's testimonial statement through the in-court testimony of another forensic analyst does not violate the Confrontation Clause.

a. Two state supreme courts have reasoned that surrogate forensic testimony satisfies the Confrontation Clause because it gives defendants the opportunity to cross-examine someone who is generally knowledgeable about the analyses involved, even if not the analyst who authored the forensic reports the prosecution seeks to introduce. In this case, the New Mexico Supreme Court followed this theory. At least when the live witness the prosecution chooses is familiar with the laboratory procedures and the operation of the gas chromatograph machine, in the New Mexico Supreme Court's view, the admission of the report by a non-testifying analyst does not violate the Confrontation Clause. ¶ 20.

The Georgia Supreme Court has also adopted the "good enough to suffice" rationale. *See Rector v. State,* 681 S.E.2d 157 (Ga. 2009). So long as a forensic analyst whom the prosecution puts on the stand has "reviewed the data and testing procedures to determine the accuracy" of another analyst's report, the testifying analyst may tell the jury the absent analyst's conclusions and say that he endorses them. *Id.* at 160.

The opinion of the Indiana Supreme Court in *Pendergrass v. Indiana,* 913 N.E.2d 703 (Ind. 2009), *petition for cert. filed* (U.S. Feb. 22, 2010) (No. 09-866), held that at least when the live witness the prosecution chooses is familiar with the laboratory as well as with the analyst who authored the report at issue, that surrogate supervisor witness "suffice[s] for Sixth Amendment purposes." *Id.* at 708. In *Pendergrass,* over petitioner's continuing objection, the supervisor testified concerning a DNA analyst's laboratory reports. The supervisor explained that as the police laboratory's supervisor, she had reviewed and initialed the actual analyst's work. But the supervisor's testimony concerning the DNA analysis consisted solely of repeating the actual analysts' assertions made in the reports themselves.

b. The Illinois Supreme Court has held that forensic analysts, as expert witnesses, can repeat testimonial statements of nontestifying analysts on the theory that such statements, even when the sole basis for the experts' opinions, are not offered for the truth of the matter asserted. *People v. Lovejoy,* 919 N.E.2d 843 (Ill. 2009). In *Lovejoy,* a medical examiner testified that another toxicologist detected six different types of drugs in the victim's body after conducting blood tests, indicating that poisoning caused the victim's death. *Id* at 866-868. Relying on footnote nine in *Crawford* which fined that the Confrontation Clause is not implicated

when out-of-court statements are introduced for reasons other than establishing the truth of the matter asserted, the Illinois Supreme Court held that the medical examiner's testimony repeating the nontestifying analyst's conclusions was not admitted for its truth but rather was introduced "to show the jury the steps [the examiner] took prior to rendering an expert opinion in th[e] case." *Id.* at 867-868 (citing *Crawford,* 541 U.S. at 59 n.9).[4]

3. The *post-Melendez-Diaz* conflict concerning surrogate forensic testimony deepens a pre-existing split over whether, as a more general matter, testimonial statements of a nontestifying witness can be introduced through the in-court testimony of an expert witness.

The Second Circuit, three state supreme courts, and the District of Columbia's highest court have held that introducing the testimonial statements of a nontestifying witness through the in-court testimony of an expert witness violates the Confrontation Clause. *See United States v. Mejia,* 545 F.3d 179 (2d Cir. 2008) (admission of testimonial statements through the in-court testimony of a

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[4] Footnote nine in *Crawford* referenced *Tennessee v. Street,* 471 U.S. 409 (1985), reaffirming that the Confrontation Clause is not implicated when the prosecution offers hearsay (even testimonial hearsay) for a purpose other than establishing the truth of the matter asserted. In *Street,* the defendant argued that his confession was false because the police had simply given him the confession of his alleged accomplice and told him to repeat it. *Id.* at 411-12. The prosecution countered by introducing the nontestifying accomplice's confession to show that it differed in material ways from the defendant's. Because the accomplice's confession was not offered for its truth, this did not violate the Confrontation Clause. *Id.* at 417.

gang expert); *Roberts v. United States*, 916 A.9c1 922 (D.C. 2007) (admission of forensic laboratory reports through DNA expert's testimony); *State v. Johnson*, 982 So. 2d 672 (Fla. 2008) (admission of lab report through supervisor's testimony); *State v. Mangos*, 957 A.2d 89 (Me. 2008) (admission of statements concerning creation of DNA swabs through supervisor); *People v. Goldstein*, 843 NE.2d 727 (N.Y. 2005) (admission oftestimonial statements through psychologist's testimony), *cert. denied*, 547 U.S. 1159 (2006).[5]

In contrast, in. *State v. Tucker*, 160 P.3d 177 (Ariz. 2007), *cert. denied*, 552 U.S. 923 (2007), a prosecutorial expert witness (a "materials expert") repeated statements on the stand that another, nontestifying expert had told him in an investigatory interview.[6] The Arizona Supreme Court did not dispute that the nontestifying expert's statements were testimonial. But the court refused to find a *Crawford* violation, reasoning that "a testifying expert witness may, for the limited purpose of showing the basis of his or her opinion, reveal the substance of a non-testifying expert's statements." *Id.* at 193. "Such statements do not violate

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[5] The Fourth Circuit, in an opinion by Judge Wilkinson, recently agreed with the Second Circuit's *Mejia* decision, explaining that "[glowing a [prosecution] witness simply to parrot o ut-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion would provide an end run around *Crawford." United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). But the Fourth Circuit held that the Confrontation Clause was not violated in the case it was considering because the expert did not repeat or refer to any testimonial statements to the jury.

[6] The petition for certiorari in *Tucker* did not raise this Confrontation Clause issue.

the Confrontation Clause," the court continued, "because they are not admissible for their truth." *Id.*

The Arizona Court of Appeals has applied *Tucker* following *Melendez-Diaz* to hold that the prosecution may present an expert forensic analyst to testify concerning the results of tests performed by others. *State v. Gomez*, 2009 WL 3526649, at *4-5 (Ariz. Ct. App. Oct. 29, 2009).

4. Although *Melendez-Diaz* is a recent decision, this conflict over surrogate testimony is now firmly entrenched and ripe for resolution. The split among state high courts and the federal courts of appeals now stands at nine-to-five. There is no prospect that this split will resolve itself, nor any reason to believe that further percolation or anything this Court says in its forthcoming *Briscoe* decision will reveal any new arguments or considerations relevant to the dispute.[1]

II. This Issue Is Important To The Proper Administration Of Criminal Trials.

This Court should not allow the conflict over surrogate witnesses to persist.

1. The question presented implicates practices in several states across the country. Crime laboratory analyses play a central evidentiary role in a

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[1] Of course, if this Court, out of an abundance of caution, wishes to hold this case pending the outcome in *Briscoe*, petitioner would have not objection to that.

large number of criminal trials, and prosecutors in numerous jurisdictions rely on surrogate witnesses to present the analysis of nontestifying analysts. Prosecutors, defense lawyers, and judges need to know as soon as possible whether surrogate testimony satisfies the Confrontation Clause.

2. The question presented also directly implicates the truth-seeking function of trial. As this Court noted in *Melendez-Diaz,* forensic reports, just like other *ex parte* testimony created by law enforcement agents, presents "risks of manipulation." 129 S. Ct. at 2536. Indeed, investigative boards, journalists, and interest groups have documented numerous recent instances of fraud and dishonesty in our nation's forensic laboratories. *Id.* at 2536-38.[8] This Court also has recognized that "a forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz,* 129 S. Ct. at 2536. Even an entirely honest and objective forensic analyst may suffer from a "lack of proper training or deficiency in judgment," *id.* at 2537, or may place undue analytical weight on a suspect methodology, *id.* at 2538. Surrogate witnesses fail to address – and may actually aggravate – the problems posed by an analyst's

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[8] For the most recent such example, see Jeremy W. Peters, *Report Condemns Police Lab Oversight,* Times, Dec. 18, 2009 (describing "pervasively shoddy forensics work," as well as routinely "falsified test results," over a fifteen year period in the New York State crime laboratory).

potential fraud, incompetence, or flawed methodology. A recent case from California vividly illustrates the point. In *People v. Dungo,* 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Ca1.8 Dec. 2, 2009) the prosecution introduced an autopsy report to prove that a certain amount of time had elapsed before the victim's death, a hotly contested issue at trial. The medical examiner who had authored the report, however, had since been fired. He had also been forced to resign "under a cloud" from another job, and was blacklisted by law enforcement in two more counties for falsifying his credentials. *Id.* at 704. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler,* 891 P.2d 153, 168 (Cal. 1995); Scott Smith, *S.J.Pathologist Under Fire Over Questionable Past,* THE RECORD, Jan. 7, 2007, @ http://www.recordnet.corn/apps/pbc.s.dl1article?20070107/A__NEWS/70 070311#STS=g32 9z7h5. 134t.

In light of this problematic track record, the prosecution in *Dungo* put the medical examiner's supervisor on the stand instead of the examiner. As the supervisor explained during the preliminary hearing, "[t]he only reason they won't use [the examiner himself] is because the law requires the District Attorney to provide this background information to each defense attorney for each case, and [the prosecutors] feel it becomes too awkward to make them easily try their cases." *Dungo,* 98 Cal. Rptr. 3d at 708 (alterations in original). The California Court of

Appeals held that this surrogate testimony violated *Crawford*, observing that the "prosecution's intent" had been to "prevent[] the defense from exploring the possibility that the [medical examiner] lacked proper training or had poor judgment or from testing [his] 'honesty, proficiency, and methodology.'" *Id* at 714 (quoting *Melendez-Diaz*, 129 S. Ct. at 2538).

Even in cases seemingly involving less dramatic facts, allowing surrogate testimony would effectively insulate forensic analysts' work from scrutiny. In the field of ballistics and toolmark analysis, even good faith forensic conclusions "involve subjective qualitative judgments by examiners, and [] the accuracy of the examiners' assessments is highly dependent on their skill and training." *United States v. Taylor*, 633 F. Supp. 2d 1170, 1177-1178 (D.N.M. 2009) (quoting Committee on Identifying the Needs of the Forensic Sciences Community; Committee on Applied and Theoretical Statistics, National Research Council, *Strengthening Forensic Sciences in the United States: A Path Forward*, 5-20 (2009). Yet there is little hope for defense counsel to find out through questioning supervisors which ballistics and toolmark reports are faulty; only questioning the analysts who authored incriminating reports can reveal whether the analysts actually understand the science at issue and whether they exercised appropriate care and followed necessary protocols in reaching their conclusions.

III. This Case Is An Excellent Vehicle For Considering The Question Presented.

This case presents an excellent vehicle for resolving the split of authority over the question presented.

1. This case raises the question presented free from any waiver or collateral review complications. It comes to this Court on direct review, and petitioner clearly and unambiguously objected at trial, arguing that the introduction of the forensic report through the testimony of a witness other than the one who authored the report violated the Confrontation Clause. Petitioner also preserved this issue by contending at each level of the New Mexico appellate courts that the admission of the analyst's reports violated the Sixth Amendment. Finally, the New Mexico courts resolved this issue on the merits.

2. This case clearly and cleanly presents the question of whether the prosecution may introduce one forensic analyst's testimonial statements through the testimony of a different forensic analyst. The forensic report at issue is unquestionably testimonial under *Melendez-Diaz,* and the statements in the report were unquestionably relayed to the jury. In fact, the prosecution introduced the report directly into evidence. Moreover, the shortcomings of using a surrogate witness were perfectly encompassed because the supervisor did not review the actual analyst's underlying

data, nor was he the reviewer of the report. *See Appendix D.*

3. Finally, the forensic report at issue played a central role at trial. If this Court concludes that petitioner's confrontation rights were violated, he would be entitled to a new trial.[9]

IV. The New Mexico Supreme Court's Decision Is Incorrect.

1. The New Mexico Supreme Court erred in holding that the government may introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst. The Sixth Amendment guarantees a defendant the right "to be confronted with *the* witnesses against him." U.S. Const. amend VI. The use of the definite article in this constitutional provision is not adventitious. Instead, it dictates that if the State decides to introduce testimonial evidence, it must afford the defendant the opportunity be confronted with the specific creator of that evidence — that is, the person who actually made the statement or authored the document at issue. *Crawford v.*

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[9] The State may argue that the admission of the report was harmless error. An assessment of "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of cannot establish harmless error. *Fahy v. Connecticut,* 375 U.S. 85, 86 (1963); *see also United States v. Lane,* 474 U.S. 438, 450 n.13 (1986) ("[T]he harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry.") (internal quotation marks and citation omitted). Rather, the government must demonstrate beyond a reasonable doubt that the tainted evidence did not contribute to the conviction." *United States v. Alvarado-Valdez, 5* 21 F.3d 337, 342 (5th Cir. 2008); *accord Fields v. United States,* 952 A.2d 859, 867-68 (D.C. 2008); *see generally Chapman v. California,* 386 U.S. 18 (1967). (emphasis added).

