

ALBUQUERQUE CRIMINAL LAWYER BLOG

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New Mexico DWI/DUI Blood Draw Reports Subject to 6th Amendment Right to Confrontation of Witnesses

Two recent cases from New Mexico's Supreme Court apply the recent United States Supreme Court decision of *Melendez-Diaz v. Massachusetts* to DWI/DUI blood draws, and chemical testing in controlled substance cases.

The first case of *State v. Bullcoming* involved a felony aggravated DWI/DUI conviction. The State introduced a blood alcohol test (blood draw) that was taken from the defendant under a search warrant issued following his refusal of the breath alcohol test. The court made some interesting and somewhat contradictory findings regarding the admissibility of the report and the defendant's 6th Amendment right of confrontation of witnesses.

First, in light of the *Melendez-Diaz* decision, the Court reversed its prior position in *State v. Dedman* that had ruled that forensic tests were public records and therefore not subject to 6th Amendment confrontation protections set forth in the United States Supreme Court case of *Crawford v. Washington*. *Dedman* found that these reports were non-testimonial in nature since they were public records. Under *Crawford*, only testimonial evidence prepared in anticipation of trial is subject to 6th Amendment protection.

Melendez-Diaz ruled that these reports are "quite plainly affidavits" and that "there [was] little doubt that [they] fall within the 'core class of testimonial statements,'" governed by the Confrontation Clause and *Crawford*. To bring New Mexico law in line with the United States Supreme Court, the Court in *Bullcoming* ruled that these reports are testimonial, they do not fall within the business records exception to the hearsay rule, and therefore they are subject to cross examination.

Then remarkably, the Court found that the analyst preparing the report was a "mere scrivener" simply transcribing the results from the gas chromatograph. As such, the analyst/scrivener was unnecessary in court to meet the demands of *Melendez-Diaz*, *Crawford* and the 6th Amendment right to confrontation of witnesses. Instead, the Court allowed for the presence in court of any other qualified analyst to testify to the results of the testing analyst/scrivener.

It is unclear where this case will go from here. However, it seems that the second part of the ruling renders the first part impotent. The second part of the holding ignores much of the analysis in *Melendez-Diaz* which makes clear that these types of reports are prepared in anticipation of trial. The court in *Melendez-Diaz* addressed the pressures on

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analysts to provide results helpful to the prosecution. The court in *Bullcoming* ignores this possibility leaving the analyst/scrivener free of cross examination on possible errors in the testing instrument or processes, or even the outright fabrication of the results contemplated in *Melendez-Diaz*.

Bullcoming takes a step in the right direction. At least, blood draw results will no longer simply be admitted as gospel with no testimony from a representative from the state lab. However, the right to confrontation and cross examination has taken a blow when the testing analyst can escape cross examination on his or her experience, expertise, testing procedures, background, history, biases, and prior work product to name only a few possible sources impacting credibility.

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