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# THE CONFRONTATION CLAUSE AND NEW MEXICO'S SHORT-LIVED ACCEPTANCE OF SURROGATE FORENSIC WITNESSES

Ethan Thomas\*

## I. INTRODUCTION

The facts of an apparent 2005 alcohol-related traffic accident in Farmington, New Mexico, and the DWI trial which ensued, created the perfect opportunity for the U.S. Supreme Court to examine the purpose behind the constitutional safeguard of a defendant's right to confrontation. On February 12, 2010, the New Mexico Supreme Court issued its opinion in *State v. Bullcoming*, which involved an alleged violation of defendant Donald Bullcoming's right to confrontation.<sup>1</sup> *Bullcoming* concerned a forensic analysis report conducted in a New Mexico crime lab, which was admitted into evidence despite the fact that a surrogate analyst testified in place of the analyst who conducted the forensic tests.<sup>2</sup> Instead of concluding that Bullcoming's right to confrontation was violated, the New Mexico Supreme Court, in essence, delineated an exception to the traditional manner in which confrontation takes place.<sup>3</sup> The essence of the New Mexico Supreme Court's exception was based on the premise that the analytical process required to come to the conclusions in forensic reports is determinative of whether a substitute forensic witness may fill in for another witness and still satisfy a defendant's right to confrontation.<sup>4</sup>

The New Mexico Supreme Court concluded that the analyst in *Bullcoming* who conducted the blood alcohol test "simply transcribed"

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1. *State v. Bullcoming*, 2010-NMSC-007, 226 P.3d 1.

2. *Id.*

3. *See id.* ¶ 1, 226 P.3d at 4.

4. *See id.* ¶ 20, 226 P.3d at 8–9.

the results generated by a gas chromatograph machine.<sup>5</sup> As the court put it, an analyst who conducts a blood alcohol test is a “mere scrivener” and the true accuser is the gas chromatograph machine which tests the blood alcohol content (BAC).<sup>6</sup> So, as the court concluded, allowing the in-court testimony of a substitute witness regarding machine-generated forensic reports is “sufficient” to satisfy the constitutional right to confrontation.<sup>7</sup>

In order to consider whether the practice employed by New Mexico in *Bullcoming* was constitutional, the U.S. Supreme Court granted certiorari on the case in the fall of 2010.<sup>8</sup> The case was argued before the Court in March of 2011 and the Court issued its opinion on June 23, 2011.<sup>9</sup> In a five to four decision, Justice Ginsburg writing for the majority held that surrogate testimony “does not meet the constitutional requirement” because a defendant has the right to be confronted “with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.”<sup>10</sup> In so holding the Court reversed and remanded Bullcoming’s conviction.<sup>11</sup> This article will examine the New Mexico Supreme Court’s reasoning, the related implications of its holding, and ultimately, agree with the U.S. Supreme Court’s conclusion that the New Mexico Supreme Court’s allowance of surrogate testimony in *Bullcoming* did not provide the adequate protection that the Confrontation Clause was intended to provide.

Part II of this article will examine the underpinnings of the constitutional right to confront one’s accusers as well as the evolution of Confrontation Clause jurisprudence over the past thirty years as it relates to forensic evidence. In tracing the trajectory of the Confrontation Clause, its historical roots will be explored by tracking its development in federal courts as well as its application in New Mexico. Part III of the article will provide an examination of the New Mexico Supreme Court’s decision in *Bullcoming*. It will then look at the U.S. Supreme Court’s review of the New Mexico case in *Bullcoming v. New Mexico*.<sup>12</sup>

After an in-depth look at the opinions, Part IV of the article will identify the problems with the New Mexico Supreme Court’s opinion. It will start with an analysis of why the short-lived New Mexico exception

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5. *Id.* ¶ 1, 226 P.3d at 4.

6. *Id.* ¶ 1, 226 P.3d at 4.

7. *Id.* ¶ 19, 226 P.3d at 9.

8. *Bullcoming v. New Mexico*, 131 S.Ct. 62 (2010) (granting certiorari).

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

10. *Id.* at 2710.

11. *Id.* at 2707, 2719.

12. 131 S.Ct. 2705.

ignored some of the core purposes of the Confrontation Clause by allowing a substitute analyst to testify in place of the particular analyst involved in the forensic testing. The article will also address the pragmatic concerns raised by supporters of the New Mexico exception and convey the author's opinion that constitutional protections cannot give way to governmental convenience.

## II. THE CONFRONTATION CLAUSE'S DEEP ROOTS

One of the key parts of the adversarial justice system employed in the United States is giving both parties the opportunity to question the evidence and theories presented by the opposing party.<sup>13</sup> The importance of cross-examination is one of the reasons that a defendant in a criminal case is afforded the opportunity "to be confronted with the witnesses against him."<sup>14</sup> Because of the Sixth Amendment's promise, prohibiting a criminal defendant from confronting his or her accusers is not only a violation of constitutional rights, but it also raises doubt as to the fairness of the trial being conducted.<sup>15</sup>

The right to confront one's accusers has a rich lineage believed to trace back to Roman times.<sup>16</sup> In a biblical passage Festus, the Roman Governor, while discussing the treatment of Paul during his imprisonment stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."<sup>17</sup> Evidence suggests that the basic principle of confrontation has been acknowledged for at least 1,500 years and developed from its Roman legal influence.<sup>18</sup>

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13. ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* 71 (1992).

14. U.S. CONST. amend. VI.

15. GARCIA, *supra* note 13, at 71.

16. *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988).

17. *Id.* at 1015-16 (quoting *Acts* 25:16).

18. Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481-84 (1994) ("The principle of confrontation, in the sense of the right of defendants to have accusing witnesses produced before them, developed along three main lines, each originating in Roman law. First, legislation of the Emperor Justinian in the year 539 provided the normative foundation of the right of witness confrontation. This norm derived from preexisting practice and was based on the heightened necessity for accurate fact-finding in criminal cases. Second, Pope Gregory I emphasized the guarantee of fundamentally fair procedures to an accused person when he applied Justinian's legislation in the year 603. Finally, the great pseudoisidorean forgeries of the mid-ninth century initiated a third line of development by creating a powerful defense tool to ward off unfair accusations and unreliable testimony.") (footnotes omitted).

While the Roman law had a strong tradition of recognizing the importance of confrontation, most of the Framers' knowledge of the subject came from the common law.<sup>19</sup> The right to confront witnesses evolved in the English common law and was a reaction to the one-sided and non-adversarial court systems found throughout England at that time.<sup>20</sup> Court sessions practicing in this manner often allowed judicial officers to examine witnesses in private and then permitted the evidence of those examinations to be presented in writing during the trial.<sup>21</sup> These written examinations differed from the common law tradition of live in-court testimony and also brought demands by defendants to bring their accusers into court where they could confront them face-to-face.<sup>22</sup> While many requested the witnesses be brought in court to testify, the courts at that time sometimes declined to grant the requests of these defendants.<sup>23</sup>

One of the most notorious examples of this type of trial was the 1603 trial of Sir Walter Raleigh.<sup>24</sup> Raleigh was accused of treason after one of Raleigh's alleged accomplices, Lord Cobham, implicated him in a letter and during questioning before the Privy Council.<sup>25</sup> Later, the examination and letter were read to the jury during the trial, where Raleigh objected to its reliability arguing that Cobham had lied in order to save himself.<sup>26</sup> Raleigh then demanded that Cobham be called to appear in court as he suspected Cobham would recant.<sup>27</sup> Raleigh argued with the court that the common law proof requirement is through witnesses and juries and that his accuser should be brought before his face.<sup>28</sup> The English court rejected Raleigh's request, and he was convicted and sentenced to death.<sup>29</sup>

The English law eventually developed the right to confrontation and "limited the abuses" that were on full display in Raleigh's trial.<sup>30</sup> Many have credited Raleigh's trial with bringing the attention necessary to lead

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19. *Crawford v. Washington*, 541 U.S. 36, 43 (2004).

20. MICHELLE LEWIS, *RIGHTS OF THE ACCUSED* 17 (2007).

21. *Crawford*, 541 U.S. at 43.

22. *Id.* at 43.

23. *Id.*

24. *Id.* at 44.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

to this common law right and eventually the Sixth Amendment.<sup>31</sup> However, others believe that Raleigh's trial made no contribution to the eventual passage of the Sixth Amendment and the trial only provides a "convenient but highly romantic myth."<sup>32</sup> Regardless of whether Raleigh's trial was the starting point of an evolution that led to the Sixth Amendment, it was in the seventeenth century when the right of criminal defendants to confront their accusers "slowly took root in English jurisprudence."<sup>33</sup>

By the time of the American Revolution, Virginia, Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire had all adopted declarations of rights guaranteeing a right of confrontation.<sup>34</sup> After some debate, the First Congress followed suit and included the Confrontation Clause in its proposed Bill of Rights.<sup>35</sup> Raleigh's effect on the Framers is still unknown, but some of the first Supreme Court cases interpreting the clause mirrored the same "trial by affidavit" issue that was the focal point of Raleigh's trial.<sup>36</sup> In those early cases, the Court upheld the defendant's right to confrontation, but recognized certain limitations. The Court began to wrestle with the "proper balance between the defendant's right to confrontation and the government's need to introduce out-of-court statements into evidence" that continues to be examined by the Court today.<sup>37</sup>

#### A. Federal Background

The U.S. Supreme Court has taken many opportunities to review the requirements of the Confrontation Clause, yet the way the Court has determined whether a specific piece of evidence is subject to the clause, and what exactly violates the clause, has evolved over time.<sup>38</sup> There have been three distinct eras of interpretation regarding the Confrontation Clause. The three main eras of interpretation which warrant discussion are the *Mattox* Era, the *Roberts* Era, and the current framework known

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31. See, e.g., FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 104 (Greenwood Press 1969) (1951).

32. See, e.g., GARCIA, *supra* note 13, at 73 (quoting Graham, *The Right to Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n. 4).

33. Herrmann and Speer, *supra* note 18, at 482.

34. *Crawford*, 541 U.S. at 48.

35. *Id.* at 49.

