SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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December 20, 2011

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Re: ***State v. Larry G. Martin*, I.D. No.: 1101005435**
Upon Larry G. Martin's Motion In Limine to Exclude The State's Proffered Forensic Reports In The Absence of Testimony of Analysts who Performed Tests.
DENIED.

Dear Counsel:

As you know, the defendant, Larry Martin, has been charged with felony driving under the influence of drugs (PCP) or alcohol, possession of oxycodone, possession of marijuana, and various traffic offenses. The State has indicated that it intends to offer into evidence forensic reports that reflect the presence of alcohol,

PCP, oxycodone and marijuana in Martin's blood at the time of his arrest. The State has further indicated that it may not admit these reports through the testimony of the analyst(s) who performed the tests, but rather may call a supervisor from the forensic laboratory, a "certifying" analyst or other witness with knowledge of the laboratory testing procedures to lay the foundation for the admission of the reports and to testify regarding their contents.

Mr. Martin has moved *in limine* to exclude this evidence based on the State's proffer on the grounds that any foundational testimony offered by someone other than the analyst(s) who performed the tests would violate the Confrontation Clause of the United States Constitution, and Delaware's constitutional counterpart.[1] He relies especially upon the recent United States Supreme Court decision in *Bullcoming v. New Mexico*.[2] In response, the State contends that it is not required to produce the analysts who actually performed the examinations in order to comply with the Confrontation Clause and, similarly, relies upon *Bullcoming* in opposition to Mr. Martin's motion.

The motion and response require the Court to address whether *vel non* the State, in seeking to admit into evidence forensic reports in the prosecution of a

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[1] U.S. Const. amend. VI; Del. Const. art. I, § 7.

[2] *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713 (2011) (citing U.S. Const. amend. VI).

driving under the influence or Title 16 drug offense, must produce at trial the analyst who performed the forensic test in order to comport with the defendant's Constitutional right of confrontation. The Sixth Amendment's Confrontation Clause confers upon the accused, "[i]n all criminal prosecutions, ... the right ... to be confronted with the witnesses against him."[3] The United States Supreme Court has "held that fidelity to the Confrontation Clause permitted admission of '[t]estimonial statements of witnesses absent from trial ... only where the declarant is unavailable, and only where the defendant had a prior opportunity to cross-examine.'"[4] There is no "forensic exception" to this rule,[5] as an analyst's certification prepared in connection with a criminal investigation or prosecution is "testimonial," and therefore within the compass of the Confrontation Clause.[6] Absent stipulation, the prosecution may not introduce a forensic laboratory report, which identifies a suspect substance, without offering a live witness competent to testify to the truth of the statements made in the report.[7]

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[3] *Id.*

[4] *Id.* at 2713 (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).

[5] *Id.* (citing *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536-38 (2009)).

[6] *Id.* at 2713-14 (citing *Melendez-Diaz*, 129 S.Ct. at 2537-40).

[7] *See id.* at 2709.

The Supreme Court in *Bullcoming* answered "no" to the question of "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification - - made for the purpose of proving a particular fact - - through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification."[8] In a five-to-four majority opinion, the Court held that "[t]he accused's right is 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."[9]

In *Bullcoming*, the evidence at issue was a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated driving while intoxicated.[10] At trial, the prosecution, for reasons unclear, did not call the analyst who signed the report's certification to lay foundation for the report's admission, but rather called another analyst who was familiar with the laboratory's testing procedures, but neither participated in nor observed the test on

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[8] *Id.* at 2710.

[9] *Id.*

[10] *Id.* at 2709.

the defendant's blood sample.[11] Over objection by defense counsel on Confrontation Clause grounds, the trial court admitted the report into evidence as a business record.[12] The New Mexico Supreme Court affirmed.[13]

In reversing and remanding that matter, the United States Supreme Court found that the report at issue was "testimonial,"[14] and that the "surrogate testimony of the kind [the testifying analyst] was equipped to give could not convey what [the certifying analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed."[15] Neither could such "surrogate" testimony "expose any lapses or lies on the certifying analyst's part."[16]

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[11] *Id.*

[12] *Id.* at 2712. Bullcoming's subsequent conviction was appealed and then affirmed by both the New Mexico Court of Appeals and the New Mexico Supreme Court without finding a violation of his right of confrontation. *Id.* at 2712-13.

[13] *Id.* at 2712-13.

[14] *Id.* at 2716-17 ("A document created solely for an 'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial.") (citing *Melendez-Diaz*, 129 S.Ct., at 2532). *Bullcoming* clarified that even "the absence of notarization" does not remove a report's certification from Confrontation Clause governance. *Id.* at 2717.

