No. _____

In The

Supreme Court of the United States

GEORGE WILLIAM YOHE, II,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Constitution's Sixth Amendment guarantees criminal defendants the right to a fair trial – including the right to confront "witnesses" against them. Here, the government introduced a forensic toxicology report via a "witness" who reviewed and confirmed laboratory analysts' work – but did not perform, observe, or have any personal connection with the analysis. Does a "witness" who reviews and confirms others' work violate the Confrontation Clause? In other words, who is the "witness" against the defendant?

TABLE OF CONTENTS

Page

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISION ... 1

CASE STATEMENT 2

REASONS FOR GRANTING THE WRIT 6

I. The Pennsylvania Supreme Court's decision not only overextends this Court's holding in *Bullcoming*, but it also fails to give a fair reading to the term "witness" within the Sixth Amendment 7

II. Federal Court of Appeals and State High Courts continue to struggle with the Confrontation Clause and its application to forensic evidence. Their struggle yields a mixed bag of cases inconsistently applying this Court's precedence 13

III. This Court should answer the question – who is the witness? – because forensic evidence continues to be a valuable and sometimes indispensable tool in criminal prosecutions and, with the ever present trend of advancing technology, this issue will continue to result in conflicting decisions without this Court's guidance 18

TABLE OF CONTENTS – Continued

Page

IV. Because there is no needle in the haystack this case presents the perfect vehicle for consideration – who is the witness that satisfies a defendant's right of Confrontation? 20

CONCLUSION..... 22

APPENDIX

The Pennsylvania Supreme Court's opinion on direct appeal, Oct. 30, 2013 .....App. 1

The Pennsylvania Superior Court's opinion on direct appeal, Feb. 16, 2012.....App. 50

The trial court's order and opinion granting Yohe's post-sentence motion.....App. 71

The laboratory's toxicology report used in this case .....App. 80

TABLE OF AUTHORITIES

Page

CASES

Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011) ..... *passim*

California v. Green, 399 U.S. 149 (1970) 22

Crawford v. Washington, 541 U.S. 36 (2004) 11, 16

Davis v. Washington, 547 U.S. 813 (2006) 15

Grim v. Mississippi, 102 So.3d 1073 (Miss. 2012) 8, 15

Lafler v. Cooper, 132 S.Ct. 1376 (2012) 2

Leger v. Georgia, 732 S.E.2d 53 (Ga. 2012) 15

Martin v. State, 60 A.3d 1100 (Del. 2013) 14, 15

Maryland v. Craig, 497 U.S. 836 (1990) 19

Mattox v. United States, 156 U.S. 237 (1895) 10

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) ..... *passim*

New Jersey v. Rehmann, 17 A.3d 278 (N.J. App. Div. 2011) 15

Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) 8

Smith v. Florida, 28 So.3d 838 (Fla. 2010) 15

State v. Brewington, 743 S.E.2d 626 (N.C. 2013) 16

United States v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Johnson, 587 F.3d 625 (4th Cir. 2009) 16, 17

United States v. Moore, 651 F.3d 30 (D.C. Cir. 2011) 14

United States v. Soto, 720 F.3d 51 (1st Cir. 2013) 14

United States v. Summers, 666 F.3d 192 (4th Cir. 2011) 17

Williams v. Illinois, 132 S.Ct. 221 (2012) 5

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. VI ..... *passim*

STATUTES

28 U.S.C. § 1257(a) 1

OTHER AUTHORITIES

Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 8

Black's Law Dictionary (9th ed. 2009) 9

Mark Memmott, *Chemist Pleads Guilty in Massachusetts Crime Lab Scandal*, Nov. 22, 2013, *available at* http://www.npr.org/blogs/thetwo-way/2013/11/22/246739071/chemist-pleads-guilty-in-massachusetts-crime-lab-scandal 20

TABLE OF AUTHORITIES – Continued

Page

Paul C. Giannelli, *The North Carolina Crime Lab Scandal*, 27 ABA Crim. Justice 1 (Spring 2012) 20

Strengthening Forensic Sciences in the United States: a Path Forward (2009) (NAS Report).....19, 20

PETITION FOR A WRIT OF CERTIORARI

Petitioner George William Yohe, II, respectfully petitions for a writ of certiorari to review the judgment of the Pennsylvania Supreme Court.

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court (Pet. App. 1) is published at 79 A.3d 520. The opinion of the Superior Court of Pennsylvania (Pet. App. 50) is published at 39 A.3d 381. The relevant trial court's order and opinion (Pet. App. 71) are unpublished.

JURISDICTION

The Pennsylvania Supreme Court entered judgment on October 30, 2013. Pet. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

CASE STATEMENT

The U.S. Constitution's Sixth Amendment guarantees all criminal defendants the right to a fair trial. In Justice Scalia's own words, a jury trial is the "24-karat test of fairness." Transcript of Oral Argument at 5, *Lafler v. Cooper*, 132 S.Ct. 1376 (2012). The Sixth Amendment, to protect that fundamental fairness, provides additional guarantees, among which is the right to confront the witnesses against the accused in a criminal trial. This Court, in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), held that the government violates the Confrontation Clause when it introduces forensic analysis results through an analyst's in-court testimony when that analyst did not personally perform or observe the test. This case presents the opportunity for this Court to define and clarify: who is the "witness" against the defendant? Is the witness the analyst who performs, participates, or directly oversees the used forensic test? Is the right to a fair trial violated when a witness is permitted to testify when the witness did not perform, participate, or directly oversee the test?

On August 19, 2009, a Northeastern York Regional Police officer stopped Petitioner George Yohe for driving with faulty license plate and brake lights. During the stop, the officer noted signs of intoxication and eventually arrested Yohe for driving under the influence of alcohol. He transported Yohe to a local hospital and drew blood. After the draw, the hospital shipped the blood sample to National Medical Services Labs (NMS) for analysis.