Washington, 541 U.S. 36, 68 (2004). Accordingly, this Court has repeatedly held that the government violates the Confrontation Clause if it introduces a witness's testimonial statements through the in-court testimony of a different person, such as a police officer. *See id; Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz*, 129 S. Ct. at 2532; *id* at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . .

Nothing about the status of an in-court witness as a forensic supervisor or similar type of person alters this analysis. It is true that a supervisor may be a competent witness to answer general questions regarding someone else's forensic declarations, such as systemic problems with the laboratory processes that the person used. But the Confrontation Clause guarantees more than that. As this Court explained in *Melendez-Diaz*, the Clause guarantees an opportunity to test the "honesty, proficiency, and methodology" of the actual author of a forensic report that the prosecution seeks to introduce into evidence. 129 S. Ct. at 2538. Indeed, an analyst "who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis" and "weed out . . . incompetent [analysts] as well." *Id.* at 2537

(citations omitted).

The holding of *Melendez-Diaz,* in fact, effectively resolves the question presented here. There, this Court explained that "[a] witness's testimony against a defendant is . . . inadmissible unless *the witness* appears at trial or, if *the witness* is unavailable, the defendant had a prior opportunity for cross-examination." 129 S. Ct. at 2531 (emphasis added); *see also id.* at 2532 ("petitioner was entitled to 'be confronted with' *the analysts* at trial") (emphasis added); *id.* at 2537 n.6 ("The analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation . .") (emphasis added). The inescapable implication of this holding – as even the dissent acknowledged – is that the analyst 'who wrote "those statements that are actually introduced into evidence" must testify at trial. 129 S. Ct. at 2545 (Kennedy, J., dissenting). Surrogate forensic testimony does not satisfy the Confrontation Clause.

2. Neither of the rationales that courts have offered for avoiding this straightforward conclusion withstands scrutiny.

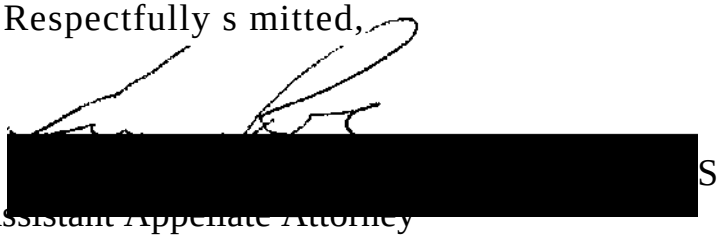
The New Mexico Supreme Court's reasoning – to allow an analyst to testify who has not performed the actual test– "is little more than an invitation to return to [this Court's] overruled decision in *[Ohio v. Roberts,* 448 U.S. 56 (1980)]." *Melendez-Diaz,* 129 S. Ct. at 2536. But *Crawford* does not simply require an opportunity for

cross-examination of *someone* who can discuss, or even vouch for, the reliability of the testimonial evidence introduced. It requires the prosecution to make the declarant of testimonial evidence available for cross-examination, so the defendant can probe the reliability of the declarant's statements directly. *Crawford*, 541 U.S. at 61. Hence, as a leading treatise explains, *"Crawford's* language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial." D.H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE-EXPERT EVIDENCE § 3.10.3, at 57 (Supp. 2009). This Court should not allow the New Mexico Supreme Court's decision to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully s mitted,



-- Susan Roth
Assistant Appellate Attorney
New Mexico Public Defender Department
Attorney of Record
301 N. Guadalupe Street
Santa Fe, New Mexico 87501
(505) 4745-0741 or (505) 476-0730

May 12, 2010

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226 P.3d 1
147 N.M. 487, 226 P.3d 1, 2010 -NMSC- 007
(Cite as: 147 N.M. 487, 226 P.3d 1)

H

Supreme Court of New Mexico.
STATE of New Mexico, Plaintiff-Respondent,
v.
Donald **BULLCOM1NG,** Defendant-Petitioner.
No. 31,186.

Feb. 12, 2010.

Background: Defendant was convicted, after a jury trial in the District Court, San Juan County, Thomas I. Hynes, D.J., of aggravated driving while under the influence of intoxicating liquor (DWI). Defendant appealed. The Court of Appeals, 144 N.M. 546, 189 P.3d 679,Wechsler, J., affirmed. Certiorari was granted.

Holdings: The Supreme Court, Maes, J., held that:
(1) laboratory report offered to prove defendant's blood alcohol content (BAC) was testimonial evidence subject to the Confrontation Clause, overruling *State v. Dedman,* 136 N.M. 561, 102 P.3d 628;
(2) admission of report did not violate Confrontation Clause;
(3) report was admissible under evidence rule relating to expert testimony;
(4) trial court did not abuse its discretion in qualifying police officer to testify as expert on cause of rear-end collision at issue;
(5) there are no formal, talismanic words that must be uttered to signal trial court's acceptance of a witness as an expert; and
(6) out-of-court statements by defendant's brother to police officer were inadmissible hearsay; but
(7) nonconstitutional error in admitting that hearsay testimony was harmless.

Conviction affirmed on other grounds.

West Ileadnotes

111 Automobiles 48A (C"- 422.1

48A Automobiles

48A1X Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases

Criminal Law 110 €662.40

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.40 k. Use of documentary evidence. Most Cited Cases
Laboratory report from Scientific Laboratory Division of Department of Health, as offered to prove defendant's blood alcohol content (BAC) in prosecution for aggravated driving while under influence of intoxicating liquor (DWI), was "testimonial evidence" subject to the Confrontation Clause, despite fact that the report was unswom; overruling *State v. Dedman,* 136 N.M. 561, 102 P.3d 628. U.S.C.A. Const.Amend. 6; West's NMSA § 66-8-102.

[2] **Automobiles 48A €422.1**

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases

Criminal Law 110 C='662.40

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.40 k. Use of documentary evidence. Most Cited Cases
Admission of testimonial evidence in form of labor-

atory report on defendant's blood alcohol content (BAC) did not violate Confrontation Clause in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI), though analyst from state laboratory who prepared report was not available to testify; that analyst was merely a scrivener who transcribed results generated by gas chromatograph machine, and another analyst from state's Scientific Laboratory Division (SLD) was qualified as an expert as to gas chromatograph machine and SLD's laboratory procedures, gave live testimony in court, and was available for cross-examination. U.S.C.A. Const.Amend. 6; West's NMSA § 66-8-102.

[3] Criminal Law 110 e=1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases
Whether Confrontation Clause was violated by admission of laboratory report of blood draw results without testimony of analyst who performed testing was question of law that would be reviewed de novo on appeal of conviction for aggravated driving while under the influence of intoxicating liquor (DWI). U.S.C.A. Const.Amend. 6; West's NMSA § 66-8-102.

[4] Criminal Law 110 €=662.9

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.9 k. Availability of declarant. Most Cited Cases
The Confrontation Clause permits the admission of testimonial statements so long as the declarant is present at trial to defend or explain it. U.S.C.A. Const.Amend. 6.

[5] Automobiles 48A e=411

48A Automobiles
48ALX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
Laboratory report containing blood alcohol content (BAC) results from gas chromatograph machine was admissible in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI), under evidence rule relating to expert testimony; report contained facts or data of the type reasonably relied upon by experts in the field, and trial court could reasonably find that report's probative value in assisting jury to understand expert analyst's testimony substantially outweighed its prejudicial effect. West's NMSA § 66-8-102; NMRA, Rule 11-703.

161 **Automobiles 48A €='411**

48A Automobiles
48A1X Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases

Criminal Law 110 €478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and **Skill**
110k478(1) k. In general. Most Cited Cases
Trial court did not abuse its discretion in prosecution for aggravated driving while under influence of intoxicating liquor (DWI) in qualifying police officer to testify as expert on cause of rear-end collision at issue; officer testified that he had obtained certifications as a traffic crash reconstructionist after attending a series of schools, he also testified that his primary duty was to investigate traffic collisions from the very minor all the way up to fatal crashes, and defense counsel did not conduct voir dire examination or otherwise challenge officer's qualifications. West's NMSA § 66-8-102; NMRA,

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Rule 11-702.

[7] Criminal Law 110 'E=·481

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k481 k. Determination of question of competency. Most Cited Cases

Criminal Law **110 X1153.12(2)**

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.12 Opinion Evidence
110k1153.12(2) k. Competency of witness. Most Cited Cases
Whether a witness possesses the necessary expertise or a sufficient foundation has been established to permit a witness to testify as an expert witness is a matter entrusted to the sound discretion of the trial court, and, absent an abuse of discretion, a reviewing court will not disturb the trial court's decision to accept or reject such testimony. NMRA, Rule 11-702.

[8] Automobiles 48A ge=)411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases
Jury was free in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI) to weigh every aspect of police officer's qualifications as expert witness on cause of the rear-end collision at issue, and any perceived deficiencies in officer's qualifications were relevant to the weight accorded by the jury to the testimony and not to the testimony's admissibility. West's NMSA § 66-8-102; NMRA, Rule 11-702.

[9] Automobiles 48A €¨-)411

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak411 k. In general. Most Cited Cases

Automobiles 48AC=·422.1

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak422 Conduct and Proof of Test; Foundation or Predicate
48Ak422.1 k. In general. Most Cited Cases
There was sufficient notice to parties in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI) that trial court was accepting police officer as expert witness on cause of accident at issue, though trial court did not "formally" accept officer as an expert, where defense counsel objected to officer's on the basis that he was "not an expert," officer subsequently laid a foundation at trial court's request, and trial court overruled defense counsel's continued objection. West's NMSA § 66-8-102; NMRA, Rule 11-702.

[10] Criminal Law 110 (S·481

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k481 k. Determination of question of competency. Most Cited Cases
There are no formal, talismanic words that must be uttered in order to signal trial court's acceptance of a witness as an expert, but, instead, witness may testify as an expert as long as the circumstances are such that the parties are on notice of the court's acceptance of that witness as an expert. NMRA, Rule 11-702.

[11] Criminal Law 110 €=419(1.5)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General

147 N.M. 487, 226 P.3d 1, 2010 -NMSC- 007
(Cite **as:** 147 N.M. 487, 226 P.3d 1)

110k419(1.5) k. Particular determinations, hearsay inadmissible. Most Cited Cases
Out-of-court statements by defendant's brother to police officer, pointing to the east as the direction in which defendant had fled from accident scene and stating that defendant was the driver of vehicle that had rear-ended another vehicle, were inadmissible "hearsay" as offered in. prosecution for aggravated driving while under the influence of intoxicating liquor (DWI); there was no other purpose for admitting the statements other than to prove that defendant was the driver of the vehicle and that he headed east as opposed to north, which was the direction he claimed in his testimony to have gone and met a group of men with whom he drank and became intoxicated. West's NMSA § 66-8-102; NMRA, Rule 11-801(C).

[12] Criminal Law 110 (€1153.10

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.10 k. Hearsay. Most Cited Cases
Appellate court reviews the admission of hearsay for an abuse of discretion by the trial court.

[13] Criminal Law 110 €¯'419(1)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k4 I 9 Hearsay in General
110k419(1) k. In general. Most Cited Cases
An out-of-court statement is inadmissible unless it is specifically excluded as non-hearsay under rule of evidence, falls within a recognized hearsay exception in the rules of evidence, or is otherwise made admissible by nthe or statute. NMRA, Rule 11-801(D).

[14] **Criminal Law 110 €=1169.1(9)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(9) k. Hearsay. Most Cited Cases
Nonconstitutional error was harmless, in prosecution for aggravated driving while under influence of intoxicating liquor (DWI), in admitting hearsay statements by defendant's brother to police officer that defendant had driven vehicle involved in accident and that he headed east after fleeing the scene, though defendant testified that he went north and met a group of men with whom he became intoxicated; substantial permissible evidence supported conviction, statements were insignificant in comparison to permissible evidence because they did not relate to centrally disputed facts, and there was no conflicting evidence as to whether defendant was driving vehicle at time of accident. West's NMSA § 66-8-102; NMRA, Rule 11-801(C).

[IS] Criminal Law 110 e=921

110 Criminal Law
110XXI Motions for New Trial
110k921 k. Rulings on evidence. Most Cited Cases
Evidence admitted in violation of hearsay rules is grounds for a new trial unless the error was harmless.

[16] Criminal Law 110 C=1169.1(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.I (1) k. Evidence in general. Most Cited Cases
To determine on harmless error review whether there is a reasonable probability that a nonconstitutional error contributed to a verdict, appellate courts should consider whether there is (1) sub-

Appendix 4A

stantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear minuscule; and (3) no substantial conflicting evidence to discredit the state's testimony, and no one factor is determinative, but, rather, the factors are considered in conjunction with one another.

