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BEYOND SCIENCE: LAB ANALYSTS AS WITNESSES IN DWI TRIALS

SUMMARY

A recent United States Supreme Court decision has substantial ramifications for prosecuting DWI cases in New Mexico.

The case concerned the constitutionality of admitting machine-generated blood-alcohol lab analyst reports without the testimony of the report's author. The court ruled that in DWI trials, the prosecutor introducing such a report must also offer as a witness the analyst who conducted the test. This requirement has already begun to strain the productivity and efficiency of the Scientific Laboratory Division (SLD) of the Department of Health, which now must produce more, and specific, lab analysts for a given drug- or alcohol-related trial. Because of the practical limitations these specialized witnesses face in attending all trials for which they are subpoenaed, it will likely also have the effect of snarling court schedules.

A combination of legislative, prosecutorial or internal SLD measures might reduce this state burden, which arises primarily in DWI cases in which *blood* tests are used. (In cases in which *breath* tests are used, heightened demand for police officer specialists as witnesses may also result.) Possible legislative measures include expanding the use of videoconferencing technology and enacting a "notice-and-demand" statute.

BACKGROUND

Bullcoming v. New Mexico, which originated in a New Mexico district court, reached the United States Supreme Court and was decided on June 23, 2011. The court concluded that the defendant's right to confront the witnesses against him was violated.

In 2005, a San Juan County man, Donald Bullcoming, was convicted of aggravated DWI. During the trial, the defense objected to the prosecution's introduction of a report showing a high blood-alcohol concentration (BAC) because the prosecution did not also call the analyst who had performed the test. Rather, the prosecution called another analyst who had neither signed the results nor witnessed the performance of the test. Compelled by previous court rulings, the trial judge allowed the report into evidence and permitted the substitute analyst to testify.

The case was appealed to the New Mexico Court of Appeals and the New Mexico Supreme Court. Both courts affirmed the judgment of the lower court.

CONSTITUTIONAL ISSUE: THE CONFRONTATION CLAUSE

Bullcoming's objection at trial was based on the Sixth Amendment's Confrontation Clause, which in relevant part reads: "[i]n all criminal prosecutions . . . the accused shall enjoy the right . . . to be confronted with the witnesses against him". The New Mexico Supreme Court concluded that the testimony of a qualified analyst, albeit

one who had no direct involvement in the test's performance and had not signed the report, satisfied this constitutional guarantee. The court characterized the original analyst as "a mere scrivener who simply transcribed the results generated by a . . . machine", and commented that "the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation".

On this point, the United States Supreme Court disagreed. It held that, unless the accused has had a prior opportunity to confront an unavailable accuser, the Confrontation Clause requires that the accused have an opportunity at trial to confront "a live witness competent to testify to the truth of the report's statements", specifically, the analyst who conducted the test and reported the results. The court based its reasoning in part on evidence of the prevalence of flawed BAC readings and "the risk of human error", which was not "so remote as to be negligible". The accused's right to cross-examine the analyst who conducted the test, the court emphasized, was a paramount constitutional concern.

BULLCOMING: IMPLICATIONS FOR NEW MEXICO

DWI ARRESTS AND THE SLD

The SLD becomes involved in DWI prosecutions only under certain circumstances. When a law enforcement officer arrests someone for DWI, that officer will usually, if practicable, administer a breath test. At times, the suspect is unconscious or in need of medical attention, or — as in *Bullcoming* — the suspect refuses

the breath test. In these cases, the officer arranges for a blood sample to be drawn. The SLD (or the Albuquerque Police Department, which operates its own lab) then becomes involved.

The tightening of confrontation requirements ushered by the *Bullcoming* holding has disrupted the SLD's ability to process samples within target time lines and make available analysts qualified as experts. Now, substantially more analysts are being called to testify at trials. Because analysts must travel throughout the state, often for two days at a time, the costs to the SLD associated with this decision are high.

