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6th Amendment Confrontation Rights Take a Blow in the 10th Circuit

The 6th Amendment's confrontation clause took a hit in the 10th Circuit Court of Appeals case of U.S. v. Pablo. The case originating in New Mexico involved the introduction of DNA evidence in a rape trial. DNA is commonly introduced in rape prosecutions. However, the method by which the prosecutor introduced the evidence to the jury in *Pablo* was highly suspect.

In short, a DNA expert who had not been involved in the investigation or preparation of the DNA or serology reports testified to the contents of those reports. The contents of the reports were clearly testimonial and therefore hearsay. The Court acknowledged as much.

However, the Court ruled that in this case and others like it, the hearsay was admissible. The Court, despite the Melendez-Diaz decision stated that the testifying expert was free to rely on the hearsay reports of others in his own testimony.

The Court distinguished *Melendez-Diaz* where an affidavit of a non-testifying forensic drug expert was admitted against the defendant. The Court stated that in *Pablo*, the testifying expert was simply relying on the contents of the hearsay reports in the formulation of his own opinions which is allowable under the Federal Rules of Evidence, Rule 703.

The Court stated that under Rule 703, the testifying expert was allowed to present the reports of the non-testifying experts who prepared the DNA and serology reports. Remarkably, the Court allowed for the full admission of those reports despite the fact that the Court fully recognized that the reports were hearsay.

To justify the admission of the otherwise inadmissible hearsay, the Court stated that the admission of the reports to the jury were necessary to allow the jury to properly evaluate the in-court testimony of the testifying expert.

In short, the Court in *Pablo* renders *Melendez-Diaz* meaningless. After all, following the Court's logic in *Pablo*, the disallowed affidavit in *Melendez-Diaz* would now be admissible in order to validate the in-court testimony of an expert testifying upon the validity of the findings stated in that affidavit.

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In short, otherwise inadmissible hearsay is now allowed under *Pablo*, at least in the 10th Circuit, so long as another expert testifies to the legitimacy of that inadmissible hearsay. The rather odd logic of *Pablo*, if allowed to stand, would serve a severe blow to the 6th Amendment confrontation clause.

We can only hope that the shortcomings in Pablo will be set straight in the New Mexico case of State v. Bullcoming which has made its way to the United States Supreme Court.

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