36. GARCIA, *supra* note 13, at 73.

37. *Id.*

38. GEORGE FISHER, *EVIDENCE* 567–87 (2nd ed. 2008) (examining Confrontation Clause evolution).

as the *Crawford* Era. The way each of these time periods approach confrontation shows not only an evolution in jurisprudence but also in courtroom procedures and how evidence is gathered.

### 1. The *Mattox* Era

The *Mattox* Era originated in 1895 as a result of the Court's decision in *Mattox v. United States*.<sup>39</sup> *Mattox* involved a man who had been convicted of murder and was granted another trial after an appeal.<sup>40</sup> At the new trial, the defendant was once again convicted but the strongest proof against him was a transcribed copy of the testimony of two of the government's witnesses from the previous trial.<sup>41</sup> The two men were recently deceased when the new trial began and were thus unavailable to testify, but both had been at the former trial and were cross-examined in that proceeding.<sup>42</sup> In *Mattox*, the Court stated a compelling definition of the Confrontation Clause's primary objective:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.<sup>43</sup>

While the Court acknowledged that an accused should never lose this opportunity to confront an accuser, it recognized that general rules of law must at times "give way to considerations of public policy and necessities of the case."<sup>44</sup> The Court noted that it would be carrying this constitutional protection to an unwarrantable extent if an accused killer went "scot free" only because "death has closed the mouth" of a witness that had already helped convict him in an earlier case.<sup>45</sup> The Court acknowledged that the substance of the constitutional protection is preserved for the defendant because he already had the opportunity to see the accusers

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39. 156 U.S. 237 (1895); see FISHER, *supra* note 38, at 565-68.

40. *Mattox v. United States*, 156 U.S. 237 (1895).

41. *Id.* at 240.

42. *Id.*

43. *Id.* at 242-43.

44. *Id.* at 243.

45. *Id.*

face-to-face and subject them to cross-examination.<sup>46</sup> *Mattox* remained mindful that the object of the constitutional provision was to prevent the abuses of using ex parte affidavits as evidence in place of in-court testimony.<sup>47</sup> However, the Court also acknowledged that at times practical considerations might give way to confrontation, but those considerations may only trump the constitutional requirements if the substance of the protection is preserved.<sup>48</sup>

Near the end of the *Mattox* Era one other significant development occurred. In 1965, the Court extended the application of the right to confrontation in *Pointer v. Texas* by holding that the Sixth Amendment's Confrontation Clause was incorporated by the Due Process Clause and was therefore binding on the states.<sup>49</sup>

## 2. The *Roberts* Era

Confrontation Clause caselaw further developed in 1980 when the Court decided *Ohio v. Roberts*.<sup>50</sup> Herschel Roberts was arrested and charged in Lake County, Ohio, with check forgery and possession of a stolen credit card.<sup>51</sup> In a preliminary hearing the prosecution called the owner of the stolen check and credit card to testify.<sup>52</sup> The owner's daughter, Anita, was called as a defense witness and was questioned at some length about her acquaintance with the defendant and how she had allowed him to live at her apartment for some time while she was away.<sup>53</sup> The questioning seemed to be an attempt to get Anita to admit that she had given Roberts the check and credit card to use without telling him that she did not have permission to use them.<sup>54</sup> Despite repeated questioning, Anita continued to deny giving her parents' property to Roberts at any time.<sup>55</sup>

In the months before trial, Anita was issued five subpoenas to appear at trial as a witness, but according to her mother she had moved out of state, and the family had only heard from her once since the preliminary hearing.<sup>56</sup> Anita did not appear at the trial, and Roberts took the stand and testified that Anita had given him her parents' checkbook and

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46. *Id.* at 244.

47. *Id.* at 242–43.

48. *See id.* at 243–44.

49. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

50. *Ohio v. Roberts*, 448 U.S. 56 (1980); *see* FISHER, *supra* note 38, at 569.

51. *Roberts*, 448 U.S. at 58.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 59–60.



credit card in order for him to use them.<sup>57</sup> In rebuttal, the judge allowed the State to introduce the transcript of Anita's preliminary hearing testimony in which she denied Roberts' claims, and Roberts was convicted.<sup>58</sup> Roberts appealed, asserting that the admission of the transcript was a violation of the Confrontation Clause.<sup>59</sup> The Court of Appeals of Ohio reversed the conviction, but later, the Supreme Court of Ohio affirmed it.<sup>60</sup>

The U.S. Supreme Court granted certiorari to consider the Confrontation Clause issue. The Court ultimately set forth the two-part "indicia of reliability" test for determining the admissibility of hearsay evidence under the clause.<sup>61</sup> Under the first prong, the prosecution must either "produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."<sup>62</sup> The court rooted this aspect of the two-part test in the Framer's preference for face-to-face accusation.<sup>63</sup> The second prong requires that any hearsay statement must be trustworthy in order to be admitted at trial and is "admissible only if it bears adequate 'indicia of reliability.'"<sup>64</sup> A reliability determination, according to the Court, promotes the underlying purpose of accurate fact-finding.<sup>65</sup> The Court concluded that although Anita was not called as an adverse witness at the preliminary hearing, she was essentially cross-examined by defense counsel in that hearing, and because of that opportunity, the transcript had a sufficient amount of reliability.<sup>66</sup> The Court also determined that Anita was correctly found to be unavailable as the prosecution showed "good-faith" in its efforts to try to locate and present her as a witness, which the Court said is all that is required by the Sixth Amendment.<sup>67</sup> *Roberts* gave rise to nearly a quarter-century of caselaw where the "indicia of reliability" test determined whether a piece of evidence violated the Confrontation Clause.<sup>68</sup>

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57. *Id.* at 59.

58. *Id.* at 59–60.

59. *Id.* at 60–62.

60. *Id.* at 60.

61. *Id.* at 65–66.

62. *Id.* at 65.

63. *Id.*

64. *Id.* at 66.

65. *Id.*

66. *Id.* at 70 n.11 ("No less than 17 plainly leading questions were asked . . .").

67. *Id.* at 74–75.

68. Jody L. Sellers, *No Witness? No Admission: The Tale of Testimonial Statements and Melendez-Diaz v. Massachusetts*, 61 *MERCER L. REV.* 683, 685 (2010).

### 3. The *Crawford* Era

In 2004, the Court decided *Crawford v. Washington*, a case which abrogated *Roberts* and its “indicia of reliability” standard.<sup>69</sup> Michael Crawford was arrested and charged with assault with a deadly weapon after he stabbed a man who allegedly tried to rape Crawford’s wife.<sup>70</sup> Crawford claimed self-defense, and his wife did not testify based on the Washington state marital privilege.<sup>71</sup> At the trial, prosecutors played his wife’s taped statement to police describing the stabbing, which was inconsistent with her husband’s account that the other man drew a weapon before Crawford assaulted him.<sup>72</sup> Crawford had no opportunity to cross-examine his wife about the tape-recorded statement, but the trial court allowed the statement into evidence.<sup>73</sup> He was convicted, and the Washington Supreme Court upheld the conviction because it determined that the statement was “reliable” under *Roberts*.<sup>74</sup>

The Supreme Court granted certiorari to determine whether the use of the statement violated the Confrontation Clause.<sup>75</sup> The Court examined the history of the Confrontation Clause including its Roman history, the English common law’s application, and the infamous trial of Sir Walter Raleigh.<sup>76</sup> Justice Scalia, writing for the Court, stated that history supports two inferences about the meaning of the Confrontation Clause: (1) that the Confrontation Clause was principally concerned with, and directed at the use of, “testimonial” evidence offered against the accused; and (2) that the Framers would not have allowed admission of “testimonial” statements unless the declarant was unavailable to testify, and the defendant had a prior opportunity to cross-examine the witness.<sup>77</sup>

The Court stated that the “testimonial” aspect of the Confrontation Clause comes from the focus of confronting witnesses against the accused, “in other words, those who ‘bear testimony.’”<sup>78</sup> The Court gave an example of this distinction by pointing out the difference between an accuser who makes a formal statement to government officers and essentially bears testimony and someone who makes a casual remark to an

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69. *Crawford v. Washington*, 541 U.S. 36 (2004).

70. *Id.* at 38, 40.

71. *Id.* at 40.

72. *Id.* at 38–39.

73. *Id.* at 38–41.

74. *Id.*

75. *Id.* at 42.

76. *Id.* at 42–50.

77. *Id.* at 50–56.

78. *Id.* at 51 (citation omitted).

acquaintance.<sup>79</sup> The Court then gave a few “formulations” of what testimonial evidence is. For instance, *ex parte* in-court testimony, affidavits, depositions, or other custodial examinations were all considered “testimonial” by the Court.<sup>80</sup> The Court went on to state that even if the Sixth Amendment is not solely concerned with “testimonial” hearsay, that type of hearsay was its primary target, and interrogations by law enforcement officers “fall squarely within that class” of statements.<sup>81</sup> As to the second requirement, the Court stated that the requirement that the witness be unavailable and the need for prior cross-examination in order for the statements to be admitted is clearly rooted in history, and the “Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.”<sup>82</sup>

Justice Scalia noted that as the caselaw has evolved, the results of the cases have remained faithful to the Framers’ understanding of the Confrontation Clause, but that the “same cannot be said of [the Court’s] rationales.”<sup>83</sup> Scalia proclaimed that the *Roberts* test’s focus on a judicial determination of reliability is one of those flawed rationales.<sup>84</sup> The “unpardonable vice” of *Roberts*, according to the Scalia, was not its evident unpredictability, but its “demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”<sup>85</sup>

According to the Court, the failings of *Roberts* were on full display in *Crawford*.<sup>86</sup> While *Crawford*’s wife’s statement made in police custody implicated her husband in the stabbing, the trial court still allowed it based on a finding of reliability, and the state supreme court followed suit

79. *Id.*

80. *Id.* at 51–52 (“*Ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, . . . extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”) (internal quotation marks and citations omitted).

81. *Id.* at 53.

82. *Id.* at 54.

83. *Id.* at 57–60.

84. *Id.* at 60. Chief Justice Rehnquist with whom Justice O’Connor joined, concurred in the judgment, but disagreed with the Court’s decision to overrule *Ohio v. Roberts* because they believed the new interpretation of the Confrontation Clause “is not backed by sufficiently persuasive reasoning to overrule long-established precedent.” *Id.* at 70–76 (Rehnquist, C.J., concurring in the judgment).