[15] *Id.* at 2715, n. 7. The Court indicated that even the performing analyst "likely would not recall a particular test, given the number of tests each analyst conducts and the standard procedure followed in testing." *Id.* The in-court testimony of the witness who performed the test, however, "would have enabled Bullcoming's counsel to raise before a jury questions concerning [the performing analyst's] proficiency, the care he took in performing his work, and his veracity." *Id.*

[16] *Id.* at 2715. The Court also noted that the testifying witness had "no knowledge of the reason why [the performing analyst] had been placed on unpaid leave (rendering the witness unavailable for trial)" - - which is something that, presumably, a supervisor would know. *See id.*

In her concurrence, Justice Sotomayor highlighted some factual scenarios that were *not* before the Court when deciding *Bullcoming*.[17] In particular, she emphasized that *Bullcoming* is "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 at issue."[18] In this regard, Justice Sotomayor noted that the testifying witness in *Bullcoming* "conceded on cross-examination that he played no role in producing the [blood-alcohol concentration] report and did not observe any portion of [the performing analyst's] conduct of the testing."[19] After creating a hypothetical that "would [present] a different case" - - where "a supervisor who observed an analyst conducting a test testified about the results or a report about such results" - - Justice Sotomayor clarified that *Bullcoming* "need not address what degree of involvement

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[17] *Id.* at 2721-23 (Sotomayor, J., concurring in part). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....'" *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). *See Horn v. Thoratec Corp.*, 376 F.3d 163, 175 (3d. Cir. 2004) (recognizing the "narrowest grounds" analysis); *Am. Civil Liberties Union of N.J. v. Lander*, 168 F.3d 92, 103-104 (3d. Cir. 1999) (same). The *Bullcoming* majority is not in uniformity as to the scope of its holding. *See Bullcoming*, 131 S.Ct. at 2719-23 (Sotomayor, J., concurring in part). Justice Sotomayor states that one purpose for her concurrence is to "emphasize the limited reach of the Court's opinion." *Id.* at 2719 (Sotomayor, J., concurring in part). Accordingly, this Court views Justice Sotomayor's limiting position within her concurrence as expressing the "narrowest grounds" and, therefore, as having the most value as among the holdings expressed in the *Bullcoming* decision.

[18] *Id.* at 2722 (Sotomayor, J., concurring in part).

[19] *Id.* Justice Sotomayor noted how "the court below also recognized [the testifying witness'] total lack of connection to the test at issue." *Id.*

is sufficient because here [the testifying witness] had no involvement whatsoever in the relevant test and report."[20] Several lower courts have since relied upon this portion of Justice Sotomayor's concurrence, where she acknowledged that a supervisor may be in a position to lay foundation for a report in a manner that satisfies the Confrontation Clause, as a basis to hold that a supervisor's testimony about a subordinate's testing and report was admissible.[21]

In the present matter, the Court is satisfied that the forensic reports proffered by the State are testimonial in nature and fall within the ambit of the Confrontation Clause. The Court is further satisfied that the State is not strictly limited to calling the analysts who performed the examinations in order to lay foundation for and testify regarding the results set forth in the forensic test reports. Although the State may certainly call the performing or the certifying analyst(s) who either performed the

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[20] *Id.*

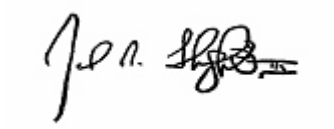
[21] *See, e.g., State v. Zimmerman*, 2011 WL 5997588, at *8 (Ohio App. Dec. 1, 2011) (reasoning that the appearing witness was "the county coroner" who testified that "each of the deputy coroners is working on my behalf and the manner of death is opined by me, and the cause of death is checked by me in conference with the forensic pathologist or deputy coroner who performed the case."); *Jenkins v. Mississippi*, 2011 WL 4031204, at *8-9 (Miss. Ct. App. Sept. 13, 2011) (admitting the testimony while noting that the testifying witness was the "supervisor" of the performing analyst and "did not personally watch [the performing analyst] perform all of her tests"); *State v. Roach*, 2011 WL 3241467, at *4-9 (N.J. Super. Ct. App. Div. Aug. 1, 2011) (emphasizing how the testifying witness reviewed the performing analyst's case file and results); *U.S. v. Moore*, 651 F.3d 30, 69-74 (D.C. Cir. July 29, 2011) (noting that the trial witness was the "Chief D.C. Medical Examiner" who testified that "he may well have had either a 'supervisor[y]' role with regard to the reports from his Office or even 'a personal, albeit limited, connection to the [autopsies] [sic] at issue'") (citing *Bullcoming*, 131 S.Ct. at 2722 (Sotomayor, J., concurring in part)).

tests or certified the results, based upon the Court's reading of *Bullcoming* and the apparently limited scope of its holding,[22] the Court concludes that the State may also call a supervisor, reviewer, or someone else within the laboratory who has a personal, albeit limited, connection to the scientific tests at issue without running afoul of the Confrontation Clause.[23] The Court further concludes that nothing in the Delaware Constitution suggests that, in this instance, it provides greater protection to Mr. Martin than the protections recognized in *Bullcoming* or in this Court's interpretation of that decision.

The defendant's motion *in limine* to exclude the State's proffered forensic reports in the absence of testimony of analysts who performed the tests is hereby **DENIED.**

IT IS SO ORDERED.

Very truly yours,



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[22] *See Bullcoming*, 131 S.Ct. at 2721-23 (Sotomayor, J., concurring in part). *See also Marks*, 430 U.S. at 193; *Horn*, 376 F.3d at 175; *Am. Civil Liberties Union of N.J.*, 168 F.3d at 103-104.

[23] The State shall attempt to lay this foundation and then seek a determination of admissibility from the Court before attempting to admit the forensic reports into evidence.