[17] **Criminal Law 110 €=1169.1(1)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
I 10k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(1) k. Evidence in general. Most Cited Cases
Appellate court must not reweigh the evidence against a defendant when applying the factors that are considered on harmless error analysis of a nonconstitutional error, but rather must determine whether the guilty verdict actually rendered in that trial was surely unattributable to the error.

1181 Criminal Law 110 '€·1168(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1168 Rulings as to Evidence in General
110k1168(1) k. Prejudice to rights of accused in general. Most Cited Cases
In some circumstances 'where, in appellate court's judgment, the evidence of a defendants guilt is sufficient even in the absence of the trial court's nonconstitutional error, appellate court may still be obliged to reverse the conviction if the jury's verdict appears to have been tainted by the error.

[19] Criminal Law 110 €1169.1(1)

110 Criminal Law
110)0(1V Review
110XXIV(Q) Harmless and Reversible Error
110k1 1 69 Admission of Evidence
110k1169.1 In General
I I Ok1169.1(1) k. Evidence in general. Most Cited Cases
On harmless error review of nonconstitutional error, assessment of the impermissible evidence in light of the permissible evidence, the disputed factual issues, and the essential elements of the crime charged is not limited to the quantity of impermissible evidence, but, rather, encompasses the quality of that evidence and its likely impact on the jury.

[201 Criminal Law 110 C=·1035(10)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(10) k. Reception of evidence. Most Cited Cases
Whether admission of out-of-court statements by defendant's brother violated Confrontation Clause would be reviewed for fundamental error, where counsel did not object under the Confrontation Clause in the trial court. U.S.C.A. Const.Amend. 6.

[21] Criminal Law 110 €=>1035(10)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(10) k. Reception of evidence. Most Cited Cases
There was no fundamental error, in prosecution for aggravated driving while under influence of intoxicating liquor (DWI), in admission of out-of-court statement by defendant's brother to police officer that defendant headed east after fleeing from scene

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of accident at issue; while statement was contrary to defendant's testimony that he headed north and met with group of men with whom he drank and became intoxicated, statement had little probative value especially in light of the other evidence presented by the prosecution. West's NMSA § 66-8-102.

[22] **Criminal Law 110 C=1030(1)**

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)I In General
110k1030 Necessity of Objections in General
110k1030(1) k. In general. Most Cited Cases
Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand.

*4 Hugh W. Dangler, Chief Public Defender, Susan Roth, Assistant Appellate Defender, Santa Fe, NM, for Petitioner.

Gary K. King, Attorney General, Arm M. Harvey, Assistant Attorney General, Santa Fe, NM, for Respondent.

Elizabeth A. Trickey, Santa Fe, NM, for Amicus Curiae, New Mexico Department of Health, Scientific Laboratory Division.

OPINION

MASS, Justice.

{1} Defendant, Donald **BuIlcoming,** appeals his conviction of aggravated DWI, a fourth-degree felony, contrary to NMSA 1978, Section 66-8-102 (2005, prior to amendments through 2008). Of the three issues that Defendant raises, the main question presented in this appeal is whether a laboratory report of Defendant's blood draw results is testimonial evidence subject to the Confrontation Clause. We first addressed this issue in *State v. Dedman,* 2004-NMSC-037, n 30, 45-46, 136 N.M. 561,102 P.3d 628, and followed the United States Supreme Court case in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), to hold that (1) blood alcohol reports are public records and (2) they are non-testimonial under *Crawford* because public records are not "investigative or prosecutorial" in nature. We reverse our holding in *Dedman* in light of the recent United States Supreme Court case of *Melendez-Diaz v. Massachusetts,* which held that the certificates reporting the results of forensic analysis were "quite plainly affidavits" and thus "there [was] little doubt that [they] fall within the 'core class of testimonial statements,' " governed by the Confrontation Clause. 557 U.S. ----, ----, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009) (5-4 decision) (quoting *Crawford,* 541 U.S. at 51, 124 S.Ct. 1354). Although the blood alcohol report was testimonial, we conclude that its admission 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.

{2} As to Defendant's other two issues, we hold that while Officer Snowbarger was never formally accepted as an expert witness, the parties understood he was being treated as an expert witness, and could give his opinion regarding the cause of the accident without witnessing it. We further hold that although the trial court erred in admitting Defendant's brother's (Brother) out-of-court hearsay statements, we fmd this error to be harmless because of the overwhelming evidence against Defendant. We affirm Defendant's convictions.

I. FACTS AND PROCEDURAL HISTORY

{3} We begin with a summary of the facts that the

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jury reasonably could have found at Defendant's trial. The facts will be further developed in the discussion of the issues. Defendant's vehicle rear-ended Dennis (Randy) Jackson's vehicle while stopped at the intersection of 30th Street and Farmington Avenue in Farmington, New Mexico. Mr. Jackson exited his vehicle to exchange insurance information with Defendant. Mr. Jackson noticed the smell of alcohol on Defendant's breath and his bloodshot eyes, and instructed his wife to call police. When Defendant was informed that police were on their way, Defendant excused himself to the restroom.

{4} Officer Marty Snowbarger of the Farmington Police Department responded to the call, learned that Defendant had left the accident scene, and went to fmd him. Officer Snowbarger drove his motorcycle in the direction where Defendant was seen walking. He first encountered and questioned Brother, who had been a passenger in the vehicle and also had left the accident scene. Brother explained to Officer Snowbarger that Defendant was the driver of the vehicle at the time of the accident, and pointed east to *5 indicate the direction- that Defendant had fled. Soon thereafter, Officer Snowbarger spotted Defendant crossing a nearby bridge at a quick pace and followed him behind a building that was east of the bridge. Officer Snowbarger noticed that Defendant exhibited signs of intoxication such as watery, bloodshot eyes, slurred speech, and smelled the odor of alcohol coming from Defendant. Defendant was taken back to the accident scene in a patrol vehicle. Officer David Rock, who had recently arrived to the accident scene, noticed that Defendant swayed while walking toward the sidewalk. Officer Rock noticed Defendant's bloodshot eyes and the odor of alcohol coming from Defendant's breath and then asked Defendant if he had been drinking that day. Defendant responded that he had a drink at 6:00 a.ra., but had not been drinking since then. The Defendant performed a series of field sobriety tests, which he failed. Defendant was arrested for DWI and transported to the Farmington police station for bookixig. Because Defendant refused to take a breath test, Officer Rock obtained a search warrant to perform a blood alcohol test. Defendant had a blood alcohol content (BAC) of 0.21gms/100mi, well over the legal limit of 0.08gms/100m1. Defendant was convicted by jury of DWI and sentenced to a prison term of two years.

{5} Defendant appealed to the Court of Appeals raising five issues:

> (1) that the district court erred in denying a motion for mistrial based on the prosecutor's improper comment on silence in closing argument, (2) that the district court abused its discretion by allowing testimony by a police officer about the cause of an accident involving Defendant when the officer did not witness the accident, (3) that the district court erred in admitting into evidence blood draw results when the analyst who prepared the results was not available to testify, (4) that the district court erred in admitting into evidence the hearsay statement of Defendant's brother, and (5) that the State did not sufficiently prove Defendant's four prior DWI convictions.

State v. ***Bullcoming,*** 2008-NMCA-097, If 1, 144 N.M. 546, 189 P.3d 679. The Court of Appeals determined that (1) the prosecutor was commenting on Defendant's pre-arrest silence, which is permissible for impeachment purposes, *id. 7;* (2) the officer was properly qualified as an expert witness and could provide his opinion about the cause of the accident, *id.* If 11; (3) the blood alcohol report was non-testimonial, and thus its admission did not violate the Confrontation Clause, *id.* 17; (4) Brother's statements were not hearsay because they were not offered for the truth of the matter asserted and their admission did not prejudice Defendant, *id*

19; and (5) that there was sufficient evidence to prove Defendant's prior convictions, *id.* 27. The Court of Appeals concluded that Defendant's claims were without merit and affirmed his conviction. *Id.* TT 1, 28. Defendant's petition for certiorari raised five issues. We granted certiorari to consider the following three issues: (1) whether the trial court abused its discretion by allowing Officer Snowbar-

ger to testify regarding the cause of Defendant's accident; (2) whether the trial court erred in admitting the blood draw results as a business record, over defense counsel's confrontation objection, when the analyst who prepared the results was not available to testify; and (3) whether the trial court erred in admitting, over defense counsel's objection, hearsay testimony through Officer Snowbarger of an eyewitness, Brother, who did not testify at trial.

IL DISCUSSION

A. Whether the **Trial Court Erred in Admitting the Blood Draw Results as a Business Record, Over Defense Counsel's** Confrontation Objection, When the **Analyst Who Prepared the Results Was Not Available to Testify**

[1] {6} At trial, the State presented the Report of Blood Alcohol Analysis of Defendant's blood through Gerasimos Razatos, an analyst for the New Mexico Department of Health, Scientific Laboratory Division, Toxicology Bureau (SLD), who helps in overseeing the breath and blood alcohol programs throughout the state. The report is a two-page document and was admitted into evidence as Exhibit 1. It is attached to this opinion for reference. The first page is composed*6 of Part A and Part B. Part A contains chain of custody information, specifically identifying the arresting officer, the donor, the person who drew the donor's blood, and the date, time, and place of the blood draw. Part A also specifies the information sought by the officer and the location -where the results are to be sent.

{7} Part B has four parts that primarily provide chain of custody information. The receiving employee signs the first section of Part B, certifying the type of specimen that was received, how it was received, whether the seal was intact, and that the employee complied with the procedures delineated in paragraph two of the second page of Exhibit 1. The analyst signs the second section. of Part B, certifying that the seal of the sample was received intact and was broken in the laboratory, that the analyst followed the procedures in paragraph number three on the second page of Exhibit 1, and that the test results were recorded by the analyst. A reviewer signs the third section of Part B, certifying that the analyst and the analyst's supervisor are qualified to conduct the analysis and that the established procedures had been followed. Finally, a laboratory employee signs the fourth section of Part B, certifying that a legible copy of the report had been mailed to the donor. Finally, the second page of Exhibit 1 identifies the method used for testing the blood sample and details the procedures that must be followed by laboratory personnel.

{8} The analyst who prepared Exhibit 1 did not testify at Defendant's trial because he "was very recently put on unpaid leave." However, Razatos, who had no involvement in preparing Exhibit 1, testified about Defendant's BAC and the standard procedures of the laboratory. He testified that the instrument used to analyze Defendant's blood was a gas chromatograph machine. The detectors within the gas chromatograph machine detect the compounds and the computer prints out the results. When Razatos was asked by the prosecutor whether "any human being could look and write and just record the result," he answered, "Correct." On cross-examination he also testified that this particular machine prints out the result and then it is transcribed to Exhibit 1. Both the nurse who drew the blood and the officer who observed the blood draw and who also prepared and sent the blood kit to SLD, testified at trial and were available for cross-examination.

{9} Defendant objected to the admission of Exhibit 1 because the analyst who performed the test was not at trial to testify, which he argued would violate Defendant's constitutional right to confrontation. He also argued that, because Exhibit 1 was prepared in anticipation of trial, it did not qualify as a business record. The trial court admitted Exhibit 1 as a business record exception. to the rule against hearsay. Rule 11-803(F), (H) NMRA. The trial

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court also held that the admission of Exhibit I was not prohibited by *Crawford*. Exhibit 1 was shown to the jury.

[2][3] {10} Whether Exhibit 1 was admitted in violation of the Confrontation Clause of the United States Constitution is a question of law which we review de novo. *State v. Rivera,* 2008-NMSC-056, ¶ 10, 144 N.M. 836, 192 P.3d 1213.

{ 11 } The United States Supreme Court in *Crawford* held that the Confrontation Clause prohibits the admission of "testimonial statements" unless the declarant is unavailable to testify, "and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54, 124 S.Ct. 1354. Though the Court declined to definitively state what constitutes a "testimonial" statement, it described the various formulations of the core class of testimonial statements covered by the Confrontation Clause. *Id* at 51-52, 124 S.Ct. 1354.

