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CONFRONTING FORENSICS: *BULLCOMING V. NEW MEXICO* AND THE SIXTH AMENDMENT

*Megan Weisgerber**

The U.S. Supreme Court's 2004 Crawford v. Washington *decision drastically altered the long-standing Confrontation Clause jurisprudence, refocusing the constitutional inquiry on the testimonial nature of a witness's statement but leaving for another day any effort to spell out a comprehensive definition of the term "testimonial." Thus began the current line of Confrontation Clause cases, each of which sought to clarify the Sixth Amendment's confrontation protections but arguably clouded any clarity that the case before it brought. In 2009, the Court decided* Melendez-Diaz v. Massachusetts*, in which it held that a forensic laboratory report prepared for a criminal trial is "testimonial" and that it therefore triggers the Confrontation Clause. Most recently, in 2010, the Court decided* Bullcoming v. New Mexico *and answered the question that* Melendez-Diaz *left open: if a forensic laboratory report triggers the Confrontation Clause, who must provide the live, in-court testimony? In a controversial 5–4 decision, the Court held that the analyst who actually conducted the forensic test and certified the report must take the stand, and that a so-called surrogate witness does not satisfy the constitutional requirement. This Comment suggests that the Court accurately assessed the fallibility of forensic science and correctly decided* Bullcoming *in a manner that was consistent with the Confrontation Clause's purposes.*

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I. INTRODUCTION

The Sixth Amendment's Confrontation Clause requires that a criminal defendant be "confronted with the witnesses against him."[1] This seemingly straightforward constitutional requirement has long been the subject of an intense debate, one that defies the stereotypical battles between conservative and liberal jurists.[2] In 2004, Justice Scalia—whose prosecutor-oriented, law-and-order principles have earned him a reputation as one of the most politically conservative U.S. Supreme Court Justices[3]—authored *Crawford v. Washington*,[4] which expanded criminal defendants' confrontation rights and paved the way for the current Sixth Amendment jurisprudence.[5] In *Crawford*, the Court held that the Sixth Amendment guarantees a defendant's right to confront, in court, a witness who bears testimony against the defendant, unless that witness is unavailable and the defendant had a prior opportunity to cross-examine him.[6]

Crawford was a groundbreaking decision. It overturned *Ohio v. Roberts*[7] and more than twenty years of Confrontation Clause jurisprudence, refocusing the constitutional inquiry on the *testimonial* nature of a witness's statement, rather than on its indicia of reliability.[8] The Court, however, declined to comprehensively define "testimonial."[9] Thus began the current line of Confrontation Clause cases, each of which sought to clarify the Sixth Amendment's confrontation protections but arguably clouded any clarity that the case before it brought.[10]

1. U.S. CONST. amend. VI.

2. Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005).

3. Joanmarie Ilaria Davoli, *Justice Scalia for the Defense?*, 40 U. BALT. L. REV. 687, 687 (2011).

4. 541 U.S. 36 (2004).

5. Bibas, *supra* note 2, at 184; Jeffrey L. Fisher, *Originalism As an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL'Y 53, 57–62 (2011). For a discussion of how Justice Scalia's adherence to the principles of originalism and formalism shaped the *Crawford* decision, see also *infra* note 54 and accompanying text.

6. *Crawford*, 541 U.S. at 50–60.

7. 448 U.S. 56 (1980). For a discussion of the *Roberts* approach, see *infra* notes 47–51 and accompanying text.

8. *Crawford*, 541 U.S. at 59.

9. *Id.* at 68.

10. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2723–28 (2011) (Kennedy, J., dissenting).

In 2009, the Court decided *Melendez-Diaz v. Massachusetts*,[11] in which it held that a forensic laboratory report prepared for a criminal trial is "testimonial" and that it therefore triggers the Confrontation Clause.[12] Then, in 2011, the Court decided *Bullcoming v. New Mexico*[13] and answered the question that *Melendez-Diaz* left open: if a forensic laboratory report triggers the Confrontation Clause, who must provide the live, in-court testimony?[14] Is it constitutionally significant who takes the stand? In a controversial 5–4 decision,[15] the Court held that the analyst who actually conducted the forensic test and certified the report must take the stand, and a so-called surrogate witness does not satisfy the constitutional requirement.[16]

Although the *Bullcoming* decision is controversial, this Comment suggests that the Court accurately assessed the fallibility of forensic science and correctly decided the case in a manner consistent with the Confrontation Clause's purposes. Part II outlines *Bullcoming*'s key facts and procedural history. Part III explains the historical framework of criminal defendants' confrontation rights. Part IV examines the Court's reasoning in *Bullcoming*. Finally, Part V analyzes the impact of forensic testimony in the context of the Confrontation Clause's purposes and ultimately concludes that a forensic report can be assessed only through the confrontation of the analyst who conducted the forensic analysis and certified the report.