NMS received the blood two days later. Per its normal practice, NMS tested Yohe's blood sample three times. First, NMS employee Megan Silcox retrieved the blood sample, extracted an aliquot, or portion of the blood, and tested the aliquot using an enzymatic assay test. Next, a different employee, Lisa Chacko, retrieved the blood sample and extracted two more aliquots. She tested each aliquot individually for alcohol content using a Headspace Gas Chromatography test, the same test used in *Bullcoming*.

After the two employees tested three different portions of Yohe's blood, they upload the test results into Yohe's file. Later Dr. Blum, assistant Lab Director, who is not part of the laboratory testing itself, read the final report before signing it. His first and only review came the day he signs the toxicology report. Dr. Blum reviewed the prepared folder his staff provided him. It included the test's chain of custody forms and the analytical results from the forensic testing. He looked at the duplicate gas chromatography test, meaning the chromatograms, and determined if the number was close to one another, and then compared those to the one enzymatic assay test result to ensure all three tests are within certain parameters. If the tests' results seemed to meet parameters, Dr. Blum certified the results, and the government uses the lower of the two gas chromatography test results as evidence against the accused at trial.

After he reviewed the analyst-generated reports, Dr. Blum effectively stamped his electronic signature.

The end report he signed is a document summarizing the tests performed by the laboratory's analysts and the tests' results with his signature. (Pet. App. 80-85).

In Yohe's case Dr. Blum followed these procedures and reported a .158% BAC result. Dr. Blum used the gas chromatography analyst's lower result – Lisa Chacko's work and analysis. At trial, Dr. Blum admitted he did not personally handle, observe, or perform the test.

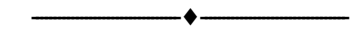
Yohe's case proceeded to a bench trial. The trial court found him guilty of the *per se* DUI charge, and later sentenced him. After sentencing, Yohe filed a post-sentence motion reasserting an earlier objection to Dr. Blum's testimony on constitutional right-of-confrontation grounds. The trial court granted Yohe's post-sentence motion and awarded a new trial. It concluded:

> In this case, [Yohe] was limited in his cross-examination of Dr. Blum in a matter that he would not have been limited in cross-examination of the analyst who performed the test. While credibility of the analyst is certainly an issue, it is not the sole reason for requiring that he or she be subject to confrontation; the manner of testing requires some exercise of judgment, which prevents a risk of error that could be addressed on cross-examination.

The government appealed and the Pennsylvania Superior Court reinstated Yohe's conviction reversing the trial court's decision. Relying on *Melendez-Diaz v.*

Massachusetts, 557 U.S. 305 (2009), the Superior Court found Dr. Blum's toxicology report testimonial. Although it acknowledged Dr. Blum did not handle Yohe's blood sample, prepare portions for testing, perform the test, or retrieve the samples after testing, it did believe that when Dr. Blum reviewed Yohe's file, compared the test results, and signed/certified the report he became the "witness" for confrontation purposes. It found Dr. Blum's certification and signed report dispositive.

The Pennsylvania Supreme Court granted Yohe's petition for review and reaffirmed the Superior Court's decision. Pennsylvania's Supreme Court first found Yohe's toxicology report testimonial – akin to the scientific reports in *Melendez-Diaz* and *Bullcoming*. It found *Williams v. Illinois*, 132 S.Ct. 221 (2012) (plurality), distinguishable. On the larger issue, the court felt Yohe's case fell within one of the scenarios identified by Justice Sotomayor as being outside the *Bullcoming* majority's "limited reach." The court focused on Dr. Blum's role in using the information provided by NMS Lab's analysts. It found that because he reviewed the analysts' generated reports and certified the report, Dr. Blum was the correct "witness" to satisfy Yohe's right of confrontation. To the Pennsylvania Supreme Court, Dr. Blum placed his expert opinion in the Toxicology Report after his "independent verification of the chain of custody and his independent analysis of the three test results produced by two lab technicians running two types of tests at different times."



REASONS FOR GRANTING THE WRIT

In this case and many others just like it this Court needs to answer one question: Who is the "witness" against the defendant?

Federal courts and state high courts continue to render deeply and intractably divided opinions over whether the Confrontation Clause allows the government to introduce a testimonial statement signed by the testifying witness where the testifying witness was not the individual who performed or even directly supervised/observed the underlying forensic analysis; Dr. Blum only reviewed and confirmed the analysts' work. This Court should use this case to resolve the various courts' struggles.

Forensic evidence plays an ever increasing role in many criminal prosecutions. Allowing the testimony of a reviewer who did not perform or oversee the analysis but rather relied on tests performed by others frustrates not only the guarantee of Confrontation, but also the guarantee of a fair trial. As such, the Pennsylvania Supreme Court's holding below that the Confrontation Clause is satisfied through the testimony of a reviewer who certified the results went outside the boundaries set by this Court in *Bullcoming* and does not conform with the "fair reading" of the term "witness" within the Sixth Amendment.

The Pennsylvania Supreme Court's decision warrants plenary review. Now is the climatic time for this Court to address the decision below, and the

underlying issue creating hodgepodge precedence in lower courts across the country.

I. The Pennsylvania Supreme Court's decision not only overextends this Court's holding in *Bullcoming*, but it also fails to give a fair reading to the term "witness" within the Sixth Amendment.

The Sixth Amendment is the heartland of constitutional criminal procedure and the bedrock principles on which we ensure all accused have a fair trial. With the rise and prevalence of forensic science within this nation's courtrooms, it seems that many courts have lost their way trying to interpret the Sixth Amendment and how it applies to this new technology. This has resulted in conflicting constitutional law, non-uniform criminal procedure, and most importantly the loss of the right to a fair trial.

In *Bullcoming*, this Court held that under the Sixth Amendment the criminally-accused has the right "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." *Bullcoming*, 131 S.Ct. at 2710.