{12} In *Dedman,* we followed *Crawford* to hold that (1) blood alcohol reports prepared by SLD are public records, and (2) they are non-testimonial under *Crawford* because public records are not "investigative or prosecutorial" in nature. *Dedman,* 2004-NMSC-037, **I111** 30, 45-46, 136 N.M. 561, 102 P.3d 628. We first determined that the reports were admissible because they fell within the hearsay exception for "public records" since they "follow a routine manner of preparation that guarantees a certain level of comfort as to their trustworthiness." *Id*

24. Second, though we recognized that the *7 "right of confrontation requires an independent inquiry that is not satisfied by *a* determination that evidence is admissible under a hearsay exception," we essentially held that blood alcohol reports were not subject to the Confrontation Clause for the same reasons that we considered them to be public records. *Id.* ¶ 25. We determined that the main concern of the Confrontation Clause was the " qi]nvolvement of government officers in the production of testimony with an eye toward trial,' because this provide[d] a "unique potential for prosecutorial abuse.' " *Id.* ¶ 29 (quoting *Crawford,* 541

U.S. at 56 n. 7, 124 S.Ct. 1354). Since blood alcohol reports are not prepared by law enforcement personnel and are neither investigative nor prosecutorial, they do not present the same potential for abuse. *Id.* .11 11 29-30. Thus, we concluded that the blood alcohol tests in question were non-testimonial because, as public records, their preparation was "routine, non-adversarial, and made to ensure an accurate measurement." *Id.* ¶ 30.

{13} While this appeal was pending, the United States Supreme Court in *Melendez-Diaz* considered whether a certificate prepared by a forensic laboratory analyst fell within the core class of testimonial statements identified in *Crawford. Melendez-Diaz,* 557 U.S. at ----, 129 S.Ct. at 2532. The plurality held that the certificates, which reported the results of forensic analysis showing that the substance found in seized bags was cocaine of a certain weight, were "quite plainly affidavits" and thus "[t]here [was] little doubt that [they] fall within the `core class of testimonial statements,' " governed by the Confrontation Clause. *Id.* Justice Scalia delivered the opinion of the Court in which Justices Stevens, Souter, Thomas and Ginsburg joined. Justice Thomas filed a concurring opinion adhering to his position in *White v. Illinois,* 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., concurring in part and concurring in judgment), that "[t]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Melendez-Diaz,* 557 U.S. at ----, 129 S.Ct. at 2543 (Thomas, J., concurring) (internal quotation marks and citation omitted). Because the certificates in question were "quite plainly affidavits," Justice Thomas agreed with the majority that they fall within the core class of testimonial statements. *Id.*

{14} The other four Justices that joined Justice Thomas to form the plurality went further, stating that the certificates were testimonial because they were " 'made under circumstances which would

lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' " Id at ----, 129 S.Ct. at 2531 (quoting *Crawford* 541 U.S. at 52, 124 S.Ct. 1354), and were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,' " *id.* at ----, 129 S.Ct. at 2532 (quoting *Davis v. Washington,* 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)). They reasoned that the Sixth Amendment only contemplated "two classes of witnesses-those against the defendant and those in his favor" and that "there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at ----, 129 S.Ct. at 2534. Forensic evidence is neither immune from manipulation nor inherently "neutral." *Id.* at ----, 129 S.Ct. at 2536.

{15} On the other hand, the dissent authored by Justice Kennedy distinguishes between "conventional witness[es]," which he defines as those "who [have] personal knowledge of some aspect of the defendant's guilt," and laboratory analysts who perform tests. *Id.* -at ----, 129 S.Ct. at 2543 (Kennedy, J., dissenting). Kennedy also focused on the policy implications of requiring laboratory analysts to testify, and argued that *MelendezDiaz* "threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, alltoo-frequent instances when a particular laboratory technician ... simply does not or cannot appear." Id at ----, 129 S.Ct. at 2549.

{16} Melendez-Diaz thrlows into doubt our assessment in *Dedman* that blood alcohol reports as public records are inherently immune*8 from governmental abuse. First, *ilifelendez-Diaz* clarified that "analysts' certificates-like police reports generated by law enforcement officials-do not qualify as business or public records" because they are "calculated for use essentially in the court, not in the business." *Id.* at --, 129 S.Ct. at 2538 (internal quotation marks and citation omitted). Though "[d]ocuments kept in the regular course of business may ordinal--ily be admitted at trial despite their hearsay status, ... that is not the case if the regularly conducted business activity is the production of evidence for use at trial." *Id.* Second, *Melendez-Diaz* made clear that the same concerns of governmental abuse which exist in the production of evidence by law enforcement exist in the production of forensic evidence. The Court noted that "[a] forensic analyst responding to a request from a law enforcement official may feel pressure-or have an incentive-to alter the evidence in a manner favorable to the prosecution." *Id.* at ----, 129 S.Ct. at 2536. For these reasons, we conclude that *Dedman's* determination that blood alcohol tests are non-testimonial does not comport with the Supreme Court's ruling in *Melendez-Diaz,* and *Dedman* is overruled.

{17} The State argues that *Melendez-Diaz* can be distinguished from the case at bar because the forensic reports in *Melendez-Diaz* were sworn affidavits and Exhibit 1 in the present case is not a sworn document. The State argues that *Melendez-Diaz* was a plurality opinion and, therefore, the holding "may be viewed as that position taken by those Members who concurred in the judgment[ ] on the narrowest grounds." *Gregg v. Georgia,* 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *accord Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). The narrowest grounds for the holding are found in Justice Thomas's concurrence. He joined the majority because he agreed that the reports in question were "plainly affidavits," and thus clearly were "formalized testimonial materials" governed by the Confrontation Clause. *Melendez-Diaz,* 557 U.S. at ----, 129 S.Ct. at 2543 (Thomas, J., concurring). The State therefore argues that, because Exhibit 1 in the present case was not an affidavit sworn by the declarant, it is not within the formalized testimonial materials described in *Melendez-Diaz* and, therefore, not subject to the Confrontation Clause.

{ 18 } Contrary to the State's argument, an affidavit is merely listed as one of several examples of "formalized testimonial materials" described in

Melendez-Diaz. Id. at ----, 129 S.Ct. at 2532. ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions." (internal quotation marks and citation omitted)). Even prior to *Melendez-Diaz,* it was made clear in *Crawford* that "the absence of oath was not dispositive" in determining if a statement *is* testimonial. *Crawford,* 541 U.S. at 52, 124 S.Ct. 1354. Exhibit 1 in this case, like the certificates in *Melendez-Diaz,* are "formalized testimonial materials" in that they were made "for the purpose of establishing or proving some fact." *Melendez-Diaz, 557* U.S. at ----, 129 S.Ct. at 2532 (internal quotation marks and citation omitted). In *Melendez-Diaz,* the certificates were offered to prove that "the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine." *Id.* Likewise, in the present case, Exhibit 1 was offered to prove that Defendant had a BAC of 0.21 gms/100m1. As in *Melendez-Diaz,* Exhibit 1 was "functionally identical to live, in-court testimony, doing precisely what *a* witness does on direct examination." *Id.* (internal quotation marks and citation omitted). Therefore, Exhibit 1 in the present case, like the certificates in *Melendez-Diaz,* are testimonial despite the fact that they are unsworn.

[4] {19} However, the Confrontation Clause permits the admission of testimonial statements "so long as the declarant is present at trial to defend or explain it." *Crawford,* 541 U.S. at 59 n. 9, 124 S.Ct. 1354 (citation omitted). Although the analyst who prepared Exhibit 1 was not present at trial, the evidence revealed that he simply transcribed the results generated by the gas chromatograph machine. He was not required to interpret the results, exercise independent*9 judgment, or employ any particular methodology in transcribing the results from the gas chromatograph machine to the laboratory report. *Cf. Melendez-Diaz,* 557 U.S. at ----, 129 S.Ct. at 2537-38 (stating that the methodology used in generating the reports "require [d] the exercise of

judgment and present[ed] a risk of error that might be explored on cross-examination"); *State v. Aragon,* 2010-NMSC-008, if 30, ---N.M. ----, 225 P.3d 1280 (holding that "[t]he determinations of whether a substance is narcotic and its degree of purity ... must be classified as 'opinion,' rooted in the assessment of one who has specialized knowledge and skill"). Thus, the analyst who prepared Exhibit 1 was a mere scrivener, and Defendant's true "accuser" was the gas chromatograph machine which detected the presence of alcohol in Defendant's blood, assessed Defendant's BAC, and generated a computer print-out listing its results. *See United States v. Moon,* 512 F.3d 359, 362 (7th Cir.2008) ("[T]he Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial."); *United States v. Washington,* 498 F.3d 225, 230 (4th Cir.2007) ("The raw data generated by the diagnostic machines are the `statements' *of the machines* themselves, not their operators."); *United States v. Hamilton,* 413 F.3d 1138, 1142-43 (10th Cir.2005) (concluding that the computer-generated header information accompanying pornographic images retrieved from the Internet "was neither a 'statement' nor a 'declarant' "). Under these circumstances, we conclude that the live, in-court testimony of a separate qualified analyst is sufficient to fulfill a defendant's right to confrontation. *See People v. Rutterschmidt,* 98 Cal.Rptr.3d 390, 411-12 (Cal.Ct.App.2009), *review granted and opinion superseded by People v. Rutterschmidt,* 102

Cal.Rptr.3d 281, 220 P.3d 239 (2009) (holding that the testimony of a qualified analyst who did not prepare the defendant's toxicology report was admissible under the Confrontation Clause).

{20} In this case, Razatos, an SLD analyst, was qualified as an expert witness with respect to the gas chromatograph machine and the SLD's laboratory procedures. Razatos provided live, in-court testimony and, thus, was available for cross-examination regarding the operation of the gas chromatograph machine, the results of Defendant's

BAC test, and the SLD's established laboratory procedures. Additionally, Razatos could be questioned about whether the operation of the gas chromatograph machine required specialized skill that the operator did not possess, involved risks of operation that might influence the test results, and required the exercise of judgment or discretion, either in the performance of the test or the interpretation of the results. Because Razatos was a competent witness who provided live, in-court testimony, we conclude that the admission of Exhibit 1 did not violate the Confrontation Clause.

(21 } We recognize that, in addition to Defendant's BAC test results, Exhibit 1 also contained information regarding chain of custody. However, in *Melendez-Diaz,* the United States Supreme Court indicated that chain of custody information may not be testimonial under the Confrontation Clause. [FI41] The Court stated that

> FN1. We are also referring to the Committee on Rules of Criminal Procedure the task of drafting a notice-and-demand rule comparable to those seemingly noted with approval in *Melendez-Diaz,* 557 U.S. at ----, 129 S.Ct. at 2541.

> [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as **part** of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," *post, at* 2546, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, *ibid.,* from *United Steam v. Lott,* 854 F.2d 244, 250 (C.A.7 1988), "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps i i the chain of custody are so crucial as to require evidence; but what testimony is *10 introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

Melendez-Diaz, 557 U.S. at ---- n. 1, 129 S.Ct. at 2532n. 1.

{22} In the present case, the jury heard live, in-court testimony from the officer who arrested Defendant and the nurse who drew Defendant's blood. Although Defendant had the opportunity to cross-examine these individuals regarding the chain of custody, he did not do so. Indeed, the record reflects that Defendant was willing to stipulate that the nurse "drew the blood ... properly." To the extent that Defendant based his Confrontation Clause claim on the chain of custody information contained in Exhibit 1, it is clear that his objection was simply pro forma.

{23 } We reiterate that the admissibility of Exhibit 1 under the Confrontation Clause was dependent on the live, in-court testimony of a qualified analyst. Clearly, had Razatos not been present to testify, Exhibit 1 would not have been admissible because Defendant would not have had the opportunity to meaningfully cross-examine a qualified witness regarding the substance of the exhibit. A defendant cannot cross-examine an exhibit. However, because Razatos did testify, Defendant's right of confrontation was preserved and the admissibility of the exhibit depends on the application of our rules of evidence.

[5] {24) Rule 11-703 NMRA provides, in relevant part, that

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular

field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.* Facts or data that are otherwise inadmissible shall not be disclosed to the jury by

the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect,

(Emphasis added.); *see also Coulter v. Stewart*, 97 N.M. 616, 617, 642 P.2d 602, 603 (1982) ("While experts may rely on hearsay under Rule 703, the hearsay itself is not admissible."). Thus, Exhibit 1 properly was admitted under Rule 11-703 if it contains facts or data of the type reasonably relied upon by experts in the field and its probative value substantially outweighs its prejudicial effect.

{25} As previously explained, the results of the gas chromatograph machine BAC test do not constitute expert opinion, but, rather, constitute facts or data of the type reasonably relied upon by experts in the field. *Cf. Aragon*, 2010-NMSC-008, ¶ 30 (holding that an analyst could not rely on an out-of-court statement of another analyst, regarding whether a substance is narcotic and its degree of purity, because the out-of-court statement was the expert opinion of a non-testifying analyst). Moreover, the trial court reasonably could have found that the probative value of Exhibit 1 in assisting the jury to evaluate Razatos's testimony substantially outweighed its prejudicial effect. Accordingly, Razatos properly relied on the gas chromatograph machine results in his testimony and the trial court did not abuse its discretion in admitting Exhibit 1 into evidence.

{26} Although we fmd no error in the present case, we strongly suggest that, in future cases, the State admit into evidence the raw data produced by the gas chromatograph machine to supplement the live, in-court testimony of its forensic analyst. With the admission of this raw data, which is not subject to the constraints of the Confrontation Clause, the jury will be able to ascertain first hand the accuracy and reliability of the analyst's testimony regarding a defendant's BAC.

