BULLCOMING SHOCKWAVES STILL RIPPLING THROUGHOUT THE STATES

The Supreme Court declares a lab report testimonial in a vital opinion reinforcing the 6th Amendment

The lab technician who tries to detect and measure the amount of alcohol in a drunk driving case involving a blood analysis must be present at court or the 6th Amendment of the Constitution is violated. The Supreme Court of the United States spoke and spoke loudly in Bullcoming v New Mexico.[[1]](#footnote-1) The Supreme Court held that the lab technician who actually conducted the analysis must be presented at trial by the government and that a “surrogate” is not acceptable for purposes of protecting the 6th Amendment right to confront witnesses.

The case involved a man charged with a crime in New Mexico called “aggravated-DUI” because he fled the scene of an accident and was arrested later, allegedly while drunk. His alleged blood was analyzed for an alcohol content estimate. Prior to trial, the analyst who actually conducted the analysis and wrote the report was placed on unpaid administrative leave.

The government called a supervisor at the lab as a surrogate. The analysis of Mr. Bullcoming’s blood was done utilizing headspace gas chromatography (HS/GC). HS/GC is a commonly used chemical analysis process that attempts to detect the presence and concentration of ethyl alcohol in a blood sample by mixing the blood with a different type of alcohol compound. The mixture is then converted to gas. The compounds are analyzed by comparing the response that each gives when it passes through a heated column and each compound separates or “elutes” from the mixture. The court stated: “Several steps are involved in the gas chromatograph process, and human error can occur at each step” (Slip Op. at 4). Thus, the practical issue of calling a “surrogate” – only the analyst who conducted that citizen’s blood analysis can answer questions about the circumstances that may have affected the specific accuracy in any particular case.

The court also held that the report analyzing the accused citizen’s blood is “testimonial” for purposes of the confrontation clause of the 6th Amendment to the United States Constitution. The 6th Amendment of the Constitution requires the government to call live witnesses, who must swear an oath and testify before the jury. The Amendment is designed to avoid problems such as those which existed in England and lead to the conviction of Sir Walter Raleigh; it also lead to the death of women in colonial America who were burned at the stake for witchcraft – all without live testimony but letters and out of court accusations that the jury was never allowed to hear or see.

The case was decided Thursday June 23, 2011. It is an extension of the principle of a prior 2009 case called Melendez-Diaz v Massachusetts. It means that the lab analysis is a testimonial document and the author of the document must be the one who testifies at trial or else the document is not admissible. These cases are part of the ongoing protection of the citizens of the United States from convictions by statements or documents that are not tested through live appearance under oath before a jury and subject to cross examination by the lawyer for the accused. It is one way street: the government is not entitled to confrontation. Typical hearsay rules apply, but not constitutional safeguards.

I found it interesting that the court used prior opinions that seemed to narrow the confrontation right to advance it in this case. For example, the court held that the primary purpose test of a statement meant that the lab record here was defined as testimonial because its primary purpose was to generate evidence in an OWI trial.[[2]](#footnote-2)

Already Bullcoming is being distinguished. In New Jersey v Roach, an appellate court upheld a conviction in a case in which a lab supervisor was allowed to testify in the form of comment on the underlying accuracy of lab reports that were never admitted into evidence.[[3]](#footnote-3) The rationale is that if the testimonial certificate is not used against the accused, confrontation is not violated by having a surrogate comment on it. See the logic?

Such a ruling could never invade Michigan’s jurisprudence because of MRE 703, which prevents backdoor hearsay by requiring that all facts or data upon which an expert relies in forming an opinion shall be in evidence (MRE 703). In Michigan, the Supreme Court is taking comment on a proposed addition to the code of criminal procedure. The court proposed a court rule allowing for “notice and demand.” In other words, the prosecution may put the accused on notice of the intent to offer the lab report without supporting testimony and require the accused to demand live testimony. Those who have concerns should make your voice heard.

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1. No. 09–10876. Argued March 2, 2011—Decided June 23, 2011 [↑](#footnote-ref-1)
2. See *Michigan v Bryant,* 131 S. Ct. 1143 (2011), [↑](#footnote-ref-2)
3. Not Reported in A.3d, 2011 WL 3241467 (N.J.Super.A.D.) [↑](#footnote-ref-3)