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# Confrontation Clause Again Before High Court

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## Confrontation Clause Again Before High Court

The U.S. Supreme Court will decide whether expert testimony in criminal cases based on inadmissible lab reports violates the Sixth Amendment, explains Robert Calhoun of Golden Gate University.

Robert Calhoun

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This past term, the U.S. Supreme Court decided the latest in a series of confrontation clause cases that began in 2004 with [Crawford v. Washington](#), 541 U.S. 36. In *Bullcoming v. New Mexico*, 11 C.D.O.S. 7706, the court held that the confrontation clause does not permit the government to introduce a forensic lab report in a criminal trial through the in-court testimony of an analyst who did not personally perform or observe the test that formed the basis for the report.

*Bullcoming* follows in the footsteps of the court's decision two terms ago in [Melendez-Diaz v. Massachusetts](#), 08 C.D.O.S. 7994, which held that a forensic lab report that showed the substance found on a defendant to be cocaine was "testimonial" in nature under its earlier test in *Crawford*, and therefore, could not be introduced without offering a live witness competent to testify to the truth of the report's statements.

*Bullcoming* represents a modest extension of the rule set out in *Melendez-Diaz*. In fact, if you believe (as I do) that *Melendez-Diaz* was correctly decided, it is difficult to see how the court could have decided it any other way. In both *Bullcoming* and *Melendez-Diaz*, the state offered documents that spoke directly to the defendant's guilt. (In *Bullcoming* it was a forensic report showing Donald Bullcoming's blood alcohol concentration well above the legal limit for DUI). The report in each case was clearly "testimonial" in that the primary purpose was the establishment or proving of past events potentially relevant to a later criminal prosecution. In neither did the government provide a witness competent to testify to the truth of the report.

However, because these cases were so straightforward, they failed to resolve the more critical issue of whether the confrontation clause is violated in similar fashion if the government does not offer the report itself in evidence (as was done in both *Melendez-Diaz* and *Bullcoming*), but rather, calls an expert to give an expert opinion that is based, in whole or in part, upon the disputed report.

Five days after issuing its opinion in *Bullcoming*, the court granted *certiorari* in yet another confrontation clause case, *Williams v. Illinois*, 10-8505, which presents exactly this unresolved issue for determination. At issue in *Williams* was a report prepared by Cellmark Labs on DNA found at the crime scene of a sexual assault/kidnapping case. In *Williams*, the report was not introduced into evidence for its truth, as was the case in *Melendez-Diaz* and *Bullcoming*. Instead, the state called an expert who did not perform the test on the crime scene evidence. She went on to give an expert opinion that the DNA profile from the Cellmark sample and the one taken from the defendant, Sandy Williams, matched and the probability of Williams' profile occurring separately in the general population was staggeringly remote, statistically.

While the expert did provide her own independent analysis and comparison of the two DNA samples, at the core of her opinion was the Cellmark report itself, prepared by a lab technician other than the one who testified.

The Illinois courts found this to be distinguishable from *Melendez-Diaz* in that the testifying expert gave an independent opinion

about the match, and to the extent it was based on the lab report of another technician, this report was offered not for the truth of the matter asserted, but merely as part of the basis of the in-court expert's opinion.

The issue of an expert witness operating as the conduit for otherwise inadmissible hearsay merely by relying upon it as part of an expert opinion is not a new one as a matter of evidence law, which generally permits such an approach, subject to constraints in extreme cases.

Both Federal Rule of Evidence 703 and California Evidence Code §801 invite such an end-run around the hearsay rule by their explicit language. Rule 703, for example, provides that "the facts or data ... upon which an expert bases an opinion or inference ... [if] of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject ... need not be admissible in order for the opinion or inference to be admitted." Similar language may be found in California Evidence Code §801.

Restricting hearsay usage to basis in this way may be analytically tidy, but it can create problems for juries, which are generally not used to such mental gymnastics. Here, as in many other areas of limited admissibility, courts have traditionally relied upon a limiting instruction, instructing the jury that it may use the otherwise inadmissible evidence in weighing the basis of the expert's opinion, but may not use it for the truth of the matter asserted. Only few trial lawyers believe that juries can segregate evidence usage in this manner, yet the courts continue to rely on the fiction that they can.

Because of this problem and because this evidence rule invites manipulation, the federal system and California courts have devised approaches that are intended to guard against misuse.

In 2000, Federal Rule 703 was amended to provide that "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect."

California courts have similarly given trial judges the power to keep inadmissible hearsay from the jury in certain extreme situations such as when the inadmissible hearsay that the expert relies upon is recited in detail. (*People v. Coleman*, 38 Cal.3d 69 (1985))

Nonetheless, the traditional evidentiary approach has been to rely on the limiting instruction. By instructing the jury of the limited role the evidence was to play, the court transforms it magically into non-hearsay. If it is not being used for the truth of the matter asserted, it is, by definition, not hearsay.