Beyond not faithfully applying this Court's past precedent, the Pennsylvania Supreme Court also did not engage in a "fair reading" to determine the governing text's application, namely the Sixth Amendment, to this case's particular circumstances. In other

words, it did not accurately apply the United States Constitution to Yohe. "In their full context words mean what they conveyed to reasonable people at the time they were written – with the understanding that general terms may embrace later technological innovations." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 16 (2012). Chief Justice John Marshall once explained:

> To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by the framers; – is to repeat what has been said more at large, and is all that can be necessary. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (opinion of Marshall, C.J.).

This case concerns the fair reading of "witness" within the Sixth Amendment. Defining the term "witness" is the question left open after this Honorable Court's decisions in *Bullcoming* and *Melendez-Diaz*. Prosecutors throughout the nation have embarked on ways to change who the "witness" is in forensic science cases so they may "satisfy" confrontation without having the actual analyst who tested the sample used as evidence at trial testify. *See*, *e.g.*, *Grim v. Mississippi*, 102 So.3d 1073 (Miss. 2012) (holding that "a supervisor, reviewer, or other analyst involved may

testify in place of the primary analyst where that person was actively involved in the production of the report and had intimate knowledge of analyses even though she did not perform the tests."). This prosecutorial maneuver to use a witness – other than the analysts who actually performed the forensic test – is understandable not to preserve Constitutional freedoms, but for practical business purposes. *Bullcoming*'s dissent noted that an "undue burden" may be placed upon the prosecution when the testing analyst is required to testify. *Bullcoming*, 131 S.Ct. at 2728. The dissent also noted that each of New Mexico's analysts received over 200 subpoenas per year. *Id*. This led to analysts being required to travel great distances on almost every working day which led to a chaotic laboratory environment. *Id*. These concerns are valid, but they should not be considered given the majority opinion in *Bullcoming*. We are a nation governed by laws, and the supreme law of the land is the United States Constitution. That Constitution guarantees the accused a right to confront the witnesses against them. This right may not be violated because it causes or creates hardships for the government.

Black's Law dictionary defines "witness" as " . . . one who gives evidence in a cause before the court." *Black's Law Dictionary* 1740 (9th ed. 2009). It further defines a witness as "one who sees, knows, or vouches for something." *Id*. In this case, the Pennsylvania Supreme Court concluded that the evidence was the toxicology report containing Yohe's BAC results.

It found the "witness" was Dr. Blum; who took the reports of three tests performed by two different analysts and certified they did their jobs and the results were accurate though he was not involved nor directly supervised the analysis. In short, Blum reviewed past events that he was not part of. The Pennsylvania Supreme Court determined that this certification was the evidence used at trial, and therefore, Dr. Blum was the "witness" against Yohe.

This is not a fair reading of the term "witness" as the term is used in the United States Constitution, and is not what the Framers understood the word to mean at the time it was written. Although forensic analysis could not be contemplated by the Framers, their amendment surely contemplated the issue before this Court. What is required is an analysis and history of the Confrontation Clause, addressing what the Framers intended to protect the accused from. From this "fair reading," it becomes clear that what the government attempts to do in this case, and many others, is exactly what the Framers feared. Therefore, despite Dr. Blum's "independent analysis," – which is entirely dependent on others' work and information – or any other certifying analyst's "opinion," he is not the "witness" against the accused. Accordingly, his testimony does not satisfy Confrontation.

In an early case this Court wrote: "The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness." *Mattox v.*

United States, 156 U.S. 237, 242 (1895). To put it another way, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50 (2004). This case involves the use of just such *ex parte* examinations. While this is not an examination in a traditional sense, as with an interrogator and a witness, it is rather an examination of some potential evidence which produces, after a forensic analysis, some definitive evidence to later use at trial. Here, the evidence is particularly damning because the government uses it to prove the charged crime's essential element. The individual who produces the evidence is never subject to cross-examination. Cross-examination is the primary way of discovering the truth. It is one of the primary reasons for the clause.

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. *Crawford*, 541 U.S. at 61.

If this Court allows the Pennsylvania Supreme Court's holding to stand, reliability is never assessed

in the best way our justice system knows how or how our Constitution demands. Further belying the point, this Honorable Court noted in several footnotes that the method of using gas chromatography is "not simple or certain." In fact, "the analyst must be aware of and adhere to, good analytical practices and understand what is being done and why." *Bullcoming*, 131 S.Ct. at 2711 n.1. The analyst must pay attention at every step because any error can invalidate the best chromatographic analysis. *Id*. Finally, "the risk of human error is not so remote as to be negligible." *Id*. Because the forensic analysis used in this case and many others like it is not as simple as placing a few numbers or samples in a system and waiting for the results to print out – the accused must be offered, and the Constitution demands they be afforded, the opportunity to cross-examine the "witness" who produced the evidence. Cross-examination is the only means by which a defendant tests the evidence's true reliability. Prosecutors can use the Pennsylvania Supreme Court's rule to shield bad employees from exposure to a jury. If the witness can just "review and confirm" a reported result – like analysts' failed proficiency tests or write-ups for failing to follow procedure – important information becomes concealed from the jury. Therefore, the failure to call the analyst who actually tested the sample to be used as evidence at trial strikes at the heart of the Sixth Amendment's procedural guarantees. And if this procedure is allowed to stand, it permits testimony that is the principal evil at which the Framers aimed the Confrontation Clause. The Supreme Court should

take this case to finally make a "fair reading" of the term "witness" in the Sixth Amendment, so the constitutional rights of all accused are protected and so the reliability of evidence is tested in the way our Framers demanded.

II. Federal Court of Appeals and State High Courts continue to struggle with the Confrontation Clause and its application to forensic evidence. Their struggle yields a mixed bag of cases inconsistently applying this Court's precedence.