POTENTIAL PROSECUTORIAL AND LEGISLATIVE SOLUTIONS

VIDEOCONFERENCING

One potential solution to the problem of too few analysts and too little time lies in video technology. Videoconferencing, which the SLD and some courts have already begun employing on a limited basis, is a technical deviation from the rule that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses".¹ So even assuming the universal feasibility and acceptance of two-way videoconferencing between the SLD and courts, the approach might present a constitutional hurdle. The United States Supreme Court has never directly ruled on lab analyst witnesses and videoconferencing, but it has offered some related guidance. Generally, any confrontation issue must be considered in light of the four underlying elements of the confrontation guarantee:

"physical presence, oath, cross-examination, and observation of demeanor by the trier of fact".²

The United States Supreme Court articulated these elements in *Maryland v. Craig*, a case that potentially supports the constitutionality of virtual testimony by lab analyst witnesses. *Craig* dealt with a Maryland statute that permitted child sexual abuse victims to testify from outside of the courtroom via one-way closed-circuit television. The court commented that, though "the Confrontation Clause reflects a preference for face-to-face confrontation at trial", that preference "must occasionally give way to considerations of public policy and the necessities of the case". In *Craig*, the state's interest in the "physical and psychological well-being of child abuse victims" transcended the absence of face-to-face confrontation.

A court would likely analyze any statute or practice creating a lab analyst videoconferencing exception to the physical presence requirement in light of *Craig* and the confrontation right's underlying elements. In a hypothetical New Mexico videoconferencing solution, the state's interest in resource conservation and efficiency might be compelling enough to relax the face-to-face standard. Whether a court would uphold this public policy interest, or even apply the *Craig* test at all, remains to be tested and seen.

NOTICE-AND-DEMAND STATUTES

The United States Supreme Court in a related case explicitly endorsed an alternative path to Confrontation Clause

compliance: "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections".³ The court was referring to notice-and-demand statutes. Though there are at least four classes of these statutes, the court sanctioned only the most conservative form — that which imposes the least burden on the defendant. More recently, in an effort to assuage the prosecutorial burden that its decision would generate, the *Bullcoming* court reinforced the notion that states retain the right to enact a simple notice-and-demand statute.

A simple notice-and-demand statute might reduce the strain induced by the *Bullcoming* decision. These statutes "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial".⁴ (The constitutionally acceptable length of that period of time is unclear.) This procedure would both satisfy constitutional demands and — in theory, at least — reduce the prosecutorial burden.

But the dissent in *Bullcoming* viewed these statutes' effects differently. It argued that there is ordinarily "no good reason for defense counsel to waive the right of confrontation" and any good defense attorney would routinely demand that certifying analysts testify. Making the demand in every case, that is, increases the odds that in a given case, the certifying

analyst will be unavailable due to an exceptional circumstance. The defense would lose nothing by making the demand, and this legislative "remedy" would therefore do nothing to ease the prosecutorial burden, the dissent argued.

On the other hand, it might be the case that after a period of profuse demand-making by defense attorneys, those attorneys would eventually recognize the general futility of the tactic and curtail its use.

But assuming the accuracy of the dissent's statements, it would follow that in order to accomplish the goal of tempering the strain on the state, a notice-and-demand procedure would have to discourage use of this ploy. For instance, a statute could require that the defendant making the demand also state a good-faith reason for the live appearance or promise to cross-examine the analyst-witness. This is sometimes called a "notice-and demand *plus*" procedure. Even more burdensome to the defendant, an "anticipatory demand" procedure provides that the state has no obligation to notify the defendant, and the defendant must affirmatively make a timely demand.

However, migration into legislative territory beyond the *simple* notice-and-demand statute raises confrontation issues. That is, the greater the burden a legislative measure imposes on a defendant, the greater the likelihood that the measure is unconstitutional: because the state bears the burden of proof in criminal cases, any inordinate burden on the defendant might compromise the right of confrontation and is therefore suspect. Nevertheless, states have enacted a range of notice-and-demand

statutes extending beyond the "simple" designation. The United States Supreme Court has yet to rule squarely on which of those violate confrontation provisions. Until it does, a state may be somewhat free to tailor and enact measures as it sees fit.

CONCLUSION

The *Bullcoming* decision will most likely continue to have repercussions for New Mexico. A legislative burden-easing measure might be warranted to help counteract the decision's effects on the SLD, prosecutors and courts. Although the efficacy and constitutional strength of any related measure can only be roughly gauged, potentially viable solutions rest in expanded videoconferencing in courts and enacting some form of a notice-and-demand statute. A measure expanding the use of videoconferencing would likely ease the strain on the SLD and courts by dramatically reducing the time that certifying analysts spend away from the lab. Meanwhile, a notice-and-demand statute might reduce the frequency that certifying analysts are called to court. Depending on how entities most affected choose to proceed, the legislature may play a role in countering the challenges resulting from these judicial decisions.

Endnotes

¹ *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

² *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

³ *Melendez-Diaz*, 129 S. Ct. 2527, 2534 n. (2009).

⁴ *Melendez-Diaz*, 129 S. Ct. at 2541.

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