85. *Id.* at 63.

86. *Id.* at 65–66.

by finding its own reasons for reliability as well.<sup>87</sup> One basis for the trial court's reliability determination was that the questioning came from "neutral" government officers that would have no interest in shading Crawford's wife's version of the truth in one way or the other.<sup>88</sup> The Supreme Court responded by pointing out that even if the state court's assessment of law enforcement's motives were accurate, the "Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers."<sup>89</sup> While the Court could have reversed the conviction simply by reweighing the *Roberts* factors and coming to the conclusion that the recorded statements were not reliable, the Court chose not to do so because it viewed it "as one of those rare cases in which the result below is so improbable that it reveals the fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion."<sup>90</sup> The Court noted that it would wait to fully define what "testimonial" evidence is in the future.<sup>91</sup> However, the Court reversed Crawford's conviction because his wife's statements played in

87. *Id.*

88. *Id.* at 66.

89. *Id.*

90. *Id.* at 67.

91. *Crawford*, 541 U.S. at 69. Since *Crawford*, the Supreme Court has given some examples of what "testimonial" evidence is. In *Davis v. Washington*, 547 U.S. 813 (2006), the Court explained which police interrogations produced testimonial statements. *Id.* at 822. Instead of defining all conceivable statements to police, the Court held that:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at 822. Another important case outlining "testimonial" evidence was *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). See *infra* Part II.A.3 (discussing *Melendez-Diaz*). The most recent explanation of "testimonial" evidence was in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). In *Bryant*, the court held that statements of a shooting victim identifying to police his alleged shooter, which were made at least twenty-five minutes after the shooting took place, constituted an on-going emergency and thus were not "testimonial." *Id.* at 1150, 1166. The majority's decision drew harsh criticism from Justice Scalia, who clearly believed these statements were testimonial, and who took issue with what he considered the Court's broad interpretation of an on-going emergency. See *id.* at 1168–77 (Scalia, J., dissenting). Scalia stated: "Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the

court clearly were testimonial and he was not afforded the opportunity to cross-examine her.<sup>92</sup>

One later elaboration of “testimonial” evidence came in its application to forensic evidence reports which was the focus of the Court’s decision in *Melendez-Diaz v. Massachusetts*.<sup>93</sup> *Melendez-Diaz*’s contribution to the Confrontation Clause analysis laid-out in *Crawford* is the determination that forensic reports qualify as testimonial evidence. In *Melendez-Diaz*, a Massachusetts court admitted into evidence three “certificates of analysis,” which showed the results of forensic analysis performed on bags of a seized white substance police believed to be cocaine.<sup>94</sup> The bags were found in the possession of three men, one of whom was the defendant-appellant Luis Melendez-Diaz.<sup>95</sup> The three certificates contained the weight of the seized bags and stated that the bags were “examined with the following results: The substance was found to contain: Cocaine.”<sup>96</sup> The reports were sworn to by analysts of a state laboratory, as required under Massachusetts law, and when prosecutors attempted to introduce the reports into evidence, Melendez-Diaz objected. He contended that the Confrontation Clause required the analysts to testify in person.<sup>97</sup> The trial court admitted the certificates, and a jury found Melendez-Diaz guilty of distributing and trafficking cocaine.<sup>98</sup>

The U.S. Supreme Court granted certiorari to answer the question of whether forensic reports are testimonial, thus making them subject to the Confrontation Clause.<sup>99</sup> In an opinion written by Justice Scalia, the plurality wasted no time coming to the conclusion that the documents in question fell “within the ‘core class of testimonial statements’” formulated in *Crawford*.<sup>100</sup> The Court explained that although the documents

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loose—is so transparently false that professing to believe it demeans this institution.” *Id.* at 1168.

92. *Id.*

93. 129 S.Ct. 2527 (2009).

94. *Id.* at 2530–31.

95. *Id.* at 2530.

96. *Id.* at 2531 (quotations and citations omitted).

97. *Id.*

98. *Id.* at 2530–31.

99. *Id.* at 2530.

100. *Id.* at 2530–32. Scalia’s resolution of the case was joined by Justices Stevens, Souter, Thomas and Ginsburg. *Id.* at 2530. Although he joined the majority’s judgment, Justice Thomas wrote a concurring opinion to note that he continues to adhere to his position that “‘the 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.’” *Id.* at 2543 (Thomas, J., concurring) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (opinion concurring in part and concurring in judgment)).

were titled “certificates,” they were “quite plainly affidavits” stating that the substance found was cocaine, which was “the precise testimony the analysts would be expected to provide if called at trial.”<sup>101</sup> The Court also noted that not only were these documents essentially affidavits, but their sole purpose was to be used at trial in order to provide “prima facie evidence” of the analyzed substance.<sup>102</sup> Thus, the Court concluded the certificates were testimonial statements. Since there was no showing that the analysts were unavailable to testify or that the defendant had a prior opportunity to cross-examine them, introduction of the certificates violated the Confrontation Clause.<sup>103</sup>

The Court’s opinion addressed what Scalia referred to as the “pot-pourri of analytical arguments” advanced by the dissenting justices and attorneys for the State of Massachusetts.<sup>104</sup> The State’s first argument was that analysts are not subject to confrontation because they are not “accusatory” witnesses given that the scope of their testimony is limited to the results of their analysis.<sup>105</sup> Scalia responded simply by noting that the text of the amendment contemplates only two types of witnesses, “those against the defendant and those in his favor.”<sup>106</sup> For that reason, there was no “third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.” The State’s second argument was that analysts should not be subject to the Confrontation Clause because they are not “conventional” witnesses who observed a crime or any human action related to it, and their statements were not in response to interrogation.<sup>107</sup> Scalia once again dismissed this argument by noting that there was no authority for that type of limitation and that the definition would carve an exception for all expert witnesses, which as a group are hardly “unconventional.”<sup>108</sup> He also noted that since affidavits were submitted in response to a police officer’s request, the affidavit should be subject to the Confrontation Clause just as a police officer’s request to a witness to “write down what happened” would be subject to constitutional protection if prosecutors attempted to introduce those types of writings in court absent an opportunity for cross-examination.<sup>109</sup>

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101. *Id.* at 2532.

102. *Id.* at 2531–32.

103. *Id.* at 2532.

104. *Id.* at 2532–33. Justice Kennedy filed the dissenting opinion, which was joined by Chief Justice Roberts and Justices Breyer and Alito. *Id.* at 2530.

105. *Id.* at 2533.

106. *Id.* at 2534.

107. *Id.* at 2535.

108. *Id.* at 2534–35.

109. *Id.* at 2535.

Scalia next addressed the State's argument that a difference exists for Confrontation Clause purposes between testimony recounting events and testimony that is the result of neutral scientific testing. It was argued that there would be little value to confronting these expert witnesses because forensic professionals will not feel differently about the results of their tests by having to "look at the defendant."<sup>110</sup> Scalia saw this argument as an attempt to return to the Court's overruled decision in *Roberts*, which allowed evidence as long as the court deemed it trustworthy.<sup>111</sup> The Court declined to revert back to that line of thinking. The Court noted that there could be better ways to challenge or verify the results of forensic evidence, but "the Constitution guarantees one way: confrontation."<sup>112</sup> As he hinted in *Crawford*, Scalia also refused to accept the rationale that this type of evidence was as "neutral" and "reliable" as was suggested.<sup>113</sup> Scalia noted that "[f]orensic evidence is not uniquely immune from the risk of manipulation" given that the majority of state laboratories are administered by law enforcement agencies.<sup>114</sup> For this reason, Scalia felt confrontation would better help to weed out a fraudulent analyst who might provide a false result, and likely deter fraudulent analysis in the first place.<sup>115</sup> Not only may confrontation of these witnesses help discover fraud, but it is also valuable for discovering "an analyst's lack of proper training or deficiency in judgment."<sup>116</sup> For these reasons, confrontation can be helpful for testing "honesty, proficiency, and methodology," which is commonly the focus in the cross-examination of most experts.<sup>117</sup>

The State also unsuccessfully argued that forensic certificates should be admissible because they are similar to business or official records admissible at common law.<sup>118</sup> The opinion cast doubt on the assumption that these documents prepared for litigation would actually qualify under one of those hearsay exceptions, but Scalia stated that even if they did fall within such hearsay exceptions, that does not abrogate the need for confrontation.<sup>119</sup> He elaborated that business and public records are generally admissible absent confrontation because they are not "testimonial." The

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110. *Id.* at 2536 (quotations and citations omitted).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 2536–37.

116. *Id.* at 2537.

117. *Id.* at 2538.

118. *Id.*

119. *Id.*

Court concluded that these documents prepared for use at trial were testimonial and, therefore, subject to confrontation.<sup>120</sup>

The State also argued that no Confrontation Clause violation should be found because the defendant could have issued a subpoena to the analysts had he wanted them to testify.<sup>121</sup> Scalia rejected this view in stating that the Confrontation Clause places a fundamental burden on the prosecution to present its witnesses, and “not on the defendant to bring those adverse witnesses into court.”<sup>122</sup> Finally, Scalia addressed the state’s request to “relax” the requirements of the Confrontation Clause in situations like this.<sup>123</sup> Scalia’s plurality vehemently opposed this request, stating:

The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.<sup>124</sup>

Scalia doubted the accuracy of both the dissent and the State’s predictions of the negative effects requiring analysts to be present at trial would have on state and federal laboratories.<sup>125</sup> Scalia doubted them because not all lab tests requested are implicated in a prosecution, only a small percentage of cases actually proceed to trial, and defense attorneys often stipulate to the nature of substances because the in-court testimony only “highlights” the forensic analysis.<sup>126</sup> Therefore the plurality did not believe its decision would “commence the parade of horrors” predicted by the State and dissenting justices.<sup>127</sup> Because admitting these certificates was plainly a violation of the Sixth Amendment, Melendez-Diaz’s conviction was reversed.<sup>128</sup>

### *B. The Confrontation Clause in New Mexico*

Confrontation Clause jurisprudence in New Mexico has also changed over the years, but most of the changes in interpretation occurred as a result of developments in the U.S. Supreme Court. During the

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120. *Id.* at 2540.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 2540, 2542.