Yohe is an evolved scenario derived from *Bullcoming*'s earlier premonitions. That is, where the prosecution introduces non-testifying analysts' forensic reports through the in-court testimony of a different forensic analyst. Since *Bullcoming* and *Melendez-Diaz*, the government mutated its prosecutorial approach and placed its non-testifying analysts' forensic work and results into a toxicology report. An expert later reviews those analysts' work and results, and then certifies the report. The government now uses that expert as its testifying witness.

Lower courts continue to contort this body of law in ways that not only conflict, but completely contradict similar courts' rulings. There is a disagreement in principle – who is the "witness" that satisfies a defendant's right of Confrontation and, in turn, to a fair trial? Since *Bullcoming*, several other courts have considered whether the testifying forensic expert

allegedly offering independent opinions may present the non-testifying analyst's results.

On the one hand, some federal courts find the government violates confrontation when faced with factually similar situations like *Yohe*. *See*, *e.g.*, *United States v. Soto*, 720 F.3d 51, 59 (1st Cir. 2013) (analyst who testified about a conclusion he drew from own independent examination previously tested by another analyst violated Confrontation); *see also United States v. Ignasiak*, 667 F.3d 1217, 1234 (11th Cir. 2012) (testifying expert expressing independent "agreement" with the non-testifying medical examiner's conclusions violated Confrontation); *United States v. Moore*, 651 F.3d 30, 71 (D.C. Cir. 2011) (testifying expert who did not observe the test and did not sign the forensic report prohibited from testifying about another analyst's conclusions).

Conforming with this line of reasoning and almost factually identical to *Yohe* – yet in disturbing contrast – the Supreme Court of Delaware rendered the most divisive opinion in *Martin v. State*, 60 A.3d 1100 (Del. 2013), where it found that a judge's decision to admit a blood analysis report, without the testing analyst's testimony, violated Confrontation.

Similar to this case and *Bullcoming*, the certifying analyst testified. *Id*. at 1106. Like in *Yohe*, the testifying expert neither participated in nor observed the test on Martin's blood sample. She only reviewed the data and conclusions of the chemist who actually performed the test. *Id*.

The state produced the note-taking laboratory supervisor who certified the unsworn hearsay testimony of the testing analyst instead of having the testing analyst certify the report and be available for cross-examination. *Id*. at 1108. The Delaware Supreme Court found that this Court's precedence, like *Davis v. Washington*, 547 U.S. 813 (2006) made clear that the Confrontation Clause does not tolerate this kind of evasion. Where the state presented critical evidence, Martin's blood-test result, to the fact-finder, Martin had a guaranteed right to confront the analyst who performed the test in order to determine her proficiency, care, and veracity. *Martin*, 60 A.3d at 1109.

Conversely, the Pennsylvania Supreme Court's decision in *Yohe* found support in other state courts. *See*, *e.g.*, *Smith v. Florida*, 28 So.3d 838 (Fla. 2010) (no Confrontation Clause violation in admission of DNA tests because supervisor evaluated raw test results, compared samples, made conclusions, and testified at trial); *Leger v. Georgia*, 732 S.E.2d 53 (Ga. 2012) (supervisor of DNA testing who selected what DNA to analyze, interpreted the data, and prepared the report was the proper witness); *Grim v. Mississippi*, 102 So.3d 1073 (Miss. 2012) (holding that "a supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where that person was actively involved in the production of the report and had intimate knowledge of analyses even though she did not perform the tests); *New Jersey v. Rehmann*, 17 A.3d 278 (N.J. App. Div. 2011)

(expert witness who testified authored the certification of the results and drew his own conclusions from the gas chromatograph's raw data did not violate Confrontation); *State v. Brewington*, 743 S.E.2d 626 (N.C. 2013) (where the testifying expert who did not observe or participate in the forensic testing testifies, that testimony is allowed so long as the testing analyst offers a "independent opinion").

Perhaps the Fourth Circuit best summarized the concern here in *United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009) where the court addressed the extent to which an expert may testify based on "testimonial" statements of non-testifying witnesses:

> The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem. The expert's opinion will be an original product that can be tested through cross-examination. *Id.* at 635.

In *Johnson*, the trial court heard police officers' expert testimony to decipher telephone conversations between drug traffickers. The experts based their testimony upon their experience in general, together with particular knowledge gleaned from the investigation. The court noted: "*Crawford* in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in

some part informed by their exposure to otherwise inadmissible evidence." *Id*.

The evolutionary question here is thus how does the expert use the testimonial hearsay? *Johnson* found it a matter of degree. *Id*.

Later, the Fourth Circuit again visited the issue in *United States v. Summers*, 666 F.3d 192 (4th Cir. 2011). There the issue revolved around DNA tests on a jacket. The test results formed the basis for an expert's opinion and testimony on the report. The court found that because the expert predominately used his independent, subjective, opinion and judgment relative to the lesser emphasis accorded the objective raw data generated by the analysts – the state did not violate Confrontation. *Id.* at 201.

But the Court found that numerical identifiers of DNA allele was nothing more than raw data produced by a machine, indistinguishable in character from gas chromatograph data and gas chromatograph and spectrometer results. *Id.* at 202. The only difference was that the court found the expert's conclusion was his own, not the analysts'. *Summers*, 666 F.3d at 203. This type of reasoning stands in stark contrast to Yohe's arguments. This expert's conclusion completely depends on the analysts' work and conclusions. He merely reviews, confirms and certifies their efforts rather than draw an independent conclusion – he parrots, verbatim, the lower result. Therein lays the tension – how does this Court reconcile Confrontation and expert testimony where the expert does not perform any other independent work other than

reviewing and confirming that forensic test results seem in accord?