II. KEY FACTS AND PROCEDURAL HISTORY

In August 2005, Donald Bullcoming rear-ended his vehicle into a truck that was stopped at an intersection in Farmington, New Mexico.[17] The truck driver approached Bullcoming to exchange insurance information and noticed that Bullcoming's eyes were bloodshot and that his breath smelled of alcohol.[18] The truck driver told his wife to call the police, but Bullcoming fled the scene.[19] The

11. 129 S. Ct. 2527 (2009).
12. *Id.* at 2532.
13. 131 S. Ct. 2705 (2011).
14. *Id.* at 2710.
15. *See id.* at 2723, 2728 (Kennedy, J., dissenting).
16. *Id.* at 2710 (majority opinion).
17. *Id.*
18. *Id.*
19. *Id.*

responding police officer quickly found Bullcoming, after which Bullcoming performed and failed a series of field sobriety tests.[20] The police officer arrested Bullcoming for driving a vehicle while under the influence (DWI).[21] At the police station, Bullcoming refused to take a breath test, so the arresting officer obtained a search warrant for a blood-alcohol test.[22] Bullcoming gave a blood sample at the local hospital, which was then sent to the New Mexico Department of Health, Scientific Laboratory Division (SLD), to be tested for blood-alcohol concentration (BAC).[23]

SLD uses a gas chromatograph machine to calculate BAC levels.[24] Gas chromatography is a widely used scientific method that analyzes a substance's quantity within a mixture.[25] SLD's testing protocol requires analysts to extract two blood samples, place the samples in vials containing a chemical additive, cap the vials, and place them in the machine; the machine then produces a chromatogram (printed graph) and software-generated data calculations.[26] The SLD analyst must have specialized knowledge and training in the chromatography process.[27] He or she "must be aware of, and adhere to, good analytical practices and understand what is being done and why" because human error can occur at any step in the process and invalidate the results.[28]

Curtis Caylor was the SLD forensic analyst who completed Bullcoming's BAC Report ("Report").[29] The Report contained two certifications: one by a reviewing SLD examiner, who reviewed Caylor's analysis and certified Caylor's qualifications, and another by Caylor himself.[30] Caylor's certification verified that he had followed the SLD procedures, which require, among other things, that the certifying analyst make note on the Report of any circumstance or condition that might have affected the sample's

20. *Id.*
21. *Id.*
22. State v. Bullcoming, 226 P.3d 1, 5 (N.M. 2010), *rev'd*, 131 S. Ct. 2705 (2011).
23. *Bullcoming*, 131 S. Ct. at 2710.
24. *Id.* at 2711.
25. *Id.* at 2711 n.1.
26. *Id.*
27. *Id.* at 2711.
28. *Id.* at 2711 n.1 (citations omitted).
29. *Id.* at 2710.
30. *Id.* at 2710–11.

integrity or the analysis's validity.[31] Caylor left this section blank, thus implicitly verifying that there was no such circumstance or condition.[32] Caylor specifically certified that Bullcoming's BAC was 0.21 grams per hundred milliliters, which allowed the state to charge Bullcoming with an aggravated DWI, a more serious crime than a regular DWI is (a regular DWI requires a BAC of only 0.16).[33]

Bullcoming went to trial in November 2005, before the Court decided *Melendez-Diaz*.[34] On the day of trial, the state announced that Caylor had been placed on unpaid leave for an undisclosed reason,[35] and the prosecution would not be calling him as a witness.[36] Instead, the state proposed to introduce the Report as a business record through the testimony of another SLD analyst, Gerasimos Razatos, who neither observed Caylor perform Bullcoming's BAC test nor reviewed Caylor's analysis.[37] Bullcoming's counsel objected that Razatos's testimony violated Bullcoming's confrontation right, but the trial court overruled the objection and admitted the Report.[38] The jury convicted Bullcoming.[39] The New Mexico Court of Appeals affirmed Bullcoming's conviction, holding that the Report was nontestimonial and thus did not trigger the Confrontation Clause.[40]

While Bullcoming's appeal was pending at the New Mexico Supreme Court, the U.S. Supreme Court decided *Melendez-Diaz*, holding that written statements in a forensic report were testimonial and therefore triggered the defendant's confrontation right.[41] The New Mexico Supreme Court affirmed Bullcoming's conviction: it recognized that the Report was testimonial under *Melendez-Diaz* but nonetheless did not violate Bullcoming's confrontation right for two reasons.[42] First, because Caylor only transcribed the gas

31. *Id.*
32. *Id.* at 2714.
33. *Id.* at 2710–11.
34. *Id.* at 2711.
35. Justice Scalia asked at oral argument why Caylor was placed on unpaid leave, but the State refused to explain. Transcript of Oral Argument at 37, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876).
36. *Bullcoming*, 131 S. Ct. at 2711–12.
37. *Id.* at 2712.
38. *Id.*
39. *Id.*
40. State v. Bullcoming, 189 P.3d 679, 685 (N.M. Ct. App. 2008), *aff'd on other grounds*, 226 P.3d 1 (N.M. 2010), *rev'd*, 131 S. Ct. 2705 (2011).
41. *Bullcoming*, 131 S. Ct. at 2712.
42. *Bullcoming*, 226 P.3d at 8.

chromatograph machine's results—he did not interpret the results or exercise any independent judgment—Caylor was a "mere scrivener," and the gas chromatograph machine was Bullcoming's true accuser.[43] Second, because the gas chromatograph machine was the true accuser, the live, in-court testimony of any qualified SLD analyst, such as Razatos, satisfied Bullcoming's confrontation right.[44]

The U.S. Supreme Court granted certiorari to address the following question:

> Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification[?][45]