127. *Id.* at 2542.

128. *Id.*



*Roberts* era, courts in New Mexico followed and applied the “indicia of reliability” standard.<sup>129</sup> In *State v. Christian*, the New Mexico Court of Appeals applied the *Roberts* standard in a case involving a BAC report which was admitted into evidence.<sup>130</sup> The report was prepared by a New Mexico state laboratory and stated that the defendant had a BAC level of .16 percent, which was well over the legal limit in New Mexico.<sup>131</sup> While the chemist who performed the test did not testify at trial, his supervisor at the lab did testify, and the defendant was convicted of DWI.<sup>132</sup> *Christian* appealed the conviction on the grounds that the absence of direct testimony from the chemist who performed the test and prepared the report was a violation of his right to confrontation.<sup>133</sup>

In an opinion written by Judge Bosson, the New Mexico Court of Appeals acknowledged that the Confrontation Clause places two conditions on the admission of hearsay evidence: “necessity and reliability.”<sup>134</sup> The court found that there were sufficient indicia of reliability because the report was prepared by the state lab and fit squarely in the hearsay exceptions as a business or public record.<sup>135</sup> As for the necessity requirement, the court stated that normally the prosecution must demonstrate that the declarant is unavailable for trial. However, this requirement can be excused when the utility of cross-examination is minimal, the defendant has other means to test the reliability of the records, or public policy would excuse the prosecution from producing the out-of-court declarant.<sup>136</sup> Although prosecutors did not attempt to explain the absence of the chemist, the court opined that the trial court had “sufficient reason to excuse the testimony.”<sup>137</sup> Thus, the court concluded there was no Confrontation Clause violation because the BAC tests performed by a gas chromatograph machine are “purely mechanical,” and the chemist’s supervisor testified that the report was valid and accurate.<sup>138</sup>

A *Roberts*-type Confrontation Clause analysis in New Mexico continued until the U.S. Supreme Court’s decision in *Crawford*. In late 2004, the New Mexico Supreme Court took the opportunity to interpret *Craw-*

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129. *State v. Christian*, 119 N.M. 776, 782, 895 P.2d 676, 682 (Ct. App. 1995).

130. *Id.* at 778, 895 P.2d at 678.

131. *Id.*

132. *Id.*

133. *Id.* at 782–83, 895 P.2d at 682–83. The defendant also challenged the admission of the report as a business or public record. *Id.* at 779–82, 895 P.2d at 679–82.

134. *Id.*

135. *Id.*

136. *Id.* at 782–83, 895 P.2d at 682–83 (quoting *State v. Austin*, 104 N.M. 573, 575–76, 725 P.2d 252, 254–55 (Ct. App. 1985)).

137. *Id.* at 783, 895 P.2d at 683.

138. *Id.*

ford, with its focus on “testimonial” evidence, when the court issued its opinion in *State v. Dedman*.<sup>139</sup> *Dedman* once again involved lab results of a BAC test performed by the state laboratory.<sup>140</sup> The State appealed after a trial court suppressed evidence of the BAC test because the report lacked foundation and the nurse who drew the blood was unavailable to testify, which the court determined violated the defendant’s right to confrontation.<sup>141</sup>

The court acknowledged that the U.S. Supreme Court had rejected *Roberts* in its opinion in *Crawford*, and therefore the court had to determine whether these BAC reports were testimonial.<sup>142</sup> The opinion, which was written by Justice Minzner, pointed out that while the U.S. Supreme Court distinguished between testimonial and non-testimonial evidence, it was reluctant to provide a “comprehensive definition” of what “testimonial” was.<sup>143</sup> The New Mexico Supreme Court opined that in *Crawford*, the U.S. Supreme Court seemed especially concerned with excluding evidence of information that is investigatory or prosecutorial in nature.<sup>144</sup> However, in the New Mexico Supreme Court’s estimation, BAC reports are not investigatory or prosecutorial because they are prepared by “non-adversarial” personnel, as opposed to law-enforcement.<sup>145</sup> The New Mexico Supreme Court also found that BAC reports are “very different from the other examples of testimonial hearsay evidence.”<sup>146</sup> After concluding that BAC reports are not testimonial, the New Mexico Supreme Court applied the *Roberts* standard of reliability and determined that because the report was grounded firmly in the hearsay exception and the utility of cross-examination was remote, admitting this report into evidence would not violate a defendant’s right to confrontation.<sup>147</sup>

### III. BULLCOMING

On February 12, 2010, the New Mexico Supreme Court issued an opinion which reflected its vision of the Confrontation Clause post-*Melendez-Diaz*. The case concerned forensic reports from a state crime lab and raised the question of whether the analyst who conducted the

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139. *State v. Dedman*, 2004-NMSC-037, 102 P.3d 628.

140. *Id.* ¶ 1, 102 P.3d at 629–30.

141. *Id.*

142. *Id.* ¶ 27, 102 P.3d at 636.

143. *Id.* ¶ 28, 102 P.3d at 636.

144. *Id.* ¶ 29, 102 P.3d at 636.

145. *Id.* ¶ 30, 102 P.3d at 636.

146. *Id.*

147. *Id.* ¶ 32–41, 102 P.3d at 636–38.

forensic tests and created the reports was required to testify in court or whether one of their supervisors could testify in their place. What began as a fairly routine case which stemmed from an apparent alcohol-related traffic accident in small-town Farmington, New Mexico, carried with it legal issues so important that soon after New Mexico's opinion was released the U.S. Supreme Court granted certiorari and eventually issued its own opinion on the matter.

#### A. State v. Bullcoming

In the late afternoon of August 14, 2005, Donald Bullcoming was driving in Farmington, New Mexico, when he rear-ended another truck.<sup>148</sup> After the accident, the driver of the truck approached Bullcoming's vehicle and asked to exchange identification and insurance information.<sup>149</sup> While talking to Bullcoming, the other driver noticed the smell of alcohol and asked his wife to call the police.<sup>150</sup> As the other driver examined his truck for damage, Bullcoming approached him and the other driver noticed more signs of intoxication.<sup>151</sup> At some point the other driver informed Bullcoming that he needed a police report and that the police had been called.<sup>152</sup> At that time, Bullcoming walked away from the scene of the accident.<sup>153</sup>

A Farmington police officer responded to the call and discovered that Bullcoming had left the accident scene, so he left in pursuit of him.<sup>154</sup> Moments later, the officer spotted Bullcoming crossing a bridge and confronted him. After Bullcoming was taken back to the scene of the accident, he failed a series of field sobriety tests, and was arrested for DWI.<sup>155</sup> Because Bullcoming had refused to take a breath test, a blood alcohol test was performed.<sup>156</sup> The results of that test showed that Bullcoming had a BAC of .21 gms/100ml, which was well over the legal limit of .08 gms/100 ml.<sup>157</sup> Bullcoming was later convicted of aggravated DWI, a fourth-

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148. State v. Bullcoming, 2010-NMSC-007, ¶ 3, 226 P.3d 1, 4; State v. Bullcoming, 2008-NMCA-097, ¶ 2, 189 P.3d 679, 681; Respondent's Brief in Opposition to Certiorari at 1, Bullcoming v. New Mexico, No. 0940876 (U.S. Aug. 20, 2010).

149. Bullcoming, 2008-NMCA-097, ¶ 2, 189 P.3d at 681.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. State v. Bullcoming, 2010-NMSC-007, ¶ 4, 226 P.3d 1, 4.

155. *Id.* ¶ 4, 226 P.3d at 5.

156. *Id.*

157. *Id.*

degree felony in New Mexico, and sentenced to a prison term of two years.<sup>158</sup>

### 1. Bullcoming's Trial

At trial, State's Exhibit 1 was the laboratory report analyzing the blood sample taken from Bullcoming,<sup>159</sup> which was introduced through the testimony of an analyst of the New Mexico Department of Health, Scientific Laboratory Division, Toxicology Bureau (SLD).<sup>160</sup> The analyst who testified at trial was not the same analyst who prepared Exhibit 1 because at the time of the trial the analyst who had prepared the report, Curtis Caylor, had recently been placed on unpaid leave.<sup>161</sup> The analyst who did testify at the trial explained that the instrument used to analyze a defendant's blood is called a gas chromatograph machine, which detects compounds and then prints out the results of the test.<sup>162</sup> The analyst went on to testify that once the machine prints out the result, that result is transcribed onto reports such as Exhibit 1.<sup>163</sup> At one point, the prosecutor asked whether any human being could look at the printout and record the result, to which the analyst responded, "Correct."<sup>164</sup>

Bullcoming objected to the admission of Exhibit 1 because Caylor, the analyst who performed the test and created the report was not at trial to testify, and as such, it violated his constitutional right to confrontation.<sup>165</sup> Bullcoming also argued that because Exhibit 1 was prepared in anticipation of trial, it did not qualify as a business record under the business record exception to the rule against hearsay.<sup>166</sup> The district court overruled the confrontation objection and allowed the report to be admitted into evidence as a business record.<sup>167</sup>

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158. *Id.*

159. *Id.* ¶ 6–7, 226 P.3d at 6. State's Exhibit 1 is a two-page document containing information about the chain of custody, detailed procedures that must be followed by laboratory personnel, the results of the testing, as well as areas for the analyst to certify that procedures were followed in the receiving and testing process. *Id.* ¶ 6–7, 226 P.3d at 6.

160. *Id.* ¶ 6, 226 P.3d at 5.

161. *Id.* ¶ 8, 226 P.3d at 6.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* ¶ 9, 226 P.3d at 6.