While case facts may vary, the issue is the same – who is the "witness" that satisfies Confrontation? The Pennsylvania Supreme Court's holding is just one more example of these muddied waters. Both federal and state appellate courts continue to apply Confrontation principles in different ways. Where Pennsylvania adopted one approach, Delaware adopted another and other courts others. A sound approach to the law begs for consistency in its application. We pray this Court grants our writ of certiorari to bring consistent application of these principles to both litigators, courts, and most importantly the criminally accused's right to a fair trial.

III. This Court should answer the question – who is the witness? – because forensic evidence continues to be a valuable and sometimes indispensable tool in criminal prosecutions and, with the ever present trend of advancing technology, this issue will continue to result in conflicting decisions without this Court's guidance.

The right of Confrontation in this case is inextricably linked to cross-examination. Cross-examination provides the accused the right to present their complete defense and challenge the veracity and honesty of the relevant witness.

Most importantly, a reviewing analyst cannot provide the same level of testimony and knowledge the actual analyst can. The vigorous cross-examination of the correct witness aids the fact-finder in determining the reliability and credibility of the evidence presented by the witness. For example, a reviewing witness might provide deficient testimony about a particular analyst's training and methodology or that analyst's past errors.

The defense cannot get answers to questions about an analyst's training record or their knowledge of the machine. Employment records may reveal analyst deficiencies a reviewing expert would have no knowledge about, although that expert entirely relied upon that analyst for their conclusions. Even more, the defense's questions about how that analyst generally performs the test in question might show the analyst does not follow laboratory protocols and procedures. Protocol awareness and protocol adherence are not the same.

The Confrontation Clause's central concern is to ensure evidence's reliability against criminal defendants by subjecting it to rigorous testing in the contest of adversary proceedings before the fact-finder. *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

The National Research Council authored a study in 2009, *Strengthening Forensic Sciences in the United States: a Path Forward* (2009) (NAS Report). Forensic science, however promising its "accurate" results, may face dire pitfalls: incompetence, error, and sometimes even fraud. The report also revealed forensic analysis

is "often handled by poorly trained technicians who then exaggerate the accuracy of their methods in court." *Id.* The NAS Report finds that forensic science is anything but infallible, often fraught with human errors including sample contamination and inaccurate reports. *Id.*; *see also* Mark Memmott, *Chemist Pleads Guilty in Massachusetts Crime Lab Scandal*, Nov. 22, 2013, *available at* http://www.npr.org/blogs/thetwo-way/2013/11/22/246739071/chemist-pleads-guilty-in-massachusetts-crime-lab-scandal (last visited Dec. 30, 2013); Paul C. Giannelli, *The North Carolina Crime Lab Scandal*, 27 ABA Crim. Justice 1, 43 (Spring 2012).

The Pennsylvania Supreme Court's decision not only impermissibly narrows *Bullcoming* and denies the accused the right to a fair trial – without the remedy of cross-examining the witness who actually performed the used test – but it buries the truth-seeking process in a glut of bureaucratic lard.

IV. Because there is no needle in the haystack this case presents the perfect vehicle for consideration – who is the witness that satisfies a defendant's right of Confrontation?

Yohe raises its question presented free from any concerns regarding waiver or collateral review. It comes to this Court on direct review, where Yohe properly objected at trial and developed his record through not only objection but post-trial motions. Yohe also preserved this issue by arguing at each

level of Pennsylvania's appellate courts that the government failed to call the appropriate witness/analyst and that failure violated the United States Constitution's Sixth Amendment's Confrontation clause.

Yohe developed a compelling record. It presents this Court with a different scenario than either *Melendez-Diaz* or *Bullcoming*. Here, there is no messy factual dispute that the testifying witness was not someone who was in the laboratory on that day, that he did not personally handle, observe, or perform any part of the test. The record makes clear that Dr. Blum only reviewed and confirmed information that he did not generate or have any direct or indirect part in generating. Therefore, this particular case serves as a useful record to develop the penumbra of Confrontation Clause jurisprudence.

This case presents the question of whether the government may introduce forensic analysts' work and conclusions through an expert who reviews the work of others and confirms it. He then certifies the report used as evidence in a defendant's trial. Every lower court agrees that the toxicology report is testimonial under *Melendez-Diaz* and the prosecution used the report's result – a blood alcohol content – to convict Yohe. The toxicology report played a critical role because under *per se* DUI charge, the test result proves an essential element of the crime. Finally, the defense properly explored the expert's shortcomings because he neither observed nor performed the forensic test which yielded the admissible result.

CONCLUSION

This case is cert-worthy. This Court need not cut through the thicket of the lower court's decisions to find the issue – who is the witness? This Court need not worry whether trial counsel properly preserved the issue. And this Court need not worry if the opinions below explored this issue. The time is ripe for this Court to answer the question – who is the witness? – and clarify its holdings in *Bullcoming* and *Melendez-Diaz*. We pray this Court uses this case as the vehicle for that guidance and grant our writ of certiorari.

"Cross-examination is the greatest legal engine ever invested for discovery of the truth." *California v. Green*, 399 U.S. 149, 158 (1970). Where cross-examination is for seeking out the truth, this Court should use this case to reconcile the ability to seek out the performed tests' truth with the government's continued use of reviewing experts who do not perform or even observe the involved forensic testing.

Respectfully submitted,

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[J-36-2013]

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ.

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 75 MAP 2012
v.	:	Appeal from the order of the Superior Court, dated February 16, 2012, at No. 315 MDA 2011, reversing the order of the York County Court of Common Pleas, Criminal Division, entered January 13, 2011, at No. CP-67-CR-0007492-2009
GEORGE WILLIAM YOHE, II, Appellant	:	39 A.3d 381.
	:	ARGUED: May 7, 2013

OPINION

MR. JUSTICE BAER DECIDED: October 30, 2013.

George William Yohe, II, (Appellant) appeals from the Superior Court order that reversed the trial court's order awarding a new trial on the ground that his constitutional right of confrontation was violated. We agree with the Superior Court that Appellant's constitutional right of confrontation was not violated

at trial because the testifying witness was not a "surrogate witness," as Appellant argues. Rather, as discussed below, the witness was the author of the testimonial statement offered into evidence and, therefore, was an appropriate witness under the Confrontation Clause. Accordingly, Appellant's confrontation rights were protected by this testimony, and we affirm.