B. Whether the Trial Court Abused its Mere-tion by Allowing Officer Snowbarger to **Offer His Opinion** Testimony as to the Cause of the Accident

[6] {27} The issue that Defendant raises on appeal is whether the trial court properly qualified Officer Snowbarger as an expert *11 witness pursuant to Rule 11-702 NMRA, and, if not, whether his testimony as to the cause of the accident was properly admitted. The following facts are relevant to this claim. During trial, defense counsel objected to Officer Snowbarger offering his opinion regarding the cause of the accident because "[t]here [was] no foundation for it. He's not an expert." The trial court then requested that the State lay a foundation to qualify him as an expert. After Officer Snowbarger testified about his experience and training in traffic reconstruction, defense counsel continued to object and was overruled by the trial court. The officer then testified that his "opinion [was] that the driver of the vehicle was not paying attention to the vehicle in front of him, or his driving habits." The prosecutor followed up asking, "[W]ere you able to formulate an opinion based on your observations as to why the driver was not paying attention?" The officer responded, "Having contacted him and observed the things that I've testified to, I believe that he was under the influence of some kind of intoxicating liquor."

[7] {28} Whether a witness possesses the necessary expertise or a sufficient foundation has been established to permit a witness to testify as an expert witness is a matter entrusted to the sound discretion of the trial court. *Sanchez v. Molycorp, Inc.*, 103 N.M. 148, 152, 703 P.2d 925, 929 (Ct.App.1985). Absent an abuse of discretion, a reviewing court will not disturb the trial court's decision to accept or reject such testimony. *Id.*

[8] {29} Rule 11-702 only requires that the proponent of the testimony demonstrate that the expert has acquired sufficient "knowledge, skill, experience, training or education" so that his testimony will aid the fact finder. To the extent that Defendant is challenging Officer Snowbarger's qualifications

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as an expert witness, he offers no reason why Officer Snowbarger does not have the proper qualifications to testify as an expert witness. Instead, Defendant argues that only "an expert accident reconstructionist" could offer testimony regarding the cause of the accident. At trial, Officer Snowbarger testified that, because he is in the traffic division of the police force, he has attended "a series of schools to become a traffic crash reconstructionist" and holds "certifications as a traffic crash reconstructionist." In addition, he testified that his primary duty was "to investigate traffic collisions from the very minor all the way up to fatal crashes." Defense counsel did not conduct *voir dire* examination or otherwise challenge his qualifications. Therefore, we cannot say that the trial court abused its discretion in qualifying Officer Snowbarger as a expert witness. Furthermore, we note that the jury was free to weigh every aspect of Officer Snowbarger's qualifications in their evaluation of his testimony, and any perceived deficiencies in his qualifications would be "relevant to the weight accorded by the jury to [the] testimony and not to the testimony's admissibility." *State v. Torrez*, 2009-NMSC-029, 18, 146 N.M. 331, 210 P.3d 228 (internal quotation marks and citation omitted).

[9][10] {30} Defendant also challenges the admission of Officer Snowbarger as an expert witness, because the trial court failed to formally accept him as an expert. However, Defendant in his briefing before this Court fails to show what formalities are required to put the parties on notice that the trial court is accepting a witness as an expert. We reject the implication that there are formal, talismanic words that must be uttered in order to signal the court's acceptance of a witness as an expert. Instead, we determine that a witness may testify *as* an expert as long as the circumstances are such that the parties are on notice of the court's acceptance of that witness as an expert. In the present case, given defense counsel's objection to Officer Snowbarger's testimony on the basis that he is "not an expert," the foundation subsequently laid by the officer at the trial court's request, and the trial court's decision to overrule the defense counsel's continued objection, we conclude there was sufficient notice to the parties that the trial court was accepting Officer Snowbarger as an expert witness.

{31} Accordingly, we conclude that the trial court properly accepted Officer Snowbarger as an expert witness and did not abuse its discretion by allowing him to offer *12 his opinion testimony *as* to the cause of the accident.

C. Whether the Trial Court Erred in Admitting Brother's Out-of-Court Statements

[11] {32} The third issue that Defendant raises on appeal is whether Officer Snowbarger's testimony regarding Brother's out-of-court statements was improperly admitted because it contained impermissible hearsay and violated the Confrontation Clause. At trial, Officer Snowbarger testified that when he came in contact with Brother and questioned him about the accident and where Defendant had gone, Brother "pointed in the direction of east, [and] said that [Defendant] had been driving the vehicle." Defense counsel objected to the statement as being hearsay, but the trial court overruled the objection and instructed the jury that Officer Snowbarger's statement "[was] not for the truth ... but to show why ... the officer did what he did."

[12][13] {33} We first address Defendant's hearsay issue. This Court reviews the admission of hearsay for an abuse of discretion by the trial court. *State v. Salgado*, 1999-NMSC-008, 5, 126 N.M. 691, 974 P.2d 661. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Rule 11-801(C) NMRA. "An out-of-court statement is inadmissible unless it is specifically excluded as non-hearsay under Rule 11-801(D) or falls within a recognized exception in the rules of evidence, or is otherwise made admissible by rule or statute." *State v. McClaugherty*, 2003-NMSC-006, 17, 133 N.M. 459, 64 P.3d 486 (citation omitted).

{34} The State argues that the statements were

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offered to show why the police officer acted as he did and not for its truth; therefore, they were properly admitted as non-hearsay. In *State v. Rosales*, 2004-NMSC-022, 16, 136 N.M. 25, 94 P.3d 768, this Court noted that "[e]xtrajudicial statements or writings may properly be received into evidence, not for the truth of the assertions therein ... but for such legitimate purposes as that of establishing knowledge, belief, good faith, reasonableness, motive, effect on the hearer or reader, and many others." In addition, the evidence must have some proper probative effect upon or relevancy to an issue in the case in order to be admissible. Rule 11-402 NMRA; *State v. Alberts*, 80 N.M. 472, 475, 457 P.2d 991, 994 (Ct.App.1969). Courts have been especially reluctant to allow testimony of a police officer to explain his conduct during the course of the investigation, because there is high potential for abuse by prosecution to admit highly prejudicial and otherwise inadmissible hearsay and the evidence is seldom relevant. *State v. Otto*, 2007-NMSC-012, 28, 141 N.M. 443, 157 P.3d 8 (Chavez, J., dissenting) ("In criminal cases the prosecution is fond of offering evidence of inculpatory out-of-court assertions as 'background' to explain why law enforcement agents decided to investigate a defendant. Such evidence is seldom relevant." (quoting David F. Binder, *Hearsay Handbook §* 2:10, at 2-40 (4th ed.2001))); *see Alberts*, 80 N.M. at 475, 457 P.2d at 994 ("The naming of defendants *as* persons engaged in 'illegal marijuana traffic,' for the purpose of showing why [an officer] conducted an investigation, is not a legitimate reason for admitting [hearsay] testiniony."); *see also State v. Blevins*, 36 Ohio App.3d 147, 521 N,E.2d 1105, 1108 (1987) ("[T]he potential for abuse in admitting such statements is great where the purpose is merely to explain an officer's conduct during the course of an investigatioa.").

{35} Despite the trial court's instruction to the jury that Officer Snowbarger's statements should not be considered for their truth, we find no other purpose for admitting these statements other than to prove that Defendant was the driver of the vehicle and headed east, as opposed to north to the creek, as he claimed in his testimony. The police officer's reason for pursuing Defendant was not a relevant issue at trial, therefore, the statements were hearsay and inadmissible.

[14][15] {36} However, evidence admitted in violation of our hearsay rules is grounds for a new trial unless the error was harmless. *See State v. Downey*, 2008-NMSC-061, 39, 145 N.M. 232, 195 P.3d 1244. Where a defendant has established a violation of court *13 rules, non-constitutional error review is appropriate, and a reviewing court should only conclude that a non-constitutional error is harmless when there is no *reasonable probability* the error affected the jury's verdict. *State v. Barr*, 2009-NMSC-024, 1111 47-48, 146 N.M. 301, 210 P.3d 198.

[16][17][18] {37} To determine whether there is a reasonable probability that a non-constitutional error contributed to a verdict, the appellate courts should consider whether there is "(1) substantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear minuscule; and (3) no substantial conflicting evidence to discredit the State's testimony." *Id.* 56 (footnote omitted). No one factor is determinative, but all three factors when considered in conjunction with one another "provide a reviewing court with a reliable basis for determining whether an error is harmless." *Id* 55. In applying these factors, we must not re-weigh the evidence against a defendant, but rather determine "whether the guilty verdict actually rendered in *this trial* was surely unattributable to the error." *Id.* 57 (citation omitted). "Accordingly, in some circumstances where, in our judgment, the evidence of a defendant's guilt is sufficient even in the absence of the trial court's error, we may still be obliged to reverse the conviction if the jury's verdict appears to have been tainted by error." *State v. Macias*, 2009-NMSC-028, ¶ 38, 146 N.M. 378, 210 P.3d

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(38} First, we examine whether there was substantial evidence to support the conviction without reference to the improperly admitted evidence. The jury could have reasonably relied on Mr. Jackson's testimony that immediately after the accident and before Defendant left the accident scene, Defendant had blood shot eyes and alcohol on his breath, in reaching its conclusion that Defendant was intoxicated at the time of the accident even before he left the accident scene. Additionally, a reasonable jury could have considered this testimony coupled with the testimony of the two arresting officers to conclude that Defendant was intoxicated to the slightest degree at the time of the accident. Based on the testimony of Mr. Jackson and Officer Snowbarger that Defendant was only away from the accident scene for approximately ten minutes when he was found by the officer, the jury could have reasonably concluded that this would not be enough time for Defendant to cross the street, walk around, climb over a fence, walk to the side of the creek, and drink a pint and a half-gallon of vodka, as Defendant claimed at trial.

[19] (39) The second factor requires us to assess the impermissible evidence in light of the permissible evidence, the disputed factual issues, and the essential elements of the crime charged. Our focus is not limited to the quantity of impermissible evidence, but, rather, encompasses the quality of that evidence and its likely impact on the jury. *See State v. Moore,* 94 N.M. 503, 505, 612 P.2d 1314, 1316 (1980) (recognizing that "a trial can be prejudiced by testimony lasting but a fraction of a second"). We conclude that the improperly admitted statements were insignificant in comparison to the permissible evidence because they did not relate to centrally disputed facts ill the case. First, the parties did not dispute that Defendant was driving the vehicle at the time of the accident; therefore, Brother's statement that Defendant was driving had no impact on the jury's resolution of any disputed factual issue. Second, the fact that Brother pointed east while Defendant testified that he headed north is not inconsistent with Defendant's claim that he became intoxicated during his flight from the accident scene, especially considering that Defendant testified that he "walked around" before heading to the creek, where he encountered the men with whom he drank. Thus, this minor discrepancy, even if noticed by the jury, is not one which would have tainted their determination of Defendant's guilt.

[20][21] (40) Finally, we address the third factor, namely, whether there was substantial conflicting evidence to discredit the State's testimony. There is no conflicting evidence regarding the fact that Defendant was driving the vehicle at the time of the accident. The only conflicting evidence regarding which direction Defendant went *14 when he fled the accident was Defendant's testimony that he went north instead of east. Considering the minimal probative value of the hearsay testimony and the strength of the countervailing evidence, we conclude that the trial court's error in admitting the hearsay statements was harmless.

[22] (41) We next address Defendant's Confrontation Clause claim. Generally, whether out-of-court statements are admissible under the Confrontation Clause is reviewed de novo, as a question of law. *State v. Ruiz,* 120 N.M. 534, 536, 903 P.2d 845, 847 (Ct.App.1995), *abrogated by State v. Martinez,* 2007-NMSC-025, 141 N.M. 713, 160 P.3d 894. However, because counsel did not object under the Confrontation Clause in the trial court, this Court must review the issue under fundamental error. *State v. Osborne,* 111 N.M. 654, 662, 808 P.2d 624, 632 (1991). "Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *State v. Baca,*

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1997-NMSC-045, 41, 124 N.M. 55, 946 P.2d 1066, *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, 36, 146 N.M. 357, 210 P.3d 783. Defendant concedes that there was no material issue rising to the level of fundamental error with regard to Brother's statement that Defend-

ant was driving when the accident occurred; therefore, we do not address this question. However, Defendant argues that there was a material issue concerning Brother's indication that Defendant headed east, because Defendant, to the contrary, testified at trial that he headed north, climbed over a fence, and then met the Native American men that he drank with by the creek. The Defendant claims that this statement prejudiced Defendant's case because "the direction Mr. **Bullcoming** walked in, where Mr. Bullcoming ended up, and how long he was gone, were critical to the jury's determination of guilty." As mentioned above, this statement had little probative value especially in light the other evidence presented by the prosecution. Thus, we conclude that there was no fundamental error, because Defendant was not prejudiced in a significant way by the admission of the statement.