In answering this question, the Court first acknowledged the well-established *Crawford* rule: an out-of-court testimonial statement may not be introduced against a criminal defendant at trial unless the declarant is unavailable and the defendant had a prior opportunity to confront him.[46] Determining that the Report was testimonial in nature, the Court reversed the New Mexico Supreme Court's judgment, holding that Bullcoming's confrontation right was violated when the trial court allowed into evidence the testimonial statement of one witness, Caylor, through the in-court testimony of another witness, Razatos.[47]

III. HISTORICAL FRAMEWORK: A CONFRONTATION CLAUSE ANALYSIS

Because the *Bullcoming* decision is essentially the follow-up decision to *Melendez-Diaz*, it is helpful to revisit the Confrontation Clause's history before addressing the Court's reasoning. When it decided *Crawford* in 2004, the Court overruled *Roberts* and radically

43. *Id.* at 8–9 (citing United States v. Washington, 498 F.3d 225, 230 (4th Cir. 2007)).
44. *Id.* at 9.
45. *Bullcoming*, 131 S. Ct. at 2713.
46. *Id.*
47. *Id.*

changed its Confrontation Clause jurisprudence.[48] Under *Roberts*, which the Court decided in 1980, an unavailable declarant's statement was admissible if it bore adequate "indicia of reliability," either by falling within a hearsay exception or otherwise showing "particularized guarantees of trustworthiness."[49] Thus, if an out-of-court statement "was good enough for the Federal Rules of Evidence, it was good enough for the confrontation clause."[50] But the Court's focus on reliability was confounded: it confused the constitutional right to confrontation with nonconstitutional evidentiary hearsay law.[51] Courts were forced to apply a multifactor, indeterminate balancing test.[52] Because individual judges weighed factors differently, results were grossly inconsistent, and case law was in disarray.[53] In *Crawford*, Justice Scalia used a blend of originalism and formalism[54] to bring order to the case-law chaos and return the confrontation doctrine to its historical and textual roots.[55]

The *Crawford* facts centered on a tape-recorded statement in which the defendant's wife described to the police how her husband stabbed the victim.[56] The wife did not testify at trial under the state's marital privilege, so the prosecution sought to introduce the wife's tape-recorded statement.[57] Relying on the *Roberts* indicia-of-reliability standard, the trial court allowed the prosecution to play the tape during trial, and the jury convicted the defendant.[58] But in a 7–2 decision, the Court reversed and established the *Crawford* rule:[59] "Testimonial statements of witnesses absent from trial [are

48. *See* Bibas, *supra* note 2, at 189–90.

49. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

50. Cyrus P.W. Rieck, *How to Deal with Laboratory Reports Under* Crawford v. Washington*: A Question with No Good Answer*, 62 U. MIAMI L. REV. 839, 840 (2008).

51. Bibas, *supra* note 2, at 189.

52. *Id.*

53. *Id.* at 189–90 (noting examples where judges gave opposite weight to the same factors for opposite reasons).

54. Because Justice Scalia is an avid proponent of originalism and formalism—and the text of the Constitution strongly protects criminal defendants' rights—his decisions do not always reflect his conservative ways; Scalia's philosophies are in stark contrast to the more pragmatic approach advanced by the dissenting Justices in *Bullcoming*, who promoted forward-looking, practical decisions that allow judges to apply general rules in a manner that seems fair. *Id.* at 186–88.

55. *Id.* at 190.

56. Crawford v. Washington, 541 U.S. 36, 38 (2004).

57. *Id.* at 40.

58. *Id.* at 40–41.

59. *Id.* at 69.

admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[60] Consequently, the *Crawford* decision "shifted the touchstone of admissibility from a statement's reliability to its testimonial nature."[61]

The Court then fleshed out a few definitions of the new *Crawford* framework. It defined a "witness" as a person who "bear[s] testimony," and it defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[62] The Court also provided a nonexhaustive list of statements that fall within the "testimonial" category—including affidavits, formalized testimonial materials, and statements that police officers take during interrogations[63]—but left "for another day any effort to spell out a comprehensive definition of 'testimonial.'"[64]

That day arrived relatively quickly. Two years later, in 2006, the Court decided *Davis v. Washington*,[65] which addressed the narrow question of whether a statement made to the police during a 911 call is testimonial.[66] The Court held that such a statement is testimonial when the circumstances objectively indicate that there is no ongoing emergency and that the statement's primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution."[67] Because the victim who made the call in *Davis* spoke about the events as they occurred, as opposed to describing past events, the Court held that the 911 call's primary purpose was to assist with an ongoing emergency and that it therefore did not trigger the Confrontation Clause.[68]

60. *Id.* at 59.

61. Hon. Paul W. Grimm et al., *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions Are Testimonial?*, 40 U. Balt. L.F. 155, 157 (2010); *see also* Bibas, *supra* note 2, at 192 ("*Crawford*'s formalistic rule turns on simple, clear requirements of testimony, cross-examination, and unavailability, rather than ad hoc estimates of reliability.").

62. *Crawford*, 541 U.S. at 51.

63. *Id.*

64. *Id.* at 68.

65. 547 U.S. 813 (2006).

66. *Id.* at 817.

67. *Id.* at 822.