On August 19, 2009, Officer Scott George performed a traffic stop of Appellant's vehicle because of its faulty license plate and brake lights. During the course of the stop, the officer observed signs of alcohol consumption, and arrested Appellant for Driving Under the Influence of alcohol (DUI).[1] Officer George transported Appellant to Memorial Hospital where a phlebotomist drew a blood sample and prepared it for shipment to National Medical Services Labs (NMS Labs) for chemical analysis.

NMS Labs received Appellant's blood sample on August 21, 2009. An employee examined it for proper seal, label, and volume, logged receipt of the sample, and placed it in a secured bin. It is the routine practice of NMS Labs to test blood samples for alcohol content by removing three small portions (referred to as "aliquots") from the blood sample and to conduct three distinct tests, using two testing methods, to determine alcohol content. One method of testing is gas chromatography, and the second is enzymatic

[1] *See* 75 Pa.C.S. § 3802.

assay, both of which determine the quantity of alcohol in the blood. It is the practice of NMS Labs routinely to test a blood sample for alcohol content twice using gas chromatography, and once using enzymatic assay.

In accord with this practice, NMS Labs conducted the three tests on Appellant's blood sample. First, NMS Labs' employee Megan Silcox retrieved the blood sample from storage, extracted an aliquot for testing, returned the balance of the sample to storage, and tested the aliquot for alcohol content using enzymatic assay. Next, another employee, Lisa Chacko, retrieved the blood sample from storage, extracted two more aliquots for testing, and returned the remaining sample to storage. She tested the aliquots for alcohol content twice, utilizing gas chromatography.

Dr. Lee Blum is Assistant Laboratory Director and a toxicologist at NMS Labs. As Assistant Lab Director, he is responsible for the lab's quality assurance program and client service. As a forensic toxicologist, he is involved in reviewing analytical testing, report writing, and testifying at trials. In this role, he receives the raw data that resulted from the three blood tests, checks the demographic information on the testing data, evaluates the chain of custody, and verifies that the lab technicians performed the appropriate testing.

Turning to the results from the three tests NMS generally conducts, Dr. Blum's practice is to examine the results of the duplicate gas chromatography tests

to determine if they validate each other by being within certain parameters, and, taking into account the appropriate margins of error, compare those test results to the results of the enzymatic assay test. If the test results are in accord, he will report the lower of the two gas chromatograph test results as the blood alcohol content (BAC) in accord with NMS Labs protocol.

After conducting this case review, Dr. Blum affixes his electronic signature to the Toxicology Report, which is a three page document summarizing the tests that were performed and the results therefrom, and certifies its contents. In addition to reporting the BAC, the Toxicology Report includes a certification that Dr. Blum "directly participated in the determination of the results by reviewing and certifying that the analytical data including internal standards and calculations utilized in reporting the results of this case are accurate and correct," and that Dr. Blum will be available to testify in court.

In this case, following laboratory procedure as outlined above, Dr. Blum reviewed Appellant's case file. The enzymatic assay test indicated Appellant's BAC was .175%, and the two gas chromatograph tests indicated it was .159% and .161%, respectively. Dr. Blum analyzed the data in the case file and electronically signed the Toxicology Report indicating Appellant's BAC was .159%, the lower of the gas chromatograph results.

At Appellant's August 30, 2010, non jury trial, the Commonwealth introduced into evidence the Toxicology Report indicating that Appellant's BAC was .159% through the expert testimony of Dr. Blum. Appellant objected to Dr. Blum's testimony regarding the Toxicology Report, and to the admission of the Toxicology Report, on the grounds that it violated his right to confrontation guaranteed by the 6th Amendment of the U.S. Constitution because the specific lab technicians who performed the testing of Appellant's blood sample were not called as witnesses.[2] The trial court overruled these objections.

Dr. Blum testified that, consistent with lab policy, on August 31, 2009, he reviewed Appellant's case file, which included the raw analytical data for the duplicate gas chromatography and enzymatic assay tests. He explained that the reason the lab employs tests on two types of machines is to ensure the accuracy of the result identified in the Toxicology Report: relying on two kinds of physical chemical analysis, performed by two different individuals, at two different times, confirms the verity of the test results.

With regard to Appellant's blood sample in particular, Dr. Blum testified that it was tested in duplicate through gas chromatography, producing values of .159% and .161%. The enzymatic assay produced a

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[2] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI.

value of .175%. Dr. Blum considered these numbers to verify each other because they were within a certain percentage,[3] recorded the lowest of these results in the Toxicology Report, and signed the report. He testified to a reasonable degree of scientific certainty that Appellant's BAC was, as reflected in the Report, .159%.

On cross-examination, counsel questioned Dr. Blum about the chain of custody and the types of tubes used to contain Appellant's blood. Dr. Blum acknowledged that he did not observe either Ms. Silcox or Ms. Chacko take the aliquots from the blood sample or test the aliquots, and, indeed, did not personally handle the aliquots or the blood sample; rather, he reviewed all documentation in the file associated with the specimen.