CONCLUSION

{42} We conclude that the blood alcohol report, prepared by an analyst who simply transcribed the results generated by a gas chromatograph machine, properly was admitted into evidence through the live, in-court testimony of a separate qualified analyst. We further conclude that, although Officer Snowbarger was never formally qualified as an expert witness, the parties understood that he was testifying as an expert witness and, thus, he could opine regarding the cause of the accident without witnessing it. Finally, though the trial court erred in admitting Brother's out-of-court hearsay statements, the error was harmless. Thus, we affirm Defendant's conviction.

{43} IT IS SO ORDERED.

WE CONCUR: EDWARD L. CHAVEZ, Chief Justice, PATRICIO SERNA, RICHARD C. BOSSON, and CHARLES W. DANIELS, Justices.
N.M.,2010.
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P-

Court of Appeals of New Mexico.
STATE of New Mexico, Plaintiff Appellee,
V.
Donald **BULLCOMING,** Defendant-Appellant.
No. 26,413.

June 4, 2008.
Certiorari Granted, No. 31,186, July 21, 2008.

Background: Defendant was convicted, after a jury trial in the District Court, San Juan County, Thomas J. Hynes, D.J., of aggravated driving while under the influence of intoxicating liquor (DWI) and was sentenced based on four prior DWI convictions. Defendant appealed.

Holdings: The Court of Appeals, Wechsler, J., held that:
(1) prosecutor's closing argument was proper comment on defendant's pre-arrest silence;
(2) police officer was qualified to testify as expert regarding cause of collision;
(3) admission of hearsay evidence did not violate Confrontation Clause; and
(4) preponderance of the evidence, rather than beyond a reasonable doubt, was State's burden of proof, with respect to proving defendant's prior convictions for DWI.

Affirmed.

West Headnotes

[1] Criminal Law 110 e=4139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases
When the facts are not in question, the issue of whether the prosecutor made an improper comment, during closing arguments, on the defendant's exercise of his Fifth Amendment right to remain silent, is a question of law that is reviewed de novo. U.S.C.A. Const.Amend. 5.

[2]Witnesses 410 0347

410 Witnesses
410W Credibility and Impeachment
4101V(B) Character and Conduct of Witness
410k347 k. Conduct of Witness Inconsistent with Testimony; Silence. Most Cited Cases
The prosecution may use a defendant's pre-arrest silence for impeachment purposes, without infringing upon his or her Fifth Amendment right to remain silent. U.S.C.A. Const.Amend. 5.

[3] Criminal Law 110 €=·2131(2)

110 Criminal Law
110XXXI Counsel
110XX.X1(F) Arguments and Statements by Counsel
110k2129 Comments on Accused's Silence or Failure to Testify
110k2131 Comments on Silence of Accused Prior to Trial
110k2131(2) k. Silence Prior to Arrest. Most Cited Cases
Prosecutor's closing argument in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI), that defendant, who testified that after leaving scene of automobile collision he drank vodka, for 30 minutes, with men he met at a creek, failed, when making statement to investigating officers that he had not had anything to drink since 6:00 a.m., to tell investigating officers about his alleged post-collision drinking at the creek, was a comment on pre-arrest silence rather than a comment on post-arrest silence, and thus, such argument, impeaching defendant's testimony, was not improper comment on defendant's exercise of his Fifth Amendment right to remain silent; statement to officer occurred before defendant's arrest, and

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prosecutor referred to officers' ability to investigate by searching for the men with whom defendant allegedly had been drinking, which reference encompassed a limited time period because anyone drinking with defendant had the ability to leave the area. U.S.C.A. Const.Amend. 5.

[4] Criminal Law **110 C=478(1)**

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k478 Knowledge, Experience, and Skill
110k478(1) k. In General. Most Cited Cases
Police officer was qualified, in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI), to testify as expert regarding cause of collision between defendant's vehicle and another vehicle in intersection; officer was assigned to traffic division of police department, his primary job duty was investigating traffic accidents, he had received training in basic accident reconstruction and traffic crash reconstruction, and he was certified as traffic crash reconstructionist. NMRA, Rule 11-702.

151 **Criminal Law 110** €;·**481**

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k481 k. Determination of Question of Competency. Most Cited Cases
The district court, in its discretion, decides whether a witness qualifies as on expert witness. NMRA, Rule 11-702.

[6] Criminal Law 110 €;=·480

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k480 k. Preliminary Evidence as to Competency. Most Cited Cases
Prosecutor was not required, in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI), to formally proffer a police officer as an expert witness on traffic crash reconstruction; there was no lack of clarity concerning scope of prosecutor's question to officer calling for officer's expertise, and no lack of clarity concerning relationship between officer's qualifications and his ability to present an opinion in response to prosecutor's question. NMRA, Rule 11-702.

[7]Criminal Law 110 €662.40

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.40 k. Use of Documentary Evidence. Most Cited Cases
Admission, under hearsay exception for business records, of blood analysis report, at trial in which State presented testimony of an analyst, from Department of Health's Scientific Laboratory Division (SLD), who was not the analyst who had performed the analysis of blood sample and who had not prepared the blood analysis report, did not violate defendant's right to confront witnesses, in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI); report was nontestimonial, and it was prepared routinely, with guarantees of trustworthiness. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 €=·**419(3)**

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
1101(419(3) k. Evidence as to Information Acted On. Most Cited Cases
Officer's testimony, that defendant's brother told officer that defendant had been driving the vehicle

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and that brother pointed in the direction in which defendant left scene of collision, was not hearsay, in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI); testimony was not offered for truth of the matters asserted, i.e., it was not offered to show that defendant had been driving the vehicle or had left the scene of the collision in a particular direction, and instead it was offered to explain why officer went looking for defendant in the direction to which brother pointed. NMRA, Rule 11-801(C).

[91 Criminal Law **110 C=1169.1(9)**

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
I I Ok1169.1 **In** General
110k1169.1(9) k. Hearsay. Most Cited Cases
Even assuming that officer's testimony, that defendant's brother told officer that defendant had been driving the vehicle and that brother pointed in the direction in which defendant left scene of collision, was offered for truth of the matters asserted rather than to explain why officer went looking for defendant in the direction to which brother pointed, a violation of the hearsay rule was not prejudicial to defendant, in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI); there was no material issue that defendant had been driving the vehicle or had left the scene of the collision in a particular direction. NMRA, Rule 11-801(C).

[101 Criminal Law 110 (€=>1153.10

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.10 k. Hearsay. Most Cited Cases
Admission of allegedly hearsay evidence is reviewed under an abuse of discretion standard.

1111 Criminal Law 110 €1035(10)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(10) k. Reception of Evidence. Most Cited Cases
Confrontation Clause claim, relating to admission of allegedly hearsay evidence, would be reviewed for fundamental error, where defendant did not raise a Confrontation Clause objection at trial. U.S.C.A. Const.Amend. 6.

[121 Criminal Law 110 €=,1030(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
"Fundamental error" exists if defendant's innocence is indisputable or the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand.

[131 Criminal Law 110 C=4035(10)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(10) k. Reception of Evidence. Most Cited Cases

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Even assuming that officer's testimony, that defendant's brother told officer that defendant had been driving the vehicle and that brother pointed in the direction in which defendant left scene of collision, was offered as hearsay for truth of the matters asserted rather than being offered as nonhearsay to explain why officer went looking for defendant in the direction to which brother pointed, alleged violation of Confrontation Clause was not fundamental error, in prosecution for aggravated driving while under the influence of intoxicating liquor (DWI); there was no material issue that defendant had been driving the vehicle or had left the scene of the collision in a particular direction. U.S.C.A. Const.Amend. 6; NMRA, Rule 11-801(C).

[141 Automobiles 48A €=>359.6

48A Automobiles
48AVII Offenses
48AVII(C) Sentence and Punishment
48Ak359.3 Driving While Intoxicated
48Ak359.6 k. Repeat Offenders. Most Cited Cases
In proving prior convictions for driving while under the influence of intoxicating liquor (DWI), for purposes of enhancing the sentence for a new DWI conviction, the State has the initial burden of presenting evidence of the validity of each of defendant's prior DWI convictions, and if State presents prima facie case, defendant may present contrary evidence, but State continues to have ultimate burden of persuading district court, as fact-finder, of validity of each prior conviction. West's NMSA § 66-8-102.

1151 Automobiles **48A €359.6**

48A Automobiles
48AVII Offenses
48AVII(C) Sentence and Punishment
48Ak359.3 Driving While Intoxicated
48Ak359.6 lc. Repeat Offenders. Most Cited Cases

Preponderance of the evidence, rather than beyond a reasonable doubt, was State's burden of proof,

with respect to proving defendant's prior convictions for driving while under the influence of intoxicating liquor (DWI), for purposes of enhancing the sentence for a new DWI conviction. West's NMSA § 66-8-102.

****681** Gary K. King, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, NM, for Appellee.

John Bigelow, Chief Public Defender, Susan Roth, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

*548 OPINION

WECHSLER, Judge.

{1} As per the Corrected Judgment, Sentence, Order Partially Suspending Sentence and Commitment to the Department of Corrections, Defendant Donald **Bullcoming** was convicted of the offense of Aggravated Driving While Under the Influence of Intoxicating Liquor and sentenced based on four prior DWI convictions. He appeals, raising five issues: (1) that the district court erred in denying a motion for mistrial based on the prosecutor's improper comment on silence in closing argument, (2) that the district court abused its discretion by allowing testimony by a police officer about the cause of an accident involving Defendant when the officer did not witness the accident, (3) that the district court erred in admitting into evidence blood draw results when the analyst who prepared the results was not available to testify, (4) that the district court erred in admitting into evidence the hearsay statement of Defendant's brother, and (5) that the State did not sufficiently prove Defendant's four prior DWI convictions. We affirm Defendant's conviction. In doing so, we agree with the district court's use of the preponderance of the evidence standard in addressing Defendant's prior DWI convictions.

BACKGROUND

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{2} Defendant was arrested after an automobile accident in which Defendant, while driving his sibling's vehicle, ran into another truck at an intersection. After the accident, the other driver got out of his truck and went back to the vehicle that Defendant was driving and asked for Defendant's license and registration. The other driver noticed the smell of alcohol coming from Defendant's vehicle. When the other driver returned to his truck, he asked his wife to call the police. As the other driver examined the rear end of his truck for damage, Defendant and his sister approached him. The other driver spoke with both of them and obtained insurance information. The other driver smelled alcohol emanating from Defendant and also observed that Defendant had bloodshot eyes. When the other driver told Defendant that he needed to get a police report and had called the police, Defendant excused himself, saying that he needed to go to the restroom, and went across the street toward a medical complex. The other driver testified that the police brought Defendant back to the scene of the accident approximately ten minutes later.

{3} Defendant testified that he had not been drinking for about ten hours that day. He said that he was driving because the others in the vehicle had been drinking and were drunk. According to Defendant, the *549 **682 odor of alcohol in the vehicle came from them, rather than him. Defendant further testified that he left the scene after the other driver told him that the police had been called because he was afraid that he was going to be arrested. Defendant knew he had an outstanding warrant because he had violated his probation in Oklahoma by leaving that state. He walked to a creek where he met other men who were drinking vodka, and he testified that he drank with them for about thirty minutes and that they drank about a pint and a half gallon. He was picked up by the police when he returned to the road. He was intoxicated when he was given field sobriety tests back at the scene of the accident.

COMMENT ON SILENCE

{4} In closing argument, on rebuttal, the prosecutor argued that Defendant did not tell the police officers anything about drinking vodka with others. He argued that if Defendant had told the officers that he "was just back in the bushes with three or four guys and I drank a whole load of vodka," and "I'll show you," one of the officers could have gone to the bushes and investigated and asked the others if Defendant had been drinking. Defendant objected on Fifth Amendment grounds. The district court then stated: "Ladies and gentlemen of the jury, ... Defendant has a right to remain silent and be presumed innocent. And, you are not to infer from counsel's argument that ... Defendant had any duty to say anything." After the district court excused the jury, Defendant moved for a mistrial, contending that the prosecutor's argument was "so prejudicial and so in violation of the law, of the constitution," that it justified a mistrial. The district court denied the motion, stating that the comment was only a casual comment that was cured by its instruction to the jury.

[I] {5} On appeal, Defendant argues that the comment was not casual; rather, Defendant asserts that its calculation was demonstrated by the prosecutor's questioning of Officer Martin Snowbarger about his conversation with Defendant. When, as here, the facts are not in question, the issue of whether the prosecutor made an improper comment on the defendant's silence is a question of law that we review de novo. *State v. Foster*, 1998-NMCA-163, 8, 126 N.M. 177, 967 P.2d 852. We may affirm the district court if it was correct for any reason, as long as the basis for such ruling was raised before the district court. *State v. Granville*, 2006-NMCA-098, ¶ 12, 140 N.M. 345, 142 P.3d 933.