68. *Id.* at 827–28. The Court decided *Hammon v. Indiana* as a companion case to *Davis*. *Id.* at 819. In *Hammon*, police responded to a domestic disturbance call. *Id.* When they arrived at the home, the victim-wife—who was sitting on the porch—told the officers that her husband shoved her head into a broken glass heater and punched her in the chest. *Id.* She later memorialized the statement in an affidavit. *Id.* at 820. The husband was charged with domestic battery, the trial court admitted the wife's statements through officer testimony and the written affidavit, and the

The *Davis* opinion imposed on courts the task of determining a statement's primary purpose.[69] Thus, while the Court certainly did not articulate a comprehensive standard for determining whether a statement is testimonial, it at least brought some clarity to the nebulous "testimonial" standard by providing one common attribute that determines when statements are testimonial: "the objective likelihood that [the statement] be used in trial."[70]

Melendez-Diaz was the next case to take up the meaning of testimonial in the context of forensic reports.[71] In *Melendez-Diaz*, the prosecution sought to introduce three certificates of analysis—without calling as witnesses the analysts who prepared the certificates—to prove that the substance seized from the defendant was cocaine.[72] The trial court admitted the certificates as "prima facie evidence of the composition, quality, and the net weight of the narcotic analyzed," and the jury convicted the defendant.[73] The Court granted certiorari and, in a straightforward *Crawford* analysis, held that the documents fell "within the core class of testimonial statements" that trigger the defendant's confrontation right.[74]

IV. THE *BULLCOMING* COURT'S REASONING

In *Melendez-Diaz*, the Court "refused to create a forensic evidence exception" to the Confrontation Clause and instead required that a live witness defend a forensic report.[75] In *Bullcoming*, the Court decided who that live witness must be.[76] Justice Ginsburg,

husband was convicted. *Id.* The Supreme Court reversed. *Id.* at 834. Unlike in *Davis*, there was no ongoing emergency during the police interrogation; rather, the wife merely described past events in response to the officer's questions. *Id.* at 829–30.

69. Grimm et al., *supra* note 61, at 158 (citing *Davis*, 547 U.S. at 822).

70. *Id.* at 159.

71. 129 S. Ct. 2527, 2530 (2009).

72. *Id.* at 2531.

73. *Id.* (internal quotation marks omitted).

74. *Id.* at 2532 (internal quotation marks omitted). The Court decided *Michigan v. Bryant* in February 2011, after *Melendez-Diaz*. 131 S. Ct. 1143 (2011). Justice Sotomayor authored the 6–2 decision, which held that police officer testimony about a dying victim's identification of a defendant did not violate the Confrontation Clause because its primary purpose was to assist with an ongoing emergency. *Id.* at 1166–67. As expected, Justice Scalia vehemently dissented. *Id.* at 1170 (Scalia, J., dissenting) ("[T]his is an absurdly easy case. . . . [The victim's] statements had little value except to ensure the [defendant's] arrest and eventual prosecution.").

75. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2713–14 (2011) (citing *Melendez-Diaz*, 129 S. Ct. at 2536–38).

76. *See id.* at 2713.

writing for the majority, held that the Confrontation Clause requires the live witness to be the person who actually made the testimonial statement.[77] And in *Bullcoming*, that person was Caylor.[78]

In addressing why Razatos's testimony failed to meet the Confrontation Clause's requirements, the Court flatly rejected the New Mexico Supreme Court's reasoning.[79] Because Caylor verified that he followed SLD protocol and that nothing affected the integrity of the sample or the validity of the analysis, the Report was the result of human action, not machine-produced data.[80] In this regard, the New Mexico Supreme Court's holding was a conduit for circumventing the Confrontation Clause, equivalent to allowing, for example, "a note-taking police [officer] [to] recite the . . . testimony of the declarant."[81] Razatos's surrogate testimony failed to satisfy the Confrontation Clause's requirements: it could not convey Caylor's experience in facilitating and processing Bullcoming's BAC test or "expose any lapses or lies on . . . [Caylor's] part."[82] And, of particular significance, Razatos had no knowledge as to why Caylor was placed on unpaid leave, thereby precluding Bullcoming's attorney from eliciting testimony to reveal whether Caylor was removed from his position as a result of incompetence, evasiveness, or dishonesty.[83] Thus, the Court appropriately held that Caylor's live testimony was hardly a "hollow formality."[84] It was simply not enough "that questioning one witness about another's testimonial statements provide[d] a *fair enough* opportunity for cross-examination."[85]

77. *Id.*

78. *Id.*

79. *Id.* at 2714–15.

80. *Id.* at 2713; *see also id.* at 2715 (noting that although the gas chromatograph machine's readout requires no interpretation by SLD analyst, "Caylor certified to more than a machine-generated number").

81. *Id.* at 2715 (alteration in original) (citation omitted); Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2546 (2009) (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.").

82. *Bullcoming*, 131 S. Ct. at 2715 & n.8 (noting Razatos' testimony that "you don't know unless you actually observe the analysis that someone else conducts, whether they followed th[e] protocol in every instance" (alteration in original)).

83. *Id.* at 2715.

84. *Id.* at 2716 (quoting *id.* at 2724 (Kennedy, J., dissenting)).