After the Commonwealth rested its case, Appellant moved for judgment of acquittal, arguing that Dr. Blum's testimony was insufficient to satisfy the

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[3] Dr. Blum testified that NMS Labs has "guidelines . . . of agreement on one test versus the other. If the enzymatic assay is within 20 percent of the headspace [gas chromatography] analysis, we feel that's agreeable, that they are likely the same sample. We report the headspace [gas chromatography] result." Notes of Testimony, Aug. 30, 2010, at 50. He further explained the role of the margin of error as follows: "The two headspace [gas chromatograph] need to agree within a certain percentage. And the level of 159, it would have been within four percent with the agreement of those two values. But the variability of the assay itself, we use five percent variability, so plus or minus five percent." *Id.*

Confrontation Clause because he did not personally test Appellant's blood. The trial court denied the motion, and Appellant presented his defense. The trial ultimately court [sic] found Appellant guilty on August 30, 2010, of DUI.[4, 5]

Following sentencing,[6] Appellant filed a post-sentence motion reasserting his objection to the admission of Dr. Blum's testimony and the Toxicology Report on confrontation grounds, arguing that the Toxicology Report should not have been admitted without accompanying testimony by the toxicologists who performed the blood tests.[7] On January 13, 2011, the trial court granted Appellant's post-sentence

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[4] *See* 75 Pa.C.S. § 3802(b) (high rate of alcohol), which provides:

> (b) High rate of alcohol. – An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

[5] The trial court found Appellant not guilty of DUI pursuant to 75 Pa.C.S. § 3802(a)(1) (general impairment).

[6] The trial court sentenced Appellant to a term of incarceration of 48 hours to six months' imprisonment and a $500 fine.

[7] Because Appellant's motion referred to analysts in the singular and the plural, it is unclear whether he believed that both Ms. Silcox and Ms. Chacko had to testify, or if only Ms. Silcox should have testified (as she conducted the test that revealed the .159% value that was ultimately reported on the Toxicology Report).

motion and granted a new trial, holding that the Toxicology Report was improperly admitted at trial because "an analyst who performed the tests did not testify." Trial Ct. Op, May 5, 2011, p. 1.

The trial court reached its conclusion by first finding that the Toxicology Report was a testimonial statement because it was compiled for the express purpose of being used at trial and was admitted into evidence. *See Crawford v. Washington,* 541 U.S. 36, 54 (2004) (defining testimonial statements as, *inter alia,* "*ex parte* in-court testimony or its functional equivalent," including affidavits "or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . "). The trial court held, therefore, that the Toxicology Report was inadmissible without the testimony of the declarant. *See id.* (holding that a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination).

Next, the trial court held that the declarant whose testimony was required at trial was the "analyst who actually performed the analysis on [Appellant's] blood sample." Trial Ct. Op., May 5, 2011, p. 3. In this regard, the trial court relied on the United States Supreme Court's decision in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009) and the Superior Court case *Commonwealth v. Barton-Martin,* 5 A.3d 363 (Pa.Super. 2010). In *Melendez-Diaz,* the prosecution proffered "certificates of analysis" identifying material seized from the defendant as drugs, which

were sworn to by the analysts who ran the tests, without offering any witnesses in support of the certificates. 557 U.S. at 308. The defendant objected, arguing that he had a constitutional right to confront the analysts, who should have been required to testify. *Id.* at 309. The Supreme Court determined that the certificates were affidavits prepared under circumstances leading a reasonable person to believe they would be used at trial, and, accordingly, were testimonial. *Id.* at 310. Consequently, the analysts who prepared the certificates were "witnesses" for purposes of the Sixth Amendment whom the defendant had a right to confront. *Id.* at 311. Because this right was not afforded, the certificates were deemed inadmissible. *Id.*

In *Barton-Martin,* the defendant objected to admission of a blood alcohol lab report without the testimony of the laboratory technician who performed the test and prepared the report. 5 A.3d at 365. The Commonwealth had presented the testimony of a witness who was the laboratory administrative director and custodian of records for the hospital where the analysis was performed. *Id.* at 366. Although the witness testified about lab procedures generally, she had not analyzed the defendant's blood or the results of the blood tests. *Id.* The trial court admitted the report, but the Superior Court reversed, holding the blood alcohol report was the type of *ex parte* out-of-court statement that was inadmissible without an opportunity for confrontation pursuant to *Melendez-Diaz*. *Id.* at 368. The court held that absent

a showing that the laboratory technician who ran the test and authored the report was unavailable and the defendant had a prior opportunity for cross-examination, "the laboratory technician's failure to testify in the Commonwealth's case-in-chief violated [the defendant's] Sixth Amendment right to confrontation." *Id.* at 369. The testimony of the custodian of records, unconnected to the performance of the analysis at issue, did not satisfy the defendant's constitutional rights. *Id.*

Considering *Melendez-Diaz* and *Barton-Martin,* the trial court here reasoned that Dr. Blum's testimony was insufficient because he neither tested the aliquots nor observed the testing, and Appellant's cross-examination of Dr. Blum was limited in ways that cross-examination of the analyst who performed the test would not have been: "While credibility of the analyst is certainly an issue, it is not the sole reason for requiring that he or she be subject to confrontation; the manner of testing requires some exercise of judgment, which presents a risk of error that could be addressed on cross-examination." Trial Ct. Op., May 5, 2011, p. 3-4.

The Commonwealth appealed to the Superior Court, arguing that because Dr. Blum was the analyst who derived the numerical conclusion of Appellant's BAC, his testimony regarding the Toxicology Report satisfied Appellant's right of confrontation under the Sixth Amendment. *Commonwealth v. Yohe,* 39 A.3d 381 (Pa.Super. 2012). The Superior Court agreed, concluding that the trial court erred in

determining Appellant was entitled to a new trial, and reversed. *Id.* The Superior Court observed that after *Melendez-Diaz* and subsequent to Appellant's trial, the United States Supreme Court addressed a scenario similar to that presented in *Barton-Martin* in *Bullcoming v. New Mexico,* ___ U.S. ___, 131 S.Ct. 2705 (2011).

In *Bullcoming,* the defendant was charged with driving while intoxicated, and, at his subsequent trial, the laboratory report of his BAC was offered into evidence. *Id.* at 2709. The report was completed, signed, and certified by an analyst who was not called to testify. *Id.* at 2711-12. Instead, the prosecutor called as a witness another analyst from the same lab to testify generally about lab procedures and equipment. *Id.* at 2712. The Supreme Court initially, again, reiterated that "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution" is testimonial, and is therefore subject to the requirements of the Confrontation Clause, *id.* at 2713-14 (citing *Melendez-Diaz,* 557 U.S. at 318-21), and that an out-of-court testimonial statement "may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Id.* at 2713.