{6} We now review the record, which demonstrates that the prosecutor's comment related to Defend-

ant's pre-arrest, as opposed to his post-arrest, silence. Officer Snowbarger first encountered Defendant on the other side of a bridge away from the scene of the accident and spoke with him at that time. He requested another police car to transport

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Defendant back to the accident scene. He arrived back at the scene at the same time as Defendant and was there during the time that Officer David Rock administered field sobriety tests to Defendant. Officer Snowbarger testified that he issued Defendant three citations but that he did not issue a citation for DWI. Officer Rock testified that when he arrived at the scene, Defendant was still in a police car. Officer Rock removed Defendant from the car, observed him walk to the sidewalk, and asked him, "Have you had anything to drink today?" Defendant responded that he "had one this morning at 6:00 a.m." Officer Rock wrote Defendant's response in his report. Officer Rock then administered the field sobriety tests. After completing the tests, Officer Rock concluded that Defendant was intoxicated and impaired, arrested him, and took him to the police station for booking. Although Officer Rock's testimony is not clear as to the exact location where he read Defendant his rights under the New Mexico Implied Consent Act, he testified that he did so after arresting Defendant Ultimately, he obtained a warrant and took Defendant to the emergency room for a blood alcohol test.

[2] {7} The prosecution may use a defendant's pre-arrest silence for impeachment purposes without infringing upon his or her Fifth Amendment rights. *See State v. Gonzales*, 113 N.M. 221, 229, 824 P.2d 1023, 1031 (1992); *Foster,* 1998-NMCA-163, ¶11 13-14. Although the transcript does not reflect exactly*550 **683 when Defendant was given his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), we assume that it was not until after Officer Rock arrested him.

[3] {8} With this factual predicate, we conclude that the context of the prosecutor's statement in rebuttal shows that he was only referencing Defendant's pre-arrest silence. First, the prosecutor discussed the police officers' ability to investigate by going to the bushes and asking anyone found there if Defendant had been *drinking.* That time period was, by necessity, limited, because anyone present in the bushes had the ability to leave that area.

Second, although a police investigation may certainly continue after an arrest, the prosecutor's discussion was limited to the police officers' investigation in the context of this case, which impliedly referenced only the investigation at the scene when the officers had the present ability to return to the bushes while someone with knowledge of Defendant was still present. Third, the prosecutor made reference to Defendant's statement to Officer Rock that he had not had anything to drink since 6:00 a.m. That statement was a pre-arrest statement.

{9} Thus, from the factual context, as well as the wording of the prosecutor's argument, we conclude that it reasonably related only to Defendant's pre-arrest silence. It did not merit a granting of Defendant's motion for a mistrial.

OFFICER SNOWBARGER'S TESTIMONY ABOUT THE CAUSE OF THE ACCIDENT

[4] { 10} Defendant contends that Officer Snowbarger was not qualified to offer opinion testimony concerning the cause of the accident because he was not qualified as an expert and, testifying as a lay witness, he could not testify about causation because he did not witness the accident. Officer Snowbarger testified at trial as the State's witness. He was dispatched to and observed the accident scene. After being informed that Defendant had left the scene, he also left the scene, located Defendant, and requested the transport of Defendant back to the scene by another officer. Defense counsel objected when the prosecutor asked Officer Snowbarger if he was able to form an opinion about the cause of the accident. Upon the district court's inquiry as to a ground for the objection, defense counsel stated, "There's no foundation for it. He's not an expert." The prosecutor offered to lay a foundation, and Officer Snowbarger testified that he was assigned to the traffic division and had the primary duty of investigating traffic accidents. He testified that he had received training in basic accident reconstruction and traffic crash reconstruction and was certified as a traffic crash reconstruction-

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ist. Officer Snowbarger also testified that he had formed opinions as to the contributing factors to Defendant's accident, and when asked to state his opinions, defense counsel again objected, stating, "I would still object, Your Honor." The district court overruled the objection. Accordingly, Officer Snowbarger testified to his opinion as to the contributing factors of Defendant's accident, stating that "the driver of the vehicle was not paying attention to the vehicle in front of him, or his driving habits." When asked if he was able to formulate an opinion based on his observations as to why the driver was not paying attention, again over objection, Officer Snowbarger testified that he believed that the driver "was under the influence of some kind of intoxicating liquor."

[5] {11} We do not agree with Defendant's contention that Officer Snowbarger was not qualified as an expert to provide his opinion about the cause of the accident. Under Rule 11-702 NMRA, a witness may testify as to an expert opinion if the "specialized knowledge" of the witness "will assist the trier of fact" and the witness is qualified as an expert to provide the opinion by virtue of "knowledge, skill, experience, training or education." The district court, in its discretion, decides whether a witness qualifies as an expert under Rule 11-702. *State v. Downey*, 2007-NMCA-046, 11, 141 N.M. 455, 157 P.3d 20, *cert. granted*, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459. When defense counsel raised the issue of Officer Snowbarger's qualifications by objecting for lack of foundation, the prosecutor elicited his qualifications. Officer Snowbarger testified about his training and his certification as a traffic ***551 **684** crash reconstructionist. Defense counsel then only restated her earlier objection of lack of foundation. She did not seek to engage Officer Snowbarger in a voir dire examination or otherwise challenge his qualifications. The district court acted within *its* discretion in allowing Officer Snowbarger's causation testimony based on the foundation laid concerning his qualifications _

[6] {12} Nor did the district court abuse its discretion because the prosecutor did not formally proffer Officer Snowbarger as an expert witness. The prosecutor clearly presented the issue to the district court. He asked Officer Snowbarger about whether he had formed any opinions about the cause of the accident. After laying a foundation for testimony about his opinion, the prosecutor asked Officer Snowbarger to state his opinions. There was no lack of clarity concerning the scope of the question calling for Officer Snowbarger's expertise or of the relationship of his qualifications to his ability to present an opinion in response to the question. Defendant does not indicate how a formal proffer would have served any meaningful purpose or how he was prejudiced by the absence of a formal proffer. *See State v. Garcia*, 76 N.M. 171, 176, 413 P.2d 210, 213-14 (1966) (explaining that the district court has substantial discretion, based on its perception of the offered expert's qualifications, in deciding whether to allow or deny the testimony of such a witness); *see also State v. Gregoroff* 287 Mont. 1, 951 P.2d 578, 580-81 (1997) (concluding that the district court did not abuse its discretion in admitting the expert testimony of a law enforcement officer even though she was never "formally offer[ed]" as an expert witness by the prosecution).

BLOOD DRAW RESULTS

[7] {13} The State introduced evidence of the analysis of the blood sample taken from Defendant through the testimony of an analyst of the New Mexico Department of Health Scientific Laboratory Division, Toxicology Bureau. The witness was not the analyst who performed the analysis of the blood sample and did not prepare the blood analysis report admitted into evidence. Defendant objected to the analyst's testimony on the basis that it violated Defendant's right of confrontation. Defendant further objected to the receipt of the blood analysis report as a business record because it was prepared in anticipation of litigation. The district court allowed the report to be admitted into evidence as a business record.

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{14} On appeal, Defendant argues that the district court erred in allowing the blood draw results. Relying on *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), he contends that testimonial statements may not be introduced against *a* defendant at trial unless both the declarant is unavailable and the defendant has had the opportunity to cross-examine the declarant. According to Defendant, the State did not prove that the analyst who prepared the report was unavailable to testify at trial, and Defendant did not have the opportunity to cross-examine that analyst. Defendant further acknowledges that our Supreme Court has decided this issue in *State v. Dedman*, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628, but argues that decisions in other states following *Crawford* have reached a different result than our Supreme Court in *Dedman*. We note that although Defendant argued in the district court that the witness's testimony should have been excluded because of late disclosure, Defendant does not raise that ground as a basis for reversal on appeal.

{15} We begin and end our legal analysis with *Dedman* because it is dispositive. In *Dedman*, the nurse who had withdrawn blood from the defendant for testing by the Scientific Laboratory Division (SLD) was not available to testify at trial. *Dedman*, 2004-NMSC-037, g 3-4. The SLD toxicologist testified at trial that the blood alcohol report was the product of the "regularly conducted business activity" of SLD. *Id.* ¶ 43. Our Supreme Court held that there was no indication the report was untrustworthy or unreliable and further held that the report was admissible under the public records exception to the hearsay rule. *Id.* 24, 44. It stated that "ordinarily a blood alcohol report is admissible as a public record and presents no issue under the Confrontation Clause because the report is nontestimonial and satisfies*552 ****685** the test of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *abrogated by Crawford*, 541 U.S. 36, 124 S.Ct. 1354, concerning the admission of hearsay evidence under the Confrontation Clause. *Dedman*, 2004-NMSC-037, I 45.

{16} I
n this case, the SLD toxicologist testified that the report was used and kept in the ordinary course of SLD's business and also testified about the procedure used in preparing the report. As in *Dedman,* there was no evidence that there was any deviation from ordinary practice or that the report was untrustworthy or unreliable. *See id* 44. We are bound by *Dedman,* a decision of our Supreme Court, and we therefore do not address the opinions of other states on the issue. *See State v. Manzanares,* 100 N.M. 621, 622, 674 P.2d 511, 512 (1983) (explaining that this Court is bound by the precedents of our Supreme Court "even when a United States Supreme Court decision seems contra").

{17} We do not agree with Defendant's argument at oral argument that *State v. Almanza,* 2007-NMCA-073, 141 N.M. 751, 160 P.3d 932, is inconsistent with *Dedman.* In *Almanza,* because of short notice to subpoena the chemist to appear at trial, the prosecution introduced the telephonic testimony of a New Mexico State Crime Lab chemist concerning the character of the substance the state alleged was illegal drugs. *Almanza,* 2007-NMCA-073, irg 1-3. This Court held that the testimony violated the defendant's confrontation rights. *Id.* II 1, 12-13. However, *Almanza* did not involve the issue of the testimonial nature of a report admissible under *Roberts.* As discussed in *Dedman,* the blood alcohol report in the present case was non-testimonial and prepared routinely with guarantees of trustworthiness. *See Dedman,* 2004-NMSC-037, 144.

HEARSAY STATEMENT OF DEFENDANT'S BROTHER

[81191 {18} Officer Snowbarger testified, over Defendant's objection, to statements that were told to him by Defendant's brother, who did not testify at trial. He testified that Defendant's brother told him that Defendant had been driving the vehicle and pointed in the direction that Defendant had gone from the scene. The district court responded to De-

fendant's hearsay objection by instructing the jury that the testimony was not for the truth of the statements; rather, it served to show that it caused Officer Snowbarger to take further action. Defendant did not make a Confrontation Clause objection.

[10] {19} We review the admission of hearsay evidence under an abuse of discretion standard. *State v. Torres*, 1998-NMSC-052, ¶ 15, 126 N.M. 477, 971 P.2d 1267, *overruled on other grounds by State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 23, 136 N.M. 309, 98 P.3d 699. The district court did not abuse its discretion in allowing this testimony. First, it did not allow hearsay testimony because it instructed the jury not to accept the testimony for the truth of what Defendant's brother said. Rule 11-801(C) NMRA (defining hearsay as "a statement ... offered in evidence to prove the truth of the matter asserted"). Second, even if the testimony had been hearsay, there was no prejudice to Defendant. ***See*** *Clark v. State*, 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991) (noting that error in the admission of evidence in a criminal case must be prejudicial and not harmless and that standard is met "if there is a reasonable possibility that the evidence complained of might have contributed to the conviction"). There was no material issue that Defendant had been driving the vehicle or had left the scene in a particular direction.

[11][12][13] {20} As to the Confrontation Clause, our review is de novo. *Torres*, 1998-NMSC-052, 20. In this case, we review for fundamental error because Defendant did not raise an objection in the district court. *See State* v. *Munoz*, 2006-NMSC-005, ¶ 12, 139 N.M. 106, 129 P.3d 142. Fundamental error exists in this context if Defendant's "innocence is indisputable or the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand." *Stole v. Hennessy*, 114 N.M. 283, 287, 837 P.2d 1366, 1370 (Ct.App.1992) (internal quotation marks and citation omitted). No such circumstances exist in this case because, as we have stated, there was no material issue as to whether Defendant was driving or *553 **686 whether he left the scene in a particular direction after the accident.