85. *Id.* (emphasis added) ("[T]rue enough, . . . the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded

Next, the Court categorically rejected the prosecution's argument that the Report was nontestimonial: the Report was unquestionably an "'affirmation[] made for the purpose of establishing or proving some fact' in a criminal proceeding,"[86] so its sole purpose was evidentiary and therefore testimonial.[87] The Court acknowledged that the Report was not sworn, unlike the certificates in *Melendez-Diaz*, but it reconciled this distinction by holding that "'the absence of [an] oath [i]s not dispositive' in determining if a statement is testimonial."[88] The Report's formalities, which resembled those in *Melendez-Diaz*, were sufficient to render Caylor's written statements testimonial: a police officer delivered the blood sample to the laboratory to assist in a criminal investigation, and an analyst tested the evidence, prepared a certificate, and formalized it by signing the document.[89]

The state, its amici,[90] and the dissenting Justices stressed the undue burden that the Court's opinion imposed on the prosecution,[91] echoing the argument raised in *Melendez-Diaz* that the Court relax the Confrontation Clause's requirements to accommodate the necessities of the criminal justice system.[92] But just as the Court swiftly rejected these arguments in *Melendez-Diaz*, it similarly rejected them in *Bullcoming*, reiterating the various ways in which the prosecution could offer this type of forensic evidence at trial.[93] The Court also emphasized that because only a small fraction of criminal cases go to trial, and within those cases defendants generally stipulate the admission of forensic analyses, a defendant

so long as the trial is, on the whole, fair." (alteration in original) (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006))).

86. *Id.* (quoting *Melendez-Diaz*, 129 S. Ct. at 2532).

87. *Id.* at 2717 (citing *Melendez-Diaz*, 129 S. Ct. at 2532).

88. *Id.* (alterations in original) (quoting State v. Bullcoming, 226 P.3d 1, 8 (N.M. 2010)).

89. *Id.*

90. Amici included the Attorneys General of thirty-four states, the National District Attorneys Association with other professional associations, and the State of Mexico Department of Health, Scientific Laboratory Division.

91. *Bullcoming*, 131 S. Ct. at 2717; *see also id.* at 2727–28 (Kennedy, J., dissenting) (explaining that despite the majority's position, the decision will "impose an undue burden on the prosecution").

92. *Melendez-Diaz*, 129 S. Ct. at 2540.

93. *Bullcoming*, 131 S. Ct. at 2717–18 (only Justices Ginsburg and Scalia supported this reasoning). For example, Razatos could have retested Bullcoming's original sample, or the prosecution could have used a notice-and-demand procedure that would have allowed Bullcoming to assert his Confrontation Clause right after he received notice of the prosecution's intent to use the Report. *Id.* at 2718.

will seldom insist on live testimony from the forensic analyst.[94] The Court looked to statistics to emphasize this final point,[95] noting that in post-*Melendez-Diaz* Michigan, in-court, forensic-analyst testimony had increased only from .07 percent in 2006 to 1 percent in 2010.[96] In light of these considerations, the Court concluded that the state was and is fully capable of ensuring that the certifying forensic analyst appears at trial.[97]

Justice Sotomayor wrote a concurring opinion to emphasize the factual scenarios that the majority did *not* address, suggesting four different circumstances in which such a forensic laboratory report could be admitted without the testimony of the certifying forensic analyst.[98] First, Sotomayor noted that a forensic lab report might be admissible if its primary purpose was something other than criminal evidence, such as providing medical treatment.[99] Second, she pointed out that this was not a case where the so-called surrogate witness was "a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue," suggesting that *Bullcoming* might have come out differently if the witness had been a supervisor who actually observed the analysis.[100] Third, Sotomayor indicated that an expert might testify with his independent opinion about the underlying forensic analysis without the report itself being admitted into evidence.[101] Finally, Sotomayor emphasized that the situation might have been different if the prosecution had only sought to introduce the machine-generated results—for example, the chromatogram—as opposed to the Report with Caylor's testimonial statements.[102]

94. *Id.* at 2718–19 ("[N]early 95% of convictions . . . are obtained via guilty plea." (quoting *Melendez-Diaz*, 129 S. Ct. at 2540)).

95. *Id.* at 2719 n.10. It is noteworthy that the dissenting Justices used different statistics to make the opposite point. *See id.* at 2728 (Kennedy, J., dissenting); *see infra* note 109 and accompanying text.

96. *Bullcoming*, 131 S. Ct. at 2719 n.10 (citing Brief of Amici Curiae Public Defender Service for the District of Columbia et al. in Support of Petitioner at 21, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876)).

97. *Id.* at 2719.

98. *Id.* at 2721–22 (Sotomayor, J., concurring).

99. *Id.* at 2722 (citing Michigan v. Bryant, 131 S. Ct. 1143, 1157 (2011)).

100. *Id.*

101. *Id.* (citing FED. R. EVID. 703) (emphasizing that Razatos *did not* offer an expert opinion about Bullcoming's BAC).

102. *Id.*

Justice Kennedy—with Chief Justice Roberts and Justices Alito and Breyer joining—penned a zealous dissent, rejecting both the specific *Bullcoming* holding and the general line of *Crawford* Confrontation Clause cases.[103] The dissent initially distinguished *Bullcoming* from the facts of *Melendez-Diaz*, asserting that Razatos's testimony and cross-examination were fully consistent with the Confrontation Clause's requirements.[104] Unlike in *Melendez-Diaz*, the Report was not a notarized affidavit but merely a "routine authentication" that could be fully examined by the in-court testimony of any qualified SLD analyst.[105] Further, the dissent asserted that Caylor's role in the Report was no greater than the roles of the other people in the chain of custody—for example, those who handled the blood sample's receipt and storage, each of whose acts had their own evidentiary significance.[106] If the Court was not going to require the government to call as witnesses each person in the chain of custody, the dissent's argument went, then Caylor's testimony would have been no more significant than Razatos's testimony was.[107]

The dissent also expressed particular dissatisfaction with the Court's *Crawford* jurisprudence, favoring instead the *Roberts* approach.[108] The dissent accused the majority of using the reliability of evidence "as a reason to exclude it"[109] and argued that the *Crawford* approach requires judges "to struggle to apply an 'amorphous, if not entirely subjective,' 'highly context-dependent inquiry.'"[110] Finally, the dissent rejected the majority's use of statistics to emphasize that the *Bullcoming* decision will not impose an undue burden on the state, and it looked instead to contrary statistics that show how the *Bullcoming* decision will continue to

103. *Id.* at 2723–28 (Kennedy, J., dissenting).