The question before the Supreme Court this term is whether this fiction of evidence law will suffice for confrontation clause purposes when the expert opinion is based not just on hearsay but on otherwise inadmissible testimonial hearsay.

I believe, at a minimum, that the court must restrict experts from operating as mere hearsay conduits, in much the way we do with simple hearsay. It would be a travesty to say that the lab report in *Melendez-Diaz* was inadmissible testimonial hearsay, but permit an expert who had no connection with the report to give an opinion that the defendant possessed cocaine based entirely on the expert's reading of the inadmissible report. To argue that the testimonial evidence was being admitted only as basis for the opinion, and not for the truth of the matter asserted, would be laughable. Justice Sonia Sotomayor's concurrence in *Bullcoming* spoke of a truly "independent" opinion from the expert. There would be nothing independent about the expert's opinion in this situation. The expert's only role would be to serve as a conduit for evidence that violates the confrontation clause.

However, subtler and more difficult questions are presented by the *Williams* case. There, the expert who testified in court did not merely provide an opinion that parroted the contents of an otherwise inadmissible report. She examined a report done by Cellmark labs that derived a DNA profile for the person whose semen was recovered from the victim's sexual assault kit. She performed her own independent comparison of this profile to one for Williams contained in the police crime database. She was available for cross-examination about how she reached her conclusion. She was also familiar with the DNA procedure Cellmark performed (STR or short tandem repeat) and was able to describe it to the court. But because she did not participate in any way in the actual analysis performed by Cellmark, she could not answer questions about whether the procedures were accurately performed as they were set out in the report, whether the sample had been handled correctly, or anything else of a first-hand nature that would be critical to assessing the validity of Cellmark's conclusion that the genetic material on the test swab was what it purported to be — a profile that matched the profile of the defendant.

This is not mere formalism, insisting on procedure for procedure's sake. Lab technicians make mistakes. The majority in *Melendez-Diaz* cited the well-known 2009 report of the National Academy of Sciences, which documented disturbingly high incidences of error, and even fraud, by the forensic laboratories administered or hired by law enforcement to produce the sort of forensic evidence at issue in cases such as these.

Nonetheless, the Illinois courts found that the Cellmark report was not introduced into evidence, but was merely used as the basis of the expert's opinion. The problem with this analysis is that it ignores the reality that Cellmark's DNA profile would support the expert's conclusion that there was a match only if it was accurate — that is, if it was true. If the Cellmark report was inaccurate (or false), it would fail to provide any basis whatsoever. Thus, in this case and in most such expert opinion situations, the underlying hearsay can only truly be relevant to the basis of the opinion if it is offered for the truth of the matter asserted.

The fiction that these two matters can easily be separated has been indulged over the years because it simplifies the presentation of expert testimony and it mirrors what experts do in their own professional practice. However, when we are talking about actual testimonial evidence, evidence that is accusatory in some fashion, the Sixth Amendment guarantees something different. It guarantees a right to confront one's accusers through adversarial testing, i.e., cross-examination.

Such a conclusion will not, as Justice Antonin Scalia has pointed out, cause "the sky to fall."

This issue comes into play only when an expert is relying on testimonial hearsay. Experts rely on all sorts of hearsay including, for example, all the professional reports and treatises that form the background of their training. They also rely on statements from all sorts of persons that never would be described as having been made for the "primary purpose of proving past events that would be potentially relevant to a later criminal prosecution" (i.e., testimonial).

If an expert relies on such hearsay and discloses some of it to the jury, it may raise issues under various evidence code provisions, but it presents no confrontation clause problem because the Sixth Amendment applies only to testimonial hearsay.

Where testimonial hearsay is involved, a ruling by the Supreme Court in *Williams*' favor would no doubt complicate prosecutions in such cases. The prosecution would have to call more foundational witnesses (e.g., the Cellmark lab technician who prepared the original report in *Williams*), but this is hardly an impossible task. In cases where an individual who has prepared the original report has moved or is otherwise unavailable, the sample may have to be tested again.

The old common law rule on expert testimony required that any fact relied upon by an expert in arriving at an expert conclusion had to be proven independently by testimony from a witness with knowledge. This was a cumbersome process that modern rules such as Federal Rule 703 and California Evidence Code §801 were intended to simplify, but no one ever argued such rules prevented common law courts from bringing criminals to justice. No one is suggesting a retreat to the common law rules governing the presentation of expert opinion. However, when the basis for expert opinion is testimonial hearsay, it seems highly inappropriate to rely on a legal fiction regarding limited usage to deny defendants the Sixth Amendment right to confront the witnesses against them.

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