PROOF OF PRIOR DWI CONVICTIONS

{21} Sentencing for a DWI conviction in New Mexico is graduated depending on a defendant's prior convictions, if any. *See* NMSA 1978, § 66-8-102(E) to (7) (2005) (amended 2007). The district court found that Defendant had at least four prior convictions of DWI and sentenced him on the basis that his conviction in this case was his fifth DWI conviction. As a result, Defendant's conviction was for a fourth degree felony, subjecting him to a two-year term of imprisonment, which term was imposed by the district court. Section 66-8-102 ([H]).

[14] {22} In proving prior DWI convictions for purposes of enhancing a DWI conviction, the state has the "initial burden of presenting evidence of the validity of each" of a defendant's prior DWI convictions. *State v. Gaede*, 2000-NMCA-004, ¶ 8, 128 N.M. 559, 994 P.2d 1177. If the state presents a prima facie case, the defendant may present contrary evidence. *Id.* The state continues to have the ultimate burden of persuading the district court, as factfinder, of the validity of each of the convictions. *Id.*

[15] {23) Defendant argues on appeal that the State's evidence was insufficient to prove that Defendant had four prior convictions. As part of his argument, he asserts that the State had to prove the convictions to a standard of beyond a reasonable doubt rather than the lesser standard, to a preponderance of the evidence, that was used by the district court.

{24) Based on documents that were before the district court, the district court found that Defendant had been convicted of DWI in Elk City Municipal Court, Andarko, Oklahoma, on December 30, 1993; in Clinton Municipal Court, Oklahoma, on April 17, 1995; in Blaine County Oklahoma, on Septem-

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189 P.3d 679, 2008 -NMCA- 097 (Cite as: 144 N.M. 546, **189 P.3d 679)**

ber 28, 2003; and in Dewey County, Taloga, Oklahoma, on December 9, 2004. Defendant contested the use of the 1993 and 1995 convictions to the district court, but the district court found that the convictions were valid. On appeal, although Defendant notes the objections below, he does not argue that the district court erred except in its application of the standard of proof. We thus understand Defendant's argument to be that the validity of those convictions depends on the district court's proper application of the standard of proof.

{25) In making his standard of proof argument, Defendant acknowledges that the New Mexico Supreme Court, in *State v. Smith,* 2000-NMSC-005, 128 N.M. 588, 995 P.2d 1030, held that in proving prior convictions for habitual offender enhancement, the State need only meet the standard of preponderance of the evidence. Defendant further acknowledges this Court's statement in *State v. Sedillo,* 2001-NMCA-001, If 5, 130 N.M. 98, 18 P.3d 1051, that proof beyond a reasonable doubt is not necessary to prove prior DWI convictions for sentencing in a DWI case. Defendant relies on cases of the United States Supreme Court starting with *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), holding that the proof of "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." According to Defendant, *Apprendi* was decided after *Smith,* and, in light of *Apprendi* and its United State Supreme Court progeny, *Sedillo* was wrongly decided.

{26} But, Defendant's argument disregards the express holding of *Apprendi.* In reaching its conclusion, the United States Supreme Court explicitly excluded "the fact of a prior conviction" from the type of facts that must be proved beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348. In doing so, the United States Supreme Court expressly confirmed its earlier position in *Jones v. United States,* 526 U.S. 227, 243 n. 6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (explaining that the

U.S.
Constitution does not require prior convictions that increase a maximum penalty to be proved beyond a reasonable doubt), that facts of prior convictions do not fit within the same category as other facts that increase "the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348.

**687 *554 {27} A beyond a reasonable doubt standard does not apply to a finding of a prior DWI conviction for purposes of DWI sentencing. *See Sedillo*, 2001-NMCA-001, 71 5, 10. There is no indication in the record on appeal that there was insufficient evidence to support the district court's findings of Defendant's prior DWI convictions.

CONCLUSION

{28) We affirm Defendant's conviction.

{29} **IT IS SO ORDERED.**

WE CONCUR: JONATHAN B. SUTIN, Chief Judge, and CELIA FOY CASTILLO, Judge.
N.M.App.,2008.
State v. Bullcoming
144 N.M. 546, 189 P.3d 679, 2008 -NMCA- 097

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DISTRICT COURT
SAN JUAN COUNTY NM
FILED

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
IN THE DISThICT COURT

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STATE OF NEW MEXICO
Plaintiff;
v.

No. CR- 05-937-6

DONALD L. BULLCOMING,
DOB: 11/12/1970
SSN: 441-60-5813
Defendant.

CORRECTED ITDGMENT, SENTENCE,
ORDER PARTIALLY SUSPENDING SENTENCE AND
COMMITMENT TO '11:1E DEPARTMENT OF CORRECTIONS

THIS MATTER came before the Court for sentencing on November 16, 2005. The State of New Mexico was represented by Paul S. Wainwright, Deputy District Attorney and the Defendant was present personally and was represented by counsel, Blaise Supler. The Defendant was found guilty at a Jury Trial on October 11, 2005, of the offense of Aggravated :Driving While Under the Influence of intoxicating Liquor or any Drug, a 4th degree felony, contrary to NMSA 1978, § 66-08102, as charged in Count 1, a crime which occurred on or about August 14, 2005. The Court considered any pre-sentence reports and statements by or on behalf of the defendant, and other interested persons.

The court finds that this is at least a fifth DWI conviction based on the following DWI prior convictions:

1. Tae defendant was convicted in Elk City Municipal, Andarko, Oklahoma, 93-11-1850, of DWI on December 30, 1993, for the offense that occurred on or about November 11, 1998; and the court found that the defendant was uncounseled but the conviction is valid under State v. Woodruff.

2. The defendant was convicted in Clinton Municipal, Oklahoma, 95-032610, of DWI on April 17. 2995, for the offense that occurred on or about February 18, 1995; and the court found that the defendam was represented by Jim Bob Wright.

• 3. The defendant was convicted in Blaine County, Oklahoma, CM-2003-117, of DWI on September 28, 2003, for the offense that occurred on or about May 15, 1998; and the court found that the defendarr: was represented by Gerald Weiss.

4. The defendant was convicted in Dewey County, Taloga, Oklahoma, CM-2003-126, of DWI on December 09, 2004, for the offense that occurred on or about September 09, 2003 and the court found that the defendant was represented by Gerald Weiss.

IT IS THE JUDGMENT AND SENTENCE of the Court that:

1. As to Count 1, the Defendant be committed to the custody of the New Mexico Corrections Department la be confined for the term of two (2) years. Upon completion of the prison term the Defendant shall be released under mandatory parole supervision for a period of one (I) year subject to the statutory provisions relating to conditions of parole and supervision and return of parolees.
2. As conditions of this Judgment and Sentence, the Defendant shall:.

2. As conditions of this Judgment and Sentence, the Defendant shall:

a. Participate in and complete within six (6) months of your release from the Department of Corrections: an Alcohol or Drug Abuse Screening Program approved by the State of New Mexico's Department of Finance and Administration.

b. Pay a sixty-five dollar ($65.00) Intoximeter fee; a. twenty dollar ($20.00) Corrections fee; a three dollar ($3.00) Traffic Safety fee; a five dollar ($5.00)

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brain injury fee; and a seventy-five dollar ($75.00) Comprehensive Community Programs fee to the District Court

c. Pay a $100.00 DNA fee pursuant to the DNA Identification Act.

d. Submit a DNA sample as ordered by the Court.

e. Pay a $5.00 Domestic Violence Offender Treatment Fee to the District Court.

3. The Defendant shall be given credit for pre-sentence confinement of ninety-three (93) days and for post-sentence confinement until delivery to the Corrections Department.

4. Th e Sheriff of San Juan County is commanded to take the defendant into custody and deliver the Defendant together with a copy of this Judgment, Sentence and Commitment to the Corrections Department to the Penitentiary of New Mexico or another corrections facility designated by the Corrections Depai __ talent. The Corrections Department is commanded to receive the Defendant and execute this Judgment and Sentence according to law.

5. Ary bail or bond posted in this cause is released, and the clerk of the Court is ordered to return any cash bail or bond to the person having posted it.

[redacted]

Corrected thi! Judgement and Sentence to say the Defendant was found guilty at a Jury Trial on October 11, 2005.

Copies to:
District Attorney
-iffefens Counsel
Adult Probation and Parole Office
San Tam County Eletention Center
San 7u.n County Sheriffs Office (2 certified copies)

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SCIENTIFIC LABORATOIr VISION
700 Camino de **Salud,** NE, P.O. Box 4700,Aibuqo „se, NM 87196-4700
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PART A-INFORMATION IN THIS BLOCK TO BE FILLED IN BY ARRESTING OFFICER

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Investigated or Witnessed by: C
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CERTIFICATE OFRECEIVING EMPLOYEE

S-pe-en Blood fl Date Received from

Received from: Via Mailti In Person ❑ Other 0 Other Remarks:

Seal Intact: Yesii No ❑ If No, explain

certify that on the date shown in the "date received" blank above, I received the sample which accompanied this report and followed the procedures set out on the reverse of this report , and the statements in this block are correct.

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CERTIFICATE OF AN ALYST

Yes ☒ No ☐ If No, explain

STATE'S

(Signature of blood drawer)

PART
LABO
USE

ONLY

The seal of this sample was received intact and broken in the laboratory: Result of Analysis

Blood sample: 0C7W gmst1130m1

alcohol concentration in sample

I certify that I followed the procedures set put on the reverse ofthis report, and the statements in this block are correct. The concentration of alcohol in the sample is based on the grams of ed milliliters of blood.

Date of analysis:

!certify that on this date Irnaited a legible copy ◦Misreport to the donor, in accordance with the mailing procedure set out on the revirT of thi%repOrt.

Date: 5 Laboratory Employee: VCIA 1\3 V-ti1A-·311/1

SLID 705 (Rules of Procedure for the **Muyill...111111.1111111.11.11....mlimilli**k, ule 6-607; and Rules of Criminal Procedure for

Form* S10 705 as emended, affective July '0599 (m.111041

I cer,ify ,hat the analyst who conducted the analysis in this case meets the qualifications required by the director of this laboratory to properly conduct such analyscs: the supervisor of analysts is also qualified to c duct ch analyses; and that the establi • procedure has been fo ed i h andling and analysis of the sample in this case.

Date **OS** Reviewer :

rxtul-auuttr,

1. The laboratory named 1- the front of this report is a laboratory a...horized or certified by the Scientific Laboratory Division of the Health Department to perform blood and alcohol tests. The agency has established formal procedures for receipt, handling and testing of blood samples to assure integrity of the sample, a formal procedure for conduct and report of the chemical analysis of the samples by the gas chromatographic method ( ) *(specify, if other method used)* and quality control procedures to validate the analyses. The quality control procedures include semi-annual proficiency testing by an independent agency. The procedures have the general acceptance and approval of the scientific community, including the medical profession, and of the courts, as a means of assuring a chemical analysis of a blood sample that accurately discloses the concentration of alcohol in the blood. The same procedures are applicable for samples other than blood if submitted for alcohol analysis. The analyst who conducts the analysis in this must meet the qualification required by the director of this laboratory to properly conduct such analyses. The supervisor of analysts must also be qualified to conduct such analyses.
2. When a blood sample is received at the laboratory, the receiving employee examines the sample container and:
   (a) determines that it is a standard container of a kit approved by the director of the laboratory;
   (b) determines that the container is accompanied by this report, with Part A completed;
   (c) determines that the donor's name and the date that the sample was taken have already been entered on this report and on the container and that they correspond;
   (d) makes a log entry of the receipt of the sample and of any irregularity in the condition of the container or its seals;
   (e) places a laboratory number and the date of receipt on the log, on the container, and on this report, so that each has the same laboratory number and date of receipt;
   (f) completes and signs the Certificate of Receiving Employee, making specific notations as to any unu[g]nal circumstances, discrepancies, or irregularities in the condition or handling of the sample up to the time that the container and report are delivered to the analysis laboratory;
   (g) personally places the container with this report attached in a designated secure cabinet for the analyst or delivers it to the analyst.
3. When the blood sample is received by the analyst, the analyst:
   (a) makes sure the laboratory number on the container corresponds with the laboratory number on this report;
   (b) makes sure the analysis is conducted on the sample which accompanied this report at the time the report was received by the analyst;
   (c) conducts a chemical analysis of the sample and enters the results on this report;
   (d) retains the sample contain& and the raw data from the analysis;
   (e) completes and signs the Certificate of Analyst, noting any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis;
   (f) delivers this report to the reviewer.
4. The reviewer checks the calculations of the analysis, examines this report, signs the Certificate of Reviewer, and delivers the report to a laboratory employee for distribution.
5. An employee of the agency mails a copy of this report to the donor at the address shown on this report, by depositing it in an outgoing mail container which is maintained in the usual and ordinary course of business of the laboratory. The employee signs the certificate of mailing to the donor, and mails the original of this report to the submitting law enforcement agency.
6. The biological sample will be retained by the testing laboratory for a period of at least six (6) months pursuant to regulations of the scientific laboratory division.