104. *Id.* at 2723–24.

105. *Id.*

106. *Id.* at 2724 (citing Razatos's testimony that "once the material is prepared and placed in the machine, you don't need any particular expertise to record the results").

107. *Id.* It is notable, however, that the State conceded during oral arguments that the chain of custody was not contested in *Bullcoming* and that it is generally not contested. Transcript of Oral Argument, *supra* note 35, at 47–48.

108. *Bullcoming*, 131 S. Ct. at 2725–28 (Kennedy, J., dissenting).

109. *Id.* at 2725.

110. *Id.* at 2726 (quoting Michigan v. Bryant, 131 S. Ct. 1143, 1175 (2011)) (arguing that the elusive distinction between testimonial statements (proving past events) and non-testimonial statements (helping the police in an ongoing emergency) does little to clarify the Confrontation Clause standard).

disrupt the way that crime labs operate and courts conduct criminal trials.[111]

V. ANALYSIS

The critics[112] of the *Bullcoming* decision unduly focused on the burden that the decision will impose on states without regard to what the Court has articulated are the purposes of the Confrontation Clause: (1) ensuring that a witness gives his testimony under oath, which highlights the seriousness of the matter and, with the threat of perjury, protects against false testimony; (2) subjecting a witness to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; and (3) allowing a jury to judge a witness's credibility by observing his demeanor.[113] With these purposes in mind, the critics' preferred indicia-of-reliability approach only operates to eviscerate the constitutional protections for confrontation.[114]

Regarding the first purpose—ensuring that a witness gives his testimony under oath—the Court had to address an underlying issue in *Bullcoming*: who was Bullcoming's accuser, Caylor or the gas chromatograph machine? The critics maintained that the machine was the true accuser, putting particular emphasis on the advanced technological nature of the machine and on SLD's strict testing protocols.[115] Accordingly, their argument went, because the machine does not tolerate "individualized . . . BAC testing"[116] and a computer

111. *Id.* at 2728 (citing Brief of Amici Curiae National District Attorneys Association et al. in Support of Respondent, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876) [hereinafter DAA Brief] (observing that each of California's blood-alcohol analysts process an average of 3,220 cases per year); Brief for State of California et al. as Amici Curiae Supporting Respondent, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876) (explaining that Los Angeles's ten toxicologists spent 782 hours at 261 court appearances during a one-year period); Brief of the Amicus Curiae State of New Mexico Department of Health Scientific Laboratory Division in Support of Respondent, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876) [hereinafter SLD Brief] (noting a 71 percent increase in subpoenas in New Mexico that require analysts to testify in DWI cases)).

112. Any reference to "critics" includes the *Bullcoming* dissenting Justices and the State of New Mexico and its amici.

113. Cornelius M. Murphy, *Justice Scalia and the Confrontation Clause: A Case Study in Originalist Adjudication of Individual Rights*, 34 AM. CRIM. L. REV. 1243, 1245 (1997) (citing California v. Green, 399 U.S. 149, 158 (1970)).

114. Ellen Liang Yee, *Confronting the "Ongoing Emergency": A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 740–41 (2008).

115. *Bullcoming*, 131 S. Ct. at 2724 (Kennedy, J., dissenting).

116. SLD Brief, *supra* note 111, at 15.

interprets the forensic results,[117] the machine was Bullcoming's accuser, thereby eliminating any constitutional objection to Razatos' testimony.[118] But this argument missed the point entirely. The issue was not how SLD analysts *typically* analyze BAC samples, but how Caylor *specifically* analyzed Bullcoming's BAC sample.[119] Caylor was the real witness against Bullcoming, and the manner in which Caylor analyzed Bullcoming's BAC sample directly addressed the second purpose of the Confrontation Clause—the discovery of truth.

During Bullcoming's trial, the prosecution sought to prove that Bullcoming's BAC was over 0.16 grams per hundred milliliters, the minimum content required to charge Bullcoming with the more-serious aggravated DWI.[120] Thus, to discharge the truth-seeking function of the Confrontation Clause, the Court was correct to emphasize both forensic science's fallibility and the possibility for human error in the analysis. The critics continuously attempted to mask forensic science's imperfections, suggesting that the "anecdotal horror stories about inaccurate laboratory results . . . are red herrings,"[121] and there is nothing inherently infallible about forensics.[122] Rather, the imperfection and associated risks of forensic science highlight exactly why a defendant's right to confrontation cannot be trivialized in this context.[123]

Unfortunately, popular television shows portray forensic science in a sensational light that simply does not exist in real life.[124] Contrary to popular belief, most forensic disciplines—including fingerprint analysis, ballistics, bite marks, footprints, tire tracks,

117. *Id.* at 19.

118. *Id.* at 37; *see also* DAA Brief, *supra* note 111, at 15 ("A qualified witness such as Razatos . . . could review the analysis, explain the results and how they were produced as well as the original person . . . by virtue of the laboratory protocol . . . .").

119. *See* Brief of Amici Curiae National Association of Criminal Defense Lawyers et al. in Support of Petitioner, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876) [hereinafter NACDL Brief] ("Cross-examining a surrogate witness is like cross-examining a textbook—an attorney can only discover what *should* have happened rather than what *actually* happened.").

120. N.M. STAT. § 66-8-102(D)(1) (2011).

121. DAA Brief, *supra* note 111, at 17.

122. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2536 (2009) ("Forensic evidence is not uniquely immune from the risk of manipulation."); NACDL Brief, *supra* note 119, at 30 (noting forensic science is "anything but infallible," and is fraught by the very human errors that lead to contamination and inaccurate reports).

123. Brief of Amicus Curiae the Innocence Network in Support of Petitioner, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876) [hereinafter Innocence Brief].

124. *Id.* at 12 n.23 (estimating upwards of forty percent of the forensic science on *CSI: Crime Scene Investigation* (*CSI*) does not currently exist in real life).

handwriting, and bloodstain patterns—have not been subject to rigorous scientific study and have little, if any, scientific basis.[125] In 2009, the National Academy of Sciences released a report[126] that shattered "any perception that the forensic sciences are beyond reproach."[127] The report noted that poorly trained analysts often handle forensic testing and then exaggerate the methodology's accuracy in court.[128]

Chromatography, which is based on organic chemistry and microbiology, is actually one of the few forensic disciplines that have been subject to scientific review.[129] But, even so, many laboratories lack meaningful protocols to guard against sample contamination and other human errors.[130] The recent uncovering of crime-lab scandals across the United States highlights the problems of inaccuracy and fabrication in forensics[131] and confirms that incompetent forensic analysis is neither new nor isolated.[132] For example, in 2010, a crime-lab investigation in San Francisco revealed several disturbing patterns of neglect: analysts often left drug evidence unsecured and unattended, failed to accurately document when evidence was opened for sampling, and failed to calibrate testing devices.[133] In one particularly alarming incident, an analyst mixed up a DNA evidentiary sample with a control sample

125. *Id.* at 13 ("[W]ith the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." (quoting COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf)).

126. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., *supra* note 125.

127. Innocence Brief, *supra* note 123, at 5.

128. NACDL Brief, *supra* note 119, at 30; *see also* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 6 (2009) ("Traditionally, there has been almost no oversight of what scientists say in the courtroom once the court deems the method used valid and reliable."). One study found that in 60 percent of cases where defendants were wrongfully convicted and later exonerated, a forensic analyst gave inaccurate testimony. *Id.* at 9.

129. Garrett & Neufeld, *supra* note 128, at 13; Brad Reagan, *CSI Myths: The Shaky Science Behind Forensics*, POPULAR MECHANICS (Dec. 18, 2009, 3:28 AM), http://www.popularmechanics.com/science/health/forensics/4325774.

130. *See* Innocence Brief, *supra* note 123, at 32–36.

131. *Id.* at 5.

132. *Id.* at 16–18.

133. *Id.* at 17–18.

on the eve of a criminal trial and then attempted to cover up his error, destroying evidence of the mix-up.[134]

There have been similar reports of faulty blood-alcohol forensic testing, confirming that even credible scientific disciplines are vulnerable to error.[135] A recent investigation of Colorado Springs's crime lab, for example, revealed that, in a two-year period, more than two hundred blood-alcohol tests were erroneously high; each test was attributable to a single analyst who had been injecting improper levels of propanol into blood samples.[136] At another laboratory in Washington, an investigation uncovered that a toxicology laboratory's supervisor had been falsifying and covering up blood-alcohol certifications.[137] These few examples drive home an important aspect of Bullcoming's argument: technology cannot correct the human error and improper conduct that invalidate forensic test results.

Another layer of concern is the intrinsic bias within forensic science. The critics would have everyone believe that forensic analysts are impartial.[138] But there is nothing inherently objective about forensic analysis. Police, not scientists, created forensic science as a "reliable way[] to match patterns from clues with evidence tied to suspects," focusing almost exclusively on the *outcome*, with little regard for the *process*.[139] Moreover, forensic laboratories operate at the beck and call of the investigating officers and prosecution,[140] and analysts likely feel pressure to produce findings that are favorable to prosecution.[141]

A discussion of the Confrontation Clause's truth-seeking function also requires a mention of the jury, the individuals who ultimately decide the truth. A defendant's right to confront the

134. *Id.* at 18. Other examples include a 2006 audit of a Houston crime laboratory and a 2008 investigation of a Detroit crime laboratory, both of which uncovered "shocking level[s] of incompetence," such as routine failure to use required scientific controls, to follow procedures to minimize contamination risks, and to properly calculate statistics. *Id.* at 17–18. The Detroit laboratory was permanently closed. *Id.* at 17.

135. NACDL Brief, *supra* note 119, at 32.

136. *Id.* at 32–33.

137. *Id.* at 33.

138. SLD Brief, *supra* note 111, at 30.

139. Reagan, *supra* note 129.

140. *See* SLD Brief, *supra* note 111, at 2 ("Like all New Mexico's state agencies . . . [SLD] is legally required to assist law enforcement without charging fees for its work.").