Because the trial court had "permitted the testimonial statement of one witness . . . to enter into evidence through the in-court testimony of a second person . . . ," the High Court reversed. *Id.* The Court specifically disapproved of such "surrogate testimony,"

which could not have conveyed "what [the certifying analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed," nor would it "expose any lapses or lies on the certifying analyst's part." *Id.* at 2715. The Court concluded that the reliability of the certifying analyst or the testing procedure conducted was irrelevant to the constitutional question:

> . . . [T]he comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in *Crawford* that the "obviou[s] reliab[ility]" of a testimonial statement does not dispense with the Confrontation Clause. Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Teresa."

Id. (quoting *Melendez-Diaz,* 557 U.S. at 319, n. 6).

Considering this precedent, the Superior Court in this case held that the factual circumstances presented herein are distinct from the precedent discussed above because the testifying witness, Dr. Blum, reviewed the entire file, compared the results of three independent test printouts on three aliquots, certified the accuracy of the results, and signed the report. *Yohe,* 39 A.3d at 388. In this regard, the Superior Court agreed with the Commonwealth that even though he did not observe, prepare, or conduct the

actual testing, "Dr. Blum was the 'analyst' or the person who reviewed the raw data from the machines and generated an expert report based on his review of the raw data that was generated. Therefore, Dr. Blum is the witness that [Appellant] had a right to confront." *Id.* at 389.

On appeal, Appellant argues that this case is factually identical to *Barton-Martin* and *Bullcoming* because Dr. Blum did not personally handle Appellant's blood sample, prepare the aliquots, or place the aliquots into the testing apparatuses. Although *Barton-Martin* is not binding on this Court, Appellant asserts that the Superior Court in that case reached a constitutionally mandated result by disapproving of the testimony of anyone other than the analyst who conducted the blood alcohol test. *See Barton-Martin,* 5 A.3d at 365 ("Because the Commonwealth did not summon at trial the analyst who prepared Appellant's lab report, we conclude that Appellant's rights under the Confrontation Clause were violated and that the lab report showing her blood-alcohol content was inadmissible."). Similarly, Appellant argues that the Superior Court opinion in the case now before us is directly contrary to *Bullcoming,* which he interprets as requiring the analyst who ran the blood tests to be made available for confrontation. 131 S.Ct. at 2715 ("the analysts who write reports that the prosecution introduces must be made available for confrontation . . . ").

Appellant asserts that the distinguishing facts on which the Superior Court relied (Dr. Blum's review of

the test results and certification of the Toxicology Report) are factually incorrect. According to Appellant, Dr. Blum was a surrogate witness because he merely reviewed the testing results committed to paper by the analysts and vouched for their validity. Although Dr. Blum could answer questions about laboratory protocols, he could not, according to Appellant, answer questions related to how the data contained in the report was generated, or address how the samples were handled, the process of placing the samples in the machines, or the retrieval of the samples following testing.

Appellant argues that requiring the analyst who conducted the relevant testing to testify serves four fundamental purposes: it enables meaningful cross-examination of what the analyst has done; it guarantees that the analyst who generated the testimonial statements is questioned under oath and subject to the penalties of perjury; it allows the fact-finder to observe that witness's demeanor and her responses to questions; and it ensures that the accuser face the accused. Appellant asserts that permitting the testimony of a surrogate witness renders it impossible to determine whether the analyst was fraudulent or incompetent. In this regard, Appellant asserts that conducting gas chromatography testing is a skill which the U.S. Supreme Court discussed in *Bullcoming* as being dependent on good analytical practices and an analyst who is aware of what is

being done and why. *Bullcoming,* 131 S.Ct. at 2711, n. 1.[8]

The Pennsylvania Association of Drunk Driving Defense Attorneys (PADDDA) has filed an *amicus curiae* brief on behalf of Appellant detailing forensic laboratory scandals that have resulted from falsified results, a lack of oversight, and the absence of quality controls, and which were not detected under the safeguards that had been in place. Considering these scandals, PADDDA posits that allowing defendants to cross-examine the person who conducted the lab test, rather than the supervisor who viewed the test results, will permit them adequately to defend themselves at trial and will operate as oversight of the lab. According to PADDDA, each of the numerous lab scandals it details in its brief ultimately came to light by cross-examination of the lab analyst by counsel for the accused. Similarly, the Pennsylvania Association of Criminal Defense Lawyers argues as *amicus* that a

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[8] The *Bullcoming* Court found that in regard to gas chromatography, analyst error was not "so remote as to be negligible:"

> Amici inform us, for example, that in neighboring Colorado, a single forensic laboratory produced at least 206 flawed blood-alcohol readings over a three-year span, prompting the dismissal of several criminal prosecutions. An analyst had used improper amounts of the internal standard, causing the chromatograph machine systematically to inflate BAC measurements. The analyst's error, a supervisor said, was "fairly complex."

Bullcoming, 131 S.Ct. at 2711, n.1 (internal citations omitted).

meaningful opportunity for cross-examination must be available in all trials involving laboratory test results, and defines the opportunity as meaningful only when the witness had an active role in the testing.

The National Conference for DUI Defense Attorneys have also filed an *amicus curiae* brief in support of Appellant, detailing the process of gas chromatography, and articulating that it is highly technical, complicated, and vulnerable to the possibility of error or fraud, including the ability surreptitiously to manipulate the data, and arguing that this Court should therefore hold that only the opportunity to cross-examine the analyst who ran the test satisfies the Confrontation Clause.[9]

The Commonwealth responds that the testimonial statement in this case, