No. 09-10876

IN THE

Supreme Court of the United States

DONALD BULLCOMING,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Susan Roth
Assistant Appellate Attorney
New Mexico Public Defender
Department
Attorney of Record
301 N. Guadalupe Street
Santa Fe, New Mexico 87501
susan.roth@state.nm.us
(505) 476-0741

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authority

REPLY BRIEF FOR PETITIONER

The State's brief in opposition agrees with the New Mexico Supreme Court's view that when a forensic analyst writes down the read-out from a machine in order to create evidence for a criminal prosecution, that analyst need not be confronted because his or her report does not contain subjective findings or conclusions. The State disagrees with the New Mexico Supreme Court's characterization of the blood alcohol report at issue as "testimonial," and argues that the admission of the report through a surrogate analyst is correct because the report is nontestimonial for two reasons: it contains only raw data, and it was not prepared under oath. The State's arguments, just like the New Mexico Supreme Court's reasoning, conflict squarely with this Court's precedent. This Court should grant certiorari and reverse.

1. The State's primary argument is: where an analyst is viewing raw data from a machine and transferring the results to a report, that analyst need not be cross-examined and a surrogate analyst will suffice to testify about the results. According to the State, a surrogate analyst who has 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 Petitioner's BAC level, and generated a computer print-out listing its results. The State is not

troubled by the surrogate analyst testifying in this case, where the evidence indicates that the surrogate had not spoken with the actual analyst about the test, observed the actual analysis, or interpreted or reviewed the analysis or the raw data computer print-out from the machine. The surrogate analyst was qualified to testify, according to the State, because he had knowledge about the general operation of the gas chromatograph machine, the laboratory's standard procedures in conducting blood alcohol analyses, and the final results that were written on the forensic blood alcohol report.[1] (BIO 8-13).

A. The State argues that there is no need to confront the actual forensic analyst by equating him to a mere scrivener. The State, citing the *dissent* from *Melendez-Diaz*, argues that a person who authors a blood report analysis is akin to "a copyist in the early 1800s who certified the truth and accuracy of the copy." BIO 10 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S.___, 129 S. Ct. 2527, 2553 (2009) (Kennedy, J., dissenting). But the majority rejected the dissent's argument, in terms squarely applicable here. Such clerks, the majority explained, "had no authority to furnish, as evidence for the trial of a lawsuit, [their] interpretation of what the record contains or shows, or to certify to its substance or

---

[1] Although the New Mexico Supreme Court states in its Opinion that the surrogate analyst was "qualified as an expert witness," he was not formally tendered by the State as an expert witness nor was he qualified as an "expert" by the trial court. *See* Pet. App. A at 11A.

effect." 129 S. Ct. at 2539. The majority continued to explain, "A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." *Id.* The majority's reasoning controls in this case.

Moreover, the actual analyst in this case was more than a mere scrivener. His role involved using scientific testing techniques, as well as reading the results from the gas chromatograph machine. The trial court testimony of the surrogate analyst explained that the actual analyst must open an original vial of blood and remove a small amount ("two aliquots") or two hundred micro-liters and place it in another vial with an "internal standard." The small sample of blood is capped in the new vial with a Teflon septum and then it is crimped with an aluminum top. Then, the glass vial is placed into a head space chromatograph with an auto sampler, which is about the size of a microwave. This machine detects which compounds are in the blood and a computer notifies the analyst of the substance and amount by recording information on a print-out, which the analyst reads.

Then the analyst records that information onto the blood alcohol report. In addition, the actual analyst certifies in the blood alcohol report chain of custody information such as "the seal of the sample was received intact and broken in the laboratory." Pet. App. D at 31A. The actual analyst also certifies in the report that

he or she followed the procedures set out on the reverse side of the report. Pet. App. D at 31A-32A. Then a reviewer (in this case, not the testifying surrogate analyst) certifies that the analysis was done according to procedures and that the analyst was qualified to conduct the analysis. Pet. App. D at 31A-32A.

B. The State (and the New Mexico Supreme Court) mistakenly portray the nontestifying forensic analyst in this case as a person who needs no scientific background and no special skills to analyze blood. After asserting that this person does not have to think or interpret anything, the State insists that it is appropriate to place a surrogate on the witness stand to repeat the analyst's testimonial statements—even though the surrogate had no personal knowledge of Petitioner's forensic test and played no role in the actual analysis and no role in reviewing the actual analysis. The State embraces the fact that Mr. Razatos, the surrogate analyst, testified that he agreed with the actual analyst's results; however, the record shows that he had no knowledge of the actual analyst's actions during the testing process, nor did he perform an independent analysis or review, or view the underlying data or notes. (BIO 8-10).

In *State v. Brewington,* 693 S.E.2d 182 (N.C. App. 2010), the prosecution, just as here, introduced one analyst's report through the testimony of another who was able to testify regarding general lab procedures but who did not herself assess the physical evidence or conduct any testing on it. *Id.* at 184, 190; *compare* Pet. App.A

at 11A-12A (Mr. Razatos, the surrogate analyst, testified regarding general procedures followed at the laboratory, the operation of the gas chromatograph machine but did not have any knowledge regarding the actual steps taken here).

The prosecution argued in *Brewington* that the surrogate testimony did not violate the Confrontation Clause because the testifying analyst reviewed the testing procedures that are typically adhered to at the lab, and reviewed the underlying notes and data of the actual analyst and the results of the examinations. *Brewington,* 693 S.E.2d at 184,190. The court rejected the surrogate's testimony as admissible "peer review" and found:

> It is clear from the testimony of [the testifying analyst] that she had no part in conducting any testing of the substance, nor did she conduct any independent analysis of *the substance.* She merely reviewed the reported findings of [the nontestifying analyst], and testified that if [that analyst] followed procedures, and if [that analyst] did not make any mistakes, and if [that analyst] did not deliberately falsify or alter the findings, then [the testifying analyst] "would have come to the same conclusion that she did." As the Supreme Court clearly established in *Melendez-Diaz,* it is precisely these "ifs" that need to be explored upon cross-examination to test the reliability of the evidence.

Id. at 190. The Court in *Brewington* concluded that under *Melendez-Diaz* and *State v. Locklear,* 363 N.C. 438, 681 S.E.2d 293 (2009), the surrogate's testimony was admitted in violation of defendant's right under the Confrontation Clause of the Sixth Amendment. *Id.*

This case, unlike *Brewington,* is a *pure* surrogate witness case. The surrogate analyst here not only had no involvement in the blood alcohol analysis, he did not review the underlying raw data or notes, or interpret or analyze the results himself. He simply explained how the test should have been performed, and read the actual analyst's results from the blood alcohol report into the record and assumed the results were correct.

C. The State argues that the New Mexico Supreme Courts' holding does not conflict with other federal appellate and state supreme courts' decisions because those decisions involved forensic "findings," "determinations," or "conclusions," instead of mere recitations of machine-generated data. BIO 10-17. But nothing about testimonial statements allegedly transcribing machine-generated data and certifying chain-of-custody information distinguishes them from other testimonial forensic statements.

Like it or not, lab analysts can (and occasionally do) falsify or simply *mistakenly record* lab data. [2] Accordingly, as this Court explained in *Melendez-Diaz*, the Clause guarantees an opportunity to test the "honesty" and care of the

---

[2] Lab analysts record data from machines that print-out data during drug analysis. *See* 2 P. Giannelli & E. Imwinkelried, Scientific Evidence § 23.03 (4th ed.2007) (describing common methods of identifying drugs, including infrared spectrophotometry, nuclear magnetic resonance, gas chromatography, and mass spectrometry).

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." *Id.* at 2537 (citations omitted). Thus, *Melendez-Diaz* confirmed that in the context of forensic evidence, as everywhere else, "[a] witness's testimony against a defendant is" always "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). Even the dissent recognized as much, acknowledging under the Court's holding that an analyst who writes a statement that is introduced into evidence must testify at trial: "The Court implies that only those statements that are actually entered into evidence require confrontation." 129 S. Ct. at 2545 (Kennedy, J., dissenting).

2. The State argues that a blood alcohol report that contains information from the gas chromatograph machine is "raw data." BIO 10-12,17. The State misunderstands the concept of raw data. Machine-generated readings or printouts are raw data because they contain no human assertions. *See, e.g., State v. Appleby*,

221 P.3d 525, 548-49 (Kan. 2009); *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009).

But once someone, as here, writes a blood alcohol report that recites what the machine supposedly says, that is a testimonial statement. Courts do *not* distinguish among instances of surrogate testimony according to the level of subjectivity in the reports at issue. (BIO 10-11). There is not a category of witnesses, helpful to the prosecution, but somehow immune from confrontation on the basis of the supposed objectivity of their assertions. Were it otherwise, the prosecution could use surrogate witnesses to introduce testimonial statements that recorded the time on a clock when shots rang out or that transcribed the numbers on a license plate of a getaway car. These assertions are just as "objective" as any assertion in a forensic report might be.

But if there is one thing that *Crawford* and *Melendez-Diaz* make clear, it is that courts may no longer deem the Confrontation Clause satisfied merely because they believe a particular statement is so objective or otherwise "obviously reliable" that cross-examining the witness who made it is unnecessary. *Crawford v. Washington*, 541 U.S. 36, 62 (2004); *Melendez-Diaz*, 129 S. Ct. at 2536.

To the extent the State suggests by its citation to cases like *State v. Appleby*, 221 P.3d 525 (Kan. 2009), that the forensic report in this case is nontestimonial, this is not so. (BIO, 14-15). The fact that the blood alcohol report here recites

objectively discernible data, does not make it nontestimonial. This Court made clear in *Melendez-Diaz* that forensic reports cannot be deemed nontestimonial on the ground that they supposedly reflect "neutral, scientific testing." 129 S. Ct. at 2536.

To be sure, the court in *Appleby* held that the forensic documents at issue there were non-testimonial. 221 P.3d at 551. But those documents were machine-generated printouts containing no human assertions. *Id.* at 548-49. The documents, therefore, constituted genuine "raw data," which does not implicate the Confrontation Clause or the question presented here. *See United States v. Washington,* 498 F.3d 225 (4th Cir. 2007), *cert. denied,* 129 S. Ct. 2856 (2009).

Here, by contrast, the State did not try to introduce a computer printout from the gas chromatograph machine. Instead, the State introduced the nontestifying analyst's written assertions describing the evidence he tested, the procedures he followed, and the results he observed. *See* Pet. App. D at 31A-32A. Much as the State attempts to imply otherwise, those assertions are *not* "raw data." They are testimonial statements.

3. The State also argues that "the document in this case was not testimonial because it was not prepared under oath." BIO 17-24. But *Crawford* squarely rejected that argument, holding that "the absence of oath [i]s not dispositive." 541 U.S. at 52. "We find it implausible that a provision which concededly condemned

trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK." *Id.* at 52 n.3. Eight Justices reaffirmed this holding in *Davis v. Washington*, 547 U.S. 813 (2006), holding that "we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it." *Id.* at 826.

Just like the certificates of analysis in *Melendez-Diaz* that were deemed testimonial, the blood alcohol report in Petitioner's case is testimonial because it has a certification by the actual analyst and an attestation clause by the analyst's reviewer. Most importantly, the report is testimonial because it is a formal assertion designed to prove facts essential to the prosecution that would otherwise have to be proved by live, in court testimony.

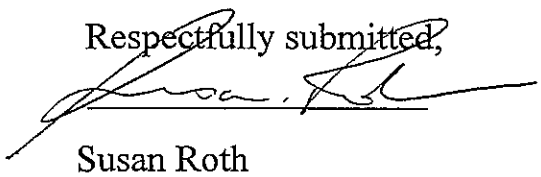
4. That leaves the New Mexico Supreme Court's holding that the prosecution may put a surrogate on the stand to repeat someone else's testimonial statements when those statements supposedly transcribe forensic data. This reasoning flies in the face of *Crawford*'s basic rule that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant. *Id.* at 54, 68. Indeed, 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.*; *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 . . . .").

CONCLUSION

There is no way to defend the result that the New Mexico Supreme Court reached in this case. Nor is there any logical way to distinguish it from other federal appellate and state supreme court decisions prohibiting surrogate forensic testimony under *Crawford* and *Melendez-Diaz*. The State's arguments are so in conflict with this Court's precedent that it may wish to consider summary reversal. But whatever the method, this Court should grant certiorari and reverse, so as to preserve and enforce the integrity of its decisions.

Respectfully submitted,



August 31, 2010

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

No. 09-10876

In the

SUPREME COURT OF THE UNITED STATES

DONALD BULLCOMING,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

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

ON PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Susan Roth, a member of the Bar of this Court, hereby certify that on the 31st day of August, 2010, one copy Petitioner's Reply Brief in the above-entitled case were mailed, first-class postage prepaid, to Ann Harvey, Esq., Assistant Attorney General, Attorney General's Office, PO Drawer 1508, Santa Fe, NM, 87504-1508, counsel for Respondent, State of New Mexico. I further certify that she is the only party required to be served, and that she has been served.

Susan Roth
Assistant Appellate Attorney
New Mexico Public Defender
Department
301 N. Guadalupe Street, Ste. 101
Santa Fe, New Mexico 87501
(505) 476-0741 or (505) 476-0730

Attorney for Petitioner