141. Innocence Brief, *supra* note 123, at 20–21.

certifying forensic analyst is most prevalent in this context because forensic testimony is incredibly persuasive to jurors,[142] sometimes even more compelling than eyewitness testimony.[143] In what is sometimes called the "CSI Effect,"[144] jurors attach to "the mistaken notion that criminal science is fast and infallible and always gets its man."[145] As evidenced by the discussion above, that perceived infallibility is simply unrealistic,[146] and it underscores the significance of a defendant's ability to cross-examine the analyst who actually performed the forensic testing.

With this framework in mind, allowing the jury to observe that analyst's demeanor and judge his credibility—the third purpose of the Confrontation Clause—is the most effective way to expose any ignorance, incompetence, mistake, or fraud that is associated with a forensic analysis of the defendant.[147] The critics sidestepped the constitutional significance of this in-court testimony, suggesting that it would be unbelievable for an analyst to say that she remembers any particular sample that she had run.[148] But, again, the critics missed the point. Even if Caylor had testified that he had no recollection of Bullcoming's test, the defense counsel could have still inquired about why Caylor was placed on leave, what steps he took and judgments he made while analyzing Bullcoming's blood sample, and whether he understood and followed SLD's testing protocol.[149] Surrogate witnesses, though competent analysts themselves, are

142. *Id.* at 3 ("In courts across the country, forensic science plays a vital role in the fact-finding process.").

143. Brief of Amici Curiae Public Defender Service for the District of Columbia et al. in Support of Petitioner at 8, Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011) (No. 09-10876) [hereinafter PD Brief].

144. In the *CSI* television series, investigators use cutting-edge (and costly) technology to solve difficult cases. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., *supra* note 125, at 48; *see also* Andrew P. Thomas, *The CSI Effect and Its Real-Life Impact on Justice*, THE PROSECUTOR, Sept./Oct. 2005, at 10 (providing background information on the CSI Effect phenomenon and the results of a study on whether the CSI Effect has affected the criminal justice system in Maricopa County, Arizona).

145. 2 FITZGERALD, INTOXICATION TEST EVIDENCE § 57:23 (2d ed. 2011) (quoting Richard Willing, *'CSI Effect' Has Juries Wanting More Evidence*, USA TODAY, Aug. 5, 2004, at A1) *available at* Westlaw INTOX.

146. *Id.*

147. NACDL Brief, *supra* note 119, at 30 (citing Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2536 (2009)).

148. SLD Brief, *supra* note 111, at 26.

149. *See* Innocence Brief, *supra* note 123, at 6; *see also* United States v. Owens, 484 U.S. 554, 564 (1988) (holding that the Confrontation Clause's cross-examination requirement is satisfied even if the witness has almost no memory of the underlying facts).

likely unaware of any errors that the analyst who performed the test committed.[150] Their presumptive testimony—that the testing analyst properly and impartially performed the test—simply cannot satisfy the defendant's Confrontation Clause rights.[151]

With the Confrontation Clause's purposes in mind, the critics' main objection—that the *Bullcoming* decision imposes an undue burden on the states—can be properly addressed. Aside from the fact that financial burden "cannot be the tail that wags the dog" for constitutional interpretation,[152] it is not a bad thing that *Bullcoming* will require states to invest more resources in their forensic laboratories and procedures. Rather, it is a good thing: it will help ensure that criminal defendants are not wrongfully convicted because of faulty forensic evidence, and there are several procedures that states can reasonably implement to ensure that they prosecute defendants in accordance with their confrontation rights. For example, prosecutors could depose the testing forensic analyst to preserve his testimony, even before charges are brought; prosecutors could have the testifying analyst reanalyze the blood before trial; a qualified witness who observed the analysis could testify to it even if he did not actually perform the test; and laboratories could continuously record the forensic testing—similar to how videotaped autopsies render live trial testimony unnecessary—thereby allowing another witness to identify the analyst and an expert to examine the analysis and render an opinion on it.[153] Additionally, laboratories could create procedures whereby supervisors thoroughly review all forensic testing, allowing them to testify at trials while they continue to work as analysts in the laboratory. Although each of these suggestions will indeed cost money when most states are in budgetary crises, the costs are worth the additional protections against wrongful convictions and the constitutional guarantees that are afforded to criminal defendants.

150. NACDL Brief, *supra* note 119, at 34.
151. Innocence Brief, *supra* note 123, at 6.
152. PD Brief, *supra* note 143, at 26.
153. Brief of Richard D. Friedman as Amicus Curiae in Support of Petitioner at 22–24, Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011) (No. 09-10876).

VI. CONCLUSION

The Court correctly decided *Bullcoming* consistent with the purposes of the Confrontation Clause, heeding the real-world dangers of forensic testing while establishing a standard that is both principled and pragmatic. If the Court had adopted the critics' reasoning, prosecutors could exclusively use surrogate witnesses to introduce forensic testimony, denying criminal defendants an opportunity to discover a fraudulent or incompetent analyst. The obvious risks of false forensic testimony make clear that the reliability of a forensic report can be assessed in only one way: through confrontation of the analyst who conducted the tests and certified the report. Any resulting costs of the *Bullcoming* decision are substantially outweighed by the preservation of the constitutional guarantees that protect criminal defendants.