166. *Id.*

167. *Id.*

## 2. New Mexico Court of Appeals

Bullcoming appealed his conviction arguing that the district court erred in admitting the blood draw results into evidence, despite the fact that the analyst who prepared the report was unable to testify.<sup>168</sup> Relying on the U.S. Supreme Court's decision in *Crawford*, Bullcoming contended that testimonial statements, like those contained in Exhibit 1, may not be introduced against a defendant at trial unless the declarant is unable to testify and the defendant has had the opportunity to cross-examine the declarant, neither of which was proven at trial by the State.<sup>169</sup> However, relying on *Dedman*, the New Mexico Court of Appeals held that the blood alcohol report was non-testimonial and did not violate *Crawford* because this type of report was "prepared routinely with guarantees of trustworthiness," and therefore it was not a violation of the Confrontation Clause to allow the report to be entered into evidence.<sup>170</sup> The court of appeals went on to affirm Bullcoming's conviction, so Bullcoming petitioned the New Mexico Supreme Court.<sup>171</sup>

## 3. *Bullcoming* and the New Mexico Supreme Court

In an opinion written by Justice Maes, the New Mexico Supreme Court held that a laboratory report offered to prove a defendant's BAC was testimonial evidence, which makes it subject to the Confrontation Clause.<sup>172</sup> In doing so, the court overruled its previous opinion in *Dedman*, which was the basis for the court of appeals' decision to affirm Bullcoming's conviction.<sup>173</sup> Although the court held that this type of forensic report was testimonial and subject to the Confrontation Clause, the court determined that the analyst who prepared Exhibit 1 "was a mere scrivener," and thus concluded that the in-court testimony of a separate

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168. *State v. Bullcoming*, 2008-NMCA-097, ¶ 1, 189 P.3d at 681. Along with the Confrontation Clause challenge, Bullcoming raised four other issues: (1) that a prosecutor's comment about silence during his closing argument was grounds for a mistrial, (2) that the district court abused its discretion by allowing a police officer to testify about the cause of an accident when the officer did not witness the accident, (3) that the district court erred in admitting into evidence a hearsay statement made by Bullcoming's brother, and (4) that the State did not sufficiently prove Bullcoming's four prior DWI convictions. *Id.* ¶ 1, 189 P.3d at 681.

169. *Id.* ¶ 14, 189 P.3d at 684.

170. *Id.* ¶ 17, 189 P.3d at 685.

171. *Id.* ¶ 28, 189 P.3d at 687. The court declined to overturn the conviction on the grounds of any of the other challenges as well. *Id.*

172. *State v. Bullcoming*, 2010-NMSC-007, ¶ 16-18, 226 P.3d 1, 7-8.

173. *Id.* ¶ 16, 226 P.3d at 8.

qualified analyst was sufficient<sup>174</sup> to fulfill Bullcoming's right to confrontation.<sup>175</sup> Based on the court's conclusions,<sup>176</sup> Bullcoming's conviction was affirmed.<sup>177</sup>

a. The *Melendez-Diaz* Effect

The New Mexico Supreme Court explained that while the U.S. Supreme Court clearly held in *Crawford* that the Confrontation Clause prohibited testimonial statements unless the declarant was unable to testify and the defendant had the chance to cross-examine that person at some point, the Court "declined to definitively state what constitutes a 'testimonial' statement."<sup>178</sup> In *Dedman*, the New Mexico Supreme Court held that BAC reports prepared by SLD were public records and non-testimonial under *Crawford* because public records are not "investigative or prosecutorial" in nature.<sup>179</sup> The court explained that in *Dedman* it had reasoned that these reports were both public records and not subject to the Confrontation Clause for essentially the same reasons: because they "follow a routine manner of preparation that guarantees a certain level of

174. On the same day *Bullcoming* was issued, the New Mexico Supreme Court also issued an opinion in *State v. Aragon*, another Confrontation Clause case with similar facts to *Bullcoming*. *State v. Aragon*, 2010-NMSC-008, 225 P.3d 1280. *Aragon* also involved a substitute witness testifying about a report that another analyst at the state crime lab had completed—but it differed from *Bullcoming* because the report in *Aragon* was a narcotic report. *Id.* at ¶ 30, 225 P.3d at 1290. In *Aragon*, the New Mexico Supreme Court held that to allow a substitute witness to testify about a narcotic report would violate the Confrontation Clause because, unlike the BAC report in *Bullcoming*, in order for an analyst to come to the conclusion of whether a substance is a narcotic, he must form an opinion based upon "specialized knowledge or skill." *Id.* Therefore, *Aragon* had the right to challenge the "judgment and conclusions" behind that opinion during cross-examination. *Id.* The Court stated that some of the issues that could have been explored in cross examination were: what test was performed, whether that test was routine, whether the test results required interpretation and the exercise of judgment, the use of skills that the analyst might not have possessed, any biases she might have, the risks of error in interpretation and whether she made any of those errors. *Id.* ¶ 33, 225 P.3d at 1291.

175. *Bullcoming*, 2010-NMSC-007, ¶ 19, 226 P.3d at 8–9.

176. The court also held that: (1) the trial court did not abuse its discretion in allowing a police officer to testify as an expert on the cause of an accident at issue in the case without witnessing it, and (2) that the trial court erred in admitting Bullcoming's brother's out of court hearsay statements, but that allowing the statements to come into evidence was a harmless error. *Id.* ¶ 2, 226 P.3d at 4.

177. *Id.* ¶ 42, 226 P.3d at 14.

178. *Id.* ¶ 11, 226 P.3d at 6.

179. *Id.* ¶ 12, 226 P.3d at 6 (quoting *State v. Dedman*, 2004-NMSC-037, ¶¶ 30, 45–46, 102 P.3d at 628).

comfort as to their trustworthiness.”<sup>180</sup> The *Dedman* court concluded that the BAC tests in question were “routine, non-adversarial, and made to ensure an accurate measurement” and therefore were non-testimonial and did not present the same potential for abuse that reports prepared by law enforcement personnel did.<sup>181</sup>

In 2009, while the *Bullcoming* case was pending, the U.S. Supreme Court decided *Melendez-Diaz*, in which the Court determined that certificates prepared by a forensic laboratory analyst fell within the core class of testimonial statements identified in *Crawford*.<sup>182</sup> The New Mexico Supreme Court noted that for two reasons *Melendez-Diaz* “throws into doubt” its assessment of blood alcohol reports in *Dedman*.<sup>183</sup> First, the court stated that *Melendez-Diaz* clarified that analysts’ reports do not qualify as business or public records because their main purpose is for use in court, not in the analyst’s business.<sup>184</sup> Second, *Melendez-Diaz* highlighted that even with forensic evidence there is the same potential for abuse as there is in evidence produced by law enforcement officials.<sup>185</sup> The court concluded that, for these reasons, *Dedman*’s holding that blood alcohol tests are non-testimonial does not fall in line with *Melendez-Diaz*.<sup>186</sup>

The State argued that Justice Thomas only joined the conclusion in *Melendez-Diaz* because he agreed that forensic reports were sworn affidavits which are clearly governed by the Confrontation Clause.<sup>187</sup> Following that reasoning, the State argued that because the report in the present case was not a sworn document like the reports in *Melendez-Diaz*, the two cases should be distinguished.<sup>188</sup> However, the court pointed out that an affidavit is only listed as one of several examples of testimonial materials, and the absence of an oath was not dispositive in determining

180. *Id.* ¶ 12, 226 P.3d at 6–7 (quoting *Dedman*, 2004-NMSC-037 ¶¶ 24–25, 102 P.3d at 628).

181. *Id.* ¶ 12, 226 P.3d at 7 (quoting *Dedman*, 2004-NMSC-037 ¶¶ 29–30, 102 P.3d at 628).

182. *Id.* ¶ 13, 226 P.3d at 7 (citing *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009)); see *supra* Part II.A.3 (discussing *Melendez-Diaz*).

183. *Bullcoming*, 2010-NMSC-007, ¶ 16, 226 P.3d at 7.

184. See *id.* ¶ 16, 226 P.3d at 8.

185. See *id.* (quoting *Melendez-Diaz*, 129 S.Ct. at 2536) (stating 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”).

186. *Id.* ¶ 16, 226 P.3d at 8.

187. *Id.* ¶ 17, 226 P.3d at 8 (citing *Melendez-Diaz*, 129 S.Ct. 2543 (Thomas, J., concurring)).

188. *Id.* ¶ 17, 226 P.3d at 8.

whether evidence is testimonial.<sup>189</sup> The court explained that, like the certificates in *Melendez-Diaz*, Exhibit 1 was testimonial material brought forth to establish a fact.<sup>190</sup> The certificates in *Melendez-Diaz* were introduced to identify the substance in the defendant's possession as cocaine, and likewise Exhibit 1 in *Bullcoming* was introduced to prove that the defendant had a BAC over the legal limit in this case.<sup>191</sup> Because of this, Exhibit 1 was testimonial despite the fact that it was unsworn.<sup>192</sup>

b. Subject to the Confrontation Clause, but Not Violative of It

While the New Mexico Supreme Court held that these blood alcohol reports were testimonial, it quickly noted that the Confrontation Clause permits testimonial statements if the declarant is present at trial to testify and be cross-examined.<sup>193</sup> The court held that admitting Exhibit 1 did not violate the Confrontation Clause because the analyst who prepared the exhibit "was a mere scrivener" and under those circumstances the live, in-court testimony of a separate qualified analyst satisfies a defendant's right to confrontation.<sup>194</sup> The evidence showed that the analyst who prepared Exhibit 1 "simply transcribed" onto the lab report the blood test results generated by the gas chromatograph machine and was not required to "interpret the results, exercise independent judgment, or employ any particular methodology" while doing so.<sup>195</sup> The court stated that because of this, *Bullcoming's* true accuser was the gas chromatograph machine which detected the BAC and printed out the results.<sup>196</sup> The court concluded that since the analyst who testified was a competent witness who provided in-court testimony about the gas chromatograph machine and SLD's lab procedures, admission of Exhibit 1 did not violate the Confrontation Clause.<sup>197</sup>

B. *Bullcoming and the U.S. Supreme Court*

In order to consider whether the practice employed by the State in *Bullcoming* was constitutional, the U.S. Supreme Court granted certiorari

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189. *Id.* ¶ 18, 226 P.3d at 8 (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)).

190. *Id.* ¶ 18, 226 P.3d at 8.

191. *Id.*

192. *Id.*

193. *Id.* ¶ 19, 226 P.3d at 8 (quoting *Crawford*, 541 U.S. at 59).

194. *Id.* ¶ 19–20, 226 P.3d at 9.

195. *Id.* ¶ 19, 226 P.3d at 8–9.

196. *Id.* ¶ 19, 226 P.3d at 9.

197. *Id.* ¶ 20, 226 P.3d at 9.



on the case in the fall of 2010.<sup>198</sup> The case was argued before the Court in March of 2011 and the Court issued its opinion on June 23, 2011.<sup>199</sup> In the five to four decision, Justice Ginsburg writing for the majority held that surrogate testimony like what occurred in *Bullcoming* “does not meet the constitutional requirement” because a defendant has the right to be confronted “with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had the opportunity, pretrial, to cross-examine that particular scientist.”<sup>200</sup> In so holding the Court reversed and remanded *Bullcoming*’s conviction.<sup>201</sup>

### 1. Surrogate Testimony Did Not Satisfy Constitutional Requirements

The majority opinion first addressed why the surrogate testimony did not meet the requirements of the Confrontation Clause. Contrary to the New Mexico Supreme Court’s opinion that the true accuser in this case was the machine and that the analyst, Caylor, was a “mere scrivener,” the majority highlighted the fact that the certification in this case “reported more than a machine-generated number.”<sup>202</sup> The Court stated that by signing and certifying this report, Caylor was really certifying that he received the sample with the seal unbroken, that its sample numbers corresponded, and that he performed the test on the sample “adhering to a precise protocol.”<sup>203</sup> Those types of representations “relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination.”<sup>204</sup> Surrogate testimony like what was given in this case violated the Confrontation Clause because the surrogate could not “convey what Caylor knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.”<sup>205</sup> The Court also pointed out that the surrogate analyst had no knowledge of the reason why Caylor had been placed on unpaid leave.<sup>206</sup> This was deemed important because “*Bullcoming*’s counsel could have asked questions designed to reveal whether in-

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198. *Bullcoming v. New Mexico*, 131 S.Ct. 62 (2010) (granting certiorari).

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

200. *Id.* at 2710.

201. *Id.* at 2719.

202. *Id.* at 2714.

203. *Id.* The Court stated that the fact Caylor left the “remarks” section of the report blank, he was further representing that no circumstance or condition affected the integrity of the sample or the analysis. *Id.*

204. *Id.*

205. *Id.* at 2715 (footnote omitted).

206. *Id.*

competence, evasiveness, or dishonesty accounted for Caylor's removal from his work station."<sup>207</sup>

The Court also found potential ramifications of the New Mexico Supreme Court's reasoning, which the majority stated "raise[d] red flags."<sup>208</sup> The Court noted that most witnesses testify about "observations of factual conditions or events, e.g., 'the light was green,' 'the hour was noon.'"<sup>209</sup> Those observations might be recorded by the witnesses after they have occurred.<sup>210</sup> The Court addressed a hypothetical raised by Bullcoming's counsel, in which a police report contained an objective fact observed by a police officer, like an address above the front door of a house or the read-out of a radar gun.<sup>211</sup> The Court then questioned: "Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures?"<sup>212</sup> In response, the Court stated: "As our precedent makes plain, the answer is emphatically 'No.'"<sup>213</sup>

The Court also rejected arguments that the reliability of the report in question makes the surrogate testimony acceptable<sup>214</sup> and emphatically stated that the "[c]lause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."<sup>215</sup> The Court also pointed out that the State never asserted two important facts: that Caylor was "unavailable," and that the analyst who testified was giving "independent opinion" about Bullcoming's BAC levels.<sup>216</sup> In sum, the Court stated that when the State chose to introduce Caylor's report, he was the person that Bullcoming had the right to confront.<sup>217</sup> The Court concluded frankly that its "precedent cannot sensibly be read any other way."<sup>218</sup>

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207. *Id.*

208. *Id.* at 2714.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 2714–15.

213. *Id.* at 2715.

214. *Id.* (stating "[t]his Court settled in *Crawford* that the 'obviou[s] reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause" (internal citations omitted) (brackets in original)).

215. *Id.* at 2716.

216. *Id.* at 2715–16.

217. *Id.* at 2716.

218. *Id.*

## 2. Blood Alcohol Reports Are Testimonial

The Court then addressed the State's argument that blood alcohol reports are nontestimonial in character and therefore no Confrontation Clause issue arose in *Bullcoming's* case.<sup>219</sup> The Court did not hesitate to conclude that its decision in *Melendez-Diaz* "left no room for that argument," just as the New Mexico Supreme Court acknowledged in its opinion.<sup>220</sup> The Court disagreed with the State's arguments that the certificate in this case was not adversarial because it was affirmations of an independent party.<sup>221</sup> It also refused to accept the argument that the certificate was not a sworn document and therefore it would not violate the Confrontation Clause.<sup>222</sup> Instead, the Court stated that "[i]n all material respects, the laboratory report in this case resembles those in *Melendez-Diaz*."<sup>223</sup> On this issue, the Court found that the New Mexico Supreme Court correctly recognized that this report was testimonial.<sup>224</sup>

## 3. Justice Ginsburg and Justice Scalia on Their Own

The last section of Ginsburg's opinion was joined only by Scalia, as Thomas, Sotomayor, and Kagan joined the majority opinion except for this specific part.<sup>225</sup> In this section of the opinion Ginsburg addressed arguments made by the State, its *amici*, as well as the dissenting justices, that "unbending application of the Confrontation Clause to forensic evidence would impose an undue burden on the prosecution."<sup>226</sup> Ginsburg stated that this type of argument had been rehearsed and rejected in *Melendez-Diaz* because this constitutional requirement may not be disregarded out of convenience.<sup>227</sup>

Ginsburg characterized predictions of the dire consequences which could result because of the Court's decision as "dubious."<sup>228</sup> She emphasized that New Mexico law, like many other states, requires "the laboratory to preserve samples, which can be retested by other analysts."<sup>229</sup> Because of policies like this, "New Mexico could have avoided any Con-

219. *Id.*

220. *Id.*

221. *Id.* at 2717.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 2709, note \* (stating that Sotomayor and Kagan do not join in Part IV of the opinion, and that Thomas also did not join in Part IV along with footnote 6).

226. *Id.* at 2717.

227. *Id.* at 2717–18.

228. *Id.* at 2718.

229. *Id.* (citing 7.33.2.15(A)(4)–(6) NMAC).

frontation Clause problem by asking (the surrogate analyst) to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe.”<sup>230</sup> Ginsburg also stated that a New Mexico policy of allowing retesting but requiring the defendant to initiate it was not good enough because the prosecution “bears the burden of proof,” and therefore it is their duty to retest when their analysts are unavailable.<sup>231</sup>

Ginsburg also pointed to notice-and-demand statutes, which are in effect in many jurisdictions, as ways to reduce burdens on forensic laboratories.<sup>232</sup> These statutes make what would normally be hearsay reports admissible even without the analyst’s testimony, while preserving a defendant’s right to demand that the prosecution call the analyst if the defendant finds it necessary.<sup>233</sup> Ginsburg also noted that only a small fraction of cases actually proceed to trial, and when they do, defendants often stipulate to the admission of forensic analysis.<sup>234</sup> Most telling to Ginsburg, however, was the fact that in jurisdictions where it is the known responsibility of analysts to testify in court regarding their results, they have found ways to complete their duties and “the sky has not fallen.”<sup>235</sup>

#### 4. Sotomayor’s Concurring Opinion: A Line in the Sand

Sotomayor wrote a concurring opinion in which she agreed that the trial court erred in admitting the BAC report, but wrote separately to highlight why she believed the report was testimonial and “emphasize the limited reach of the Court’s opinion.”<sup>236</sup> In explaining why this certification was testimonial, Sotomayor examined the importance of a statement’s formality in determining what the “primary purpose” of a statement is.<sup>237</sup> Because the analyst who performed the test in this case was asked to sign his name and certify to the result and statements in the

230. *Id.*

231. *Id.*

232. *Id.* at 2718.

233. *Id.* These statutes may ease the burden on the State because a defendant may forfeit by silence his Confrontation Clause rights, making the analysts appearance in court unnecessary. *Id.*

234. *Id.*

235. *Id.* at 2719 (giving examples of State procedures that have made the process easier like: operational and staffing decisions which facilitate appearance at trials, scheduling trials to accommodate analysts availability, granting continuances when conflicts arise, and retaining samples for retesting).

236. *Id.* at 2719 (Sotomayor, J., concurring).

237. *Id.* at 2721.

form, it required him to attest to the truthfulness of the certification.<sup>238</sup> In sum, Sotomayor was “compelled” to conclude that the report in Bullcoming’s case had a primary purpose of creating an out-of-court substitute for trial testimony and therefore it required confrontation.<sup>239</sup>

A noteworthy aspect of Sotomayor’s concurring opinion was that she took the time to point out the limited reach of the Court’s holding. In Sotomayor’s mind, this case was “materially indistinguishable” from the facts considered in *Melendez-Diaz*, but she deemed it important to “highlight some of the factual circumstances that this case does *not* present.”<sup>240</sup> First, Sotomayor noted that “this is not a case in which the State suggested an alternate purpose, much less an alternate *primary* purpose, for the BAC report.”<sup>241</sup> As an example, Sotomayor pointed to the State’s failure to claim that the report was necessary in order to provide Bullcoming with medical treatment.<sup>242</sup>

Second, Sotomayor pointed out that this was not a case in which “the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test as issue.”<sup>243</sup> In *Bullcoming*, the analyst who testified at trial conceded that he had played no role in producing the report or observing the testing, but it would be different if “a supervisor who observed an analyst conducting a test testified about the results or a report about such results.”<sup>244</sup> Third, Sotomayor pointed out that this was also not a case where an expert witness was asked for his “independent opinion about underlying testimonial reports that were not themselves admitted into evidence.”<sup>245</sup> In *Bullcoming*, the State offered into evidence the report and the testimonial statements contained in it, but Sotomayor stated that “[w]e would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others’ testimonial statements if the testimonial statements were not themselves admitted as evidence.”<sup>246</sup>

Finally, Sotomayor explained that this was not a situation where the State introduced machine-generated results only, like a printout directly from the gas chromatograph machine.<sup>247</sup> Because the report introduced

238. *Id.*

239. *Id.*

240. *Id.* at 2721–22.

241. *Id.* at 2722.

242. *Id.*

243. *Id.*

244. *Id.* (Sotomayor noted that she was not addressing exactly what degree of involvement is sufficient in this type of situation).

245. *Id.*

246. *Id.*

247. *Id.*

included numbers which were apparently copied from the gas chromatograph printout, as well as several other testimonial statements from the analyst, this was not “raw data generated by a machine.”<sup>248</sup> Sotomayor concluded the limitation of the Court’s holding by stating that the Court’s opinion should not be read to address, any of the four factual scenarios she illustrated.<sup>249</sup>

### 5. The Dissent

Justice Kennedy wrote a dissenting opinion, which was joined by Roberts, Breyer, and Alito.<sup>250</sup> The dissenting Justices disagreed with the majority’s interpretation of the Confrontation Clause and expressed their opinion that the procedures taken in this case were “fully consistent with the Confrontation Clause and with well-established principles for ensuring that criminal trials are conducted in full accord with requirements of fairness and reliability . . . .”<sup>251</sup> In the dissenting Justices’ opinion, requiring the State to call the technician who filled out a form and recorded the test results was nothing but a “hollow formality.”<sup>252</sup>

A section of the dissenting opinion also focuses on problems the Justices see in the *Crawford* progeny. One of those criticisms is that the *Crawford* line of cases “has treated the reliability of evidence as a reason to exclude it.”<sup>253</sup> Also, according to the dissent, there have been “persistent ambiguities in the Court’s approach” of what constitutes testimonial evidence.<sup>254</sup> This causes a problem because judges are then left to “guess” which future rules the Court will distill from the constitutional test.<sup>255</sup>

The dissent also expressed concern that both *Bullcoming* and *Melendez-Diaz* impose an undue burden on the prosecution.<sup>256</sup> Multiple examples from California were noted in an attempt to demonstrate the strain put on state forensic departments in order to fulfill their duties investigating and prosecuting criminals.<sup>257</sup> The dissent also cited specific examples from New Mexico that demonstrate a dramatic rise in subpoenas to New Mexico analysts requiring them to testify in impaired-driving

248. *Id.*

249. *Id.* at 2723.

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

251. *Id.*

252. *Id.* at 2724.

253. *Id.* at 2725.

254. *Id.* at 2726.

255. *Id.*

256. *Id.* at 2728.

257. *Id.* (stating that “10 toxicologists for the Los Angeles Police Department spent 782 hours at 261 court appearances during a 1-year period,” and that “each blood-alcohol analyst in California processes 3,220 cases per year on average”).

cases from 2008 to 2010.<sup>258</sup> These types of increases, the dissent stated, will “further impede the state laboratory’s ability to keep pace with its obligations.”<sup>259</sup> Thus, opinions like *Bullcoming* and *Melendez-Diaz* are strains on states at a time when “[s]carce state resources could be committed to other urgent needs in the criminal justice system.”<sup>260</sup>

The dissent concluded by stating that “[s]even years after its initiation, it bears remembering that the *Crawford* approach was not pre-ordained.”<sup>261</sup> A proper place to return to solid ground would therefore be to “decline to extend *Melendez-Diaz* to bar the reliable, commonsense evidentiary framework the State sought to follow in this case.”<sup>262</sup>

#### IV. *BULLCOMING*: UNDERSTANDING THE PURPOSE OF CONFRONTATION

The U.S. Supreme Court was correct in overruling New Mexico’s recent surrogate-analyst exception to Confrontation Clause jurisprudence. The Court was faced with the choice of either continuing its trajectory along the path blazed by *Crawford* and *Melendez-Diaz* or swinging the pendulum back toward a less stringent protection of the Confrontation Clause. Blind reliance upon the so-called reliability of certain types of forensic evidence is an approach that is too pragmatic and shows a flawed understanding of the Confrontation Clause’s important purposes. By overruling the New Mexico Supreme Court’s Confrontation Clause analysis in *Bullcoming* the U.S. Supreme Court reaffirmed the progress generated in Confrontation Clause jurisprudence over recent years.

##### A. *New Mexico’s Bullcoming Opinion Ignores the Purpose of the Confrontation Clause*

The adversarial system of justice is built upon the opportunity to challenge and rebut evidence presented by an opposing party.<sup>263</sup> The value of this opportunity is on full display when a witness is cross-examined. Allowing a substitute witness to take the stand in place of an analyst who actually performed the forensic tests would hinder the defen-

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258. *Id.* (stating that it equated to eight or nine requests every workday).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. GARCIA, *supra* note 13.

dant's ability to challenge the evidence against him and clearly impede upon his right to a fair trial.<sup>264</sup>

One of the most important reasons for preserving this right is the value of having face-to-face confrontation between the witness and the accused. The physical requirement of bringing the witness in front of the accused is important because a witness will likely think twice about the truthfulness of their testimony when put in front of the person they have accused of a crime.<sup>265</sup> As the trier of fact is the ultimate judge of credibility, it is also important for the witness to be under oath, and in front of the jury, so that the jury might come to conclusions about how the witnesses conduct themselves when face-to-face with the defendant.<sup>266</sup> The conditions of a face-to-face confrontation may have an effect on a witnesses' recollection, communication, and ultimately the veracity of their testimony.<sup>267</sup> If a surrogate witness is allowed to step-in and testify for the person who is actually involved in a case, granted the surrogate would be face-to-face with the defendant, but the true value of face-to-face confrontation would be thwarted. The purpose of confrontation would be undermined because these important tests of credibility do not have anywhere near the same effect on someone who was not personally involved in the substance of what they are testifying about.

In order to satisfy the purposes of the Confrontation Clause, the only witnesses that should testify about testimonial statements or assertions should be the particular witness who made them. Not only does requiring the actual witness to be involved ensure the goals of face-to-face confrontation, but it also enables cross-examination into the witness' factual assertions and perceptions as well as the witnesses' character and

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264. See Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 29, *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011) (No. 09-10876) ("allowing a surrogate analyst to testify insulates the actual analyst from ever being put through the 'crucible of cross-examination'" (quoting *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536 (2009))).

265. See *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"); see also Toni M. Mas-saro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 872 (1988) ("In short, the witness must look the accused in the eye, and must be present for public observation by the judge and jury. All of these conditions may chill the accuser's willingness to make condemning remarks about the defendant.").

266. *Coy*, 487 U.S. at 1019 (explaining that the requirement of physical confrontation is important so that the trier of fact might draw its own "conclusions" about accusers truthfulness because even if a lie is told "it will often be told less convincingly").

267. Michael H. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 74 (1985).



biases.<sup>268</sup> Because allowing a substitute witness cannot guarantee an opportunity to complete a thorough cross-examination into all of these areas which could be implicated in a given case, the New Mexico Supreme Court erred in acknowledging a surrogate testimony exception and in concluding that it was sufficient in cases like *Bullcoming*. A cursory cross-examination of a person who was not personally involved in the forensic testing at issue will not allow the goals of confrontation to be fulfilled and warrants the Constitution's protection. As the majority in the U.S. Supreme Court opinion noted, once the State chose to introduce the certification of the analyst who conducted the test, it was *that* analyst who *Bullcoming* had the right to confront.<sup>269</sup> The Supreme Court's Confrontation Clause "precedent cannot sensibly be read any other way."<sup>270</sup>

### B. *The Age of Forensic Machine Accusers*

The New Mexico Supreme Court's assertion that the true accuser in *Bullcoming* was the gas chromatograph machine is also troublesome at its core. Increased technology has only aided in a prosecutor's ability to prove his or her case through scientific testing and forensic evidence, which is evident by the sheer amount used in trials today.<sup>271</sup> Law enforcement agencies and prosecutors use forensics regularly as convincing, and seemingly irrefutable evidence, against those they have accused of crimes.<sup>272</sup> The public's awareness of forensic evidence has also grown due to media coverage of high profile cases and the many television programs detailing crime scene investigation.<sup>273</sup> Prosecutors are familiar with this fact, and as would be expected, use machines like the gas chromatograph

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268. See Brief for Petitioner at 10, 17, *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011) (No. 09-10876).

269. *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2716 (2011).

270. *Id.*

271. See Valerie P. Hans et al., *Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence*, 35 *LAW & HUM. BEHAV.* 60, 60 (2011) ("Complex scientific evidence has become ubiquitous in both civil and criminal trials.") (citation omitted).

272. See Joel D. Liebermann et al., *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 *PSYCHOL. PUB. POL'Y & L.*, 27, 32 (stating that certain types of forensic evidence is "often viewed as being qualitatively different from other evidence because of its presumed scientific rigor and accuracy").

273. See *id.* (expressing that most jurors have "preconceived beliefs" about forensic evidence because of events like "O.J. Simpson's criminal trial, the identification of President Clinton's DNA on Monica Lewinsky's famed 'blue dress,' and television crime dramas like *CSI*").

machine to convince jurors of a defendant's guilt.<sup>274</sup> Despite the weight juries at times give to forensic evidence, it is far from flawless, especially when it comes to the potential for human error.<sup>275</sup> Even if one were to conclude that a machine can be an accuser in the legal sense, a gas chromatograph machine does not act independently.<sup>276</sup> If New Mexico's interpretation in *Bullcoming* had been upheld, it would have decreased a defendant's ability to challenge forensic evidence effectively, especially the possibility of human error<sup>277</sup>—and in so doing decrease a defendant's opportunity for a fair trial. The truth is that a gas chromatograph machine requires some human operation even if it is capable of calculating BAC on its own.<sup>278</sup> Because machine “accusers” cannot be brought into court

274. *See id.* (stating that judges have noted that “jurors are especially prone to attribute a ‘mystic infallibility’ to [DNA] evidence”) (citations omitted).

275. *See id.* at 45 (stating that “[e]ven if the scientific techniques were perfect, human involvement may create inaccurate results” through errors, “deceitful technicians, subconscious bias, or observer effects”) (citation omitted).

276. *See* Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, *supra* note 264, at 5–14, (explaining how a gas chromatograph machine determines BAC).

277. On the Confrontation Blog, a blog written by Richard D. Friedman devoted strictly to the Confrontation Clause, Friedman posted an illustration of the inherent problems with the New Mexico rule in *Bullcoming*:

Hon. Dib Waldrip, a Texas trial court judge, active student of the Confrontation Clause, and reader of this blog, has told me about a recent case that illustrates the value of having the analyst who performed a lab test testify at trial—or, put another way, a danger that will not be prevented unless *Bullcoming* is reversed. He has given me permission to report on it here.

The defendant was charged with possession with intent to distribute a quantity of methamphetamine of 4 grams or more but less than 200 grams. In Texas, this is a first-degree felony with a punishment range of 5 to 99 years or life and a fine up to \$10,000.00.

The official lab report, signed by the analyst who performed the actual test, reflected the presence in the tested substance of methamphetamine with an aggregate weight of 4.51 grams. The analyst testified at trial. Using his personal notes to refresh his memory, he testified that the aggregate weight of the methamphetamine was 1.51 grams. The prosecutor then asked the analyst to review the lab report. After a pause the analyst testified that report was in error and that his notes reflected the correct amount. (Apparently, a clerk prepared the report from the notes of the analyst and made the error.)

Soon after, the prosecutor moved to dismiss. The judge granted the motion, with thanks to the analyst for his integrity. But it appears that earlier, before a different judge, a co-defendant had entered a plea based on the erroneous report.

Richard D. Friedman, CONFRONTATION BLOG (May 26, 2011, 11:21 PM), <http://confrontationright.blogspot.com/2011/05/illustration-of-dangers-of-new-mexico.html>.

278. *See* Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, *supra* note 264, at 14–27 (discussing how an analyst could make errors during a gas chromatograph test).

and cross-examined, the particular people who operated the machines should be the ones subject to confrontation, especially if it is those people who generated the forensic analysis reports entered into evidence at trial.

### C. Reliability Is Not Sufficient

The New Mexico Supreme Court's creation of this surrogate-analyst exception in the case of BAC reports was unnecessary and is not consistent with the U.S. Supreme Court's recent analysis and application of the Confrontation Clause.<sup>279</sup> In *Bullcoming*, the New Mexico Supreme Court stepped backward to previous opinions which would not have found certain forensic reports as testimonial because of their supposed trustworthiness. The problem is not only that trustworthiness is no longer the legal standard for determining whether or not a person's right to confrontation might be violated, but also that forensic evidence is not always that trustworthy.<sup>280</sup> Lab analysts in state crime labs face inherent pressures of working for law enforcement, and research has also shown that there are problems with a lack of accreditation and certification of crime labs, a lack of standards in examining evidence, and issues with how the evidence is presented in the courtrooms.<sup>281</sup> Because of its probative value to a jury, forensic evidence can be highly prejudicial when any part of the process is done incorrectly. In light of the prejudicial effect which could stem from an analysis that was performed erroneously or incorrectly explained to a jury, the need for adequate confrontation and cross-examination must not be overlooked or undervalued. Unfortunately, the short-lived exception reached by the New Mexico Supreme Court in *Bullcoming*, which allowed a substitute witness to testify in certain cases, had that troubling effect.

### D. The Effect Upon the States

The U.S. Supreme Court's opinion in *Bullcoming* was eagerly awaited for many reasons. What many of the Court's followers were interested in seeing was if the replacement of Justices Stevens and Souter with Justices Kagan and Sotomayor would reverse recent precedents in

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279. See *Crawford v. Washington*, 541 U.S. 36, 54 (2004) ("The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.").

280. See NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 4 (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

281. See *id.* at 6; see also Paul C. Giannelli & Susan Friedman, *The National Academy of Sciences' Forensics Report*, 45 No. 6 CRIM. L. BULL. ART. 9 (Winter 2009) (summarizing the National Academy's report on forensic science).

this area of the law.<sup>282</sup> Many were especially focused on how Sotomayor would come out on the issue given that she was a former prosecutor and trial court judge.<sup>283</sup> There was concern that her background might make her more sympathetic to the practical necessities of law enforcement and “move the court a bit to the right on criminal justice issues.”<sup>284</sup> Instead, Sotomayor voted as her predecessor did, thus maintaining the Court’s five to four “formalist-pragmatist split on the Confrontation Clause.”<sup>285</sup>

Pragmatic critics of the U.S. Supreme Court’s decision in *Melendez-Diaz* put most of their footing on the sentiment that requiring lab analysts to appear in court and testify in every case is too demanding on the states.<sup>286</sup> New Mexico and its *amici* made similar arguments in *Bullcoming* based on the increased cost and difficulty on the State, and even the possibility that some analysts might change jobs or otherwise be unavailable.<sup>287</sup> Justice Kennedy’s dissent echoed concerns raised by *amici* about the “chaotic” burden it places on states like New Mexico.<sup>288</sup> He specifically mentioned that subpoenas for New Mexico analysts in impaired-driving cases rose 71 percent during a recent two-year period, and that while New Mexico is the nation’s fifth largest state by area, it employs only ten forensic analysts.<sup>289</sup>

Acknowledging that the decision in *Bullcoming* has real-world implications on how law enforcement does its job is inescapable, and to say that some of the arguments raised by the dissent have no merit would be short-sighted.<sup>290</sup> However, the problem with an absolute pragmatic ap-

282. Jonathan H. Adler, *Formalists Prevail in Bullcoming v. New Mexico*, VOLOKH CONSPIRACY (June 23, 2011), available at <http://volokh.com/2011/06/23/formalists-prevail-in-bullcoming-v-new-mexico/>.

283. Walter Dellinger, *Supreme Court Year in Review: Entry 5: What Do Criminal Defendants Really Enjoy?*, SLATE (Jun. 24, 2011, 4:29 PM), [http://www.slate.com/articles/life/the\\_breakfast\\_table/features/2011/supreme\\_court\\_year\\_in\\_review/what\\_do\\_criminal\\_defendants\\_really\\_enjoy.html](http://www.slate.com/articles/life/the_breakfast_table/features/2011/supreme_court_year_in_review/what_do_criminal_defendants_really_enjoy.html).

284. *Id.*

285. Adler, *supra* note 282.

286. See Jennifer B. Sokoler, Note, *Between Substance and Procedure: A Role for States’ Interest in the Scope of the Confrontation Clause*, 110 COLUM. L. REV. 161, 179–81 (2010); Jennifer Ciszewski, Note, *Melendez-Diaz v. Massachusetts* 129 S.Ct. 2527, 36 OHIO N.U. L. REV. 637 (2010).

287. See, e.g., Brief for State of New Mexico Department of Health Scientific Laboratory Division as Amicus Curiae Supporting Respondent at 7, *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011) (No. 09-10876).

288. *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2728 (2011) (Kennedy, J., dissenting).

289. *Id.*

290. Although, as Justice Ginsburg stated in footnote nine of *Bullcoming*, the increases in New Mexico, cited by the dissent, were increases in the number of sub-

proach to the issue is that one cannot construe the Constitution based upon a cost-benefit analysis.<sup>291</sup> Granted, requiring the analyst who performed the test to be in court to testify about his or her report might put some burden on that state, there are some things which can be done to lighten that impact. Sotomayor gave several examples of this in a concurring opinion where she emphasized prosecutorial approaches which may not have been barred by *Melendez-Diaz* and *Bullcoming*.<sup>292</sup> The two most notable possibilities were to have an expert witness give his “independent opinion” about reports that were not themselves admitted into evidence or to introduce only the machine-generated printout from the gas chromatograph.<sup>293</sup>

New Mexico could also follow the lead of many other jurisdictions that have enacted notice-and-demand statutes which satisfy a defendant’s right to confrontation when a defendant does not demand that the analyst appear at the trial after the State has given notice of intent to introduce forensic reports.<sup>294</sup> States could also stop routine testing to determine drug purity if the prosecutors are not required to prove purity as an element of the drug offense, or even making possession of small amounts of marijuana a civil citation as opposed to a criminal offense; both of which would likely decrease the workload for forensic analysts.<sup>295</sup> When put to the test, state legislatures certainly could have other creative ways of

poenas. *Id.* at 2719, n.9. However, the dissent was silent on “the number of instances in which subpoenaed analysts in fact testify, *i.e.*, the figure that would reveal the actual burden of courtroom testimony.” *Id.* She also pointed to the fact that the New Mexico Department of Health has attributed the increased workload to several factors, among them “staff attrition, a state hiring freeze, a 15% increase in the number of blood samples received for testing, and ‘wildly’ divergent responses by New Mexico District Attorneys to *Melendez-Diaz*.” *Id.*

291. See *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) (“It is a truism that constitutional protections have costs.”); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring that defendants be provided with assistance of counsel regardless of the burden it may create on states); Radley Balko, *Cross-Examining Forensics*, REASON.COM (Aug. 10, 2009), available at <http://reason.com/archives/2009/08/10/cross-examining-forensics> (“To say we should suspend constitutional protections because keeping them in place would prove inconvenient to the government rather misses the point.”).

292. *Bullcoming*, 131 S.Ct. at 2719–23 (Sotomayor, J., concurring in part).

293. *Id.* at 2722.

294. See Jennifer B. Sokoler, Note, *Between Substance and Procedure: A Role for States’ Interest in the Scope of the Confrontation Clause*, 110 COLUM. L. REV. 161, 181–96 (2010); *Bullcoming*, 131 S.Ct. at 2718 (“Furthermore, notice-and-demand procedures, long in effect in many jurisdictions, can reduce burdens on forensic laboratories.”).

295. See Martin F. Murphy & Marian T. Ryan, *Melendez-Diaz, One Year Later*, BOSTON BAR J., Fall 2010, 26.

dealing with the issue without infringing upon this important constitutional right.

## V. CONCLUSION

Those practicing criminal law in New Mexico and across the country awaited the U.S. Supreme Court's opinion in *Bullcoming* with great interest. The Court's conclusion that it was error for New Mexico to allow surrogate testimony in *Bullcoming* was the correct decision because the short-lived New Mexico surrogate exception ignored some of the core purposes of the Confrontation Clause. While the Confrontation Clause does put a burden on the states in certain situations, constitutional protections cannot give way in order to improve government convenience. Exactly where Confrontation Clause jurisprudence will go from here is uncertain, but because of the trial of Donald Bullcoming, practitioners now know that calling surrogate forensic witnesses will not fulfill a defendant's right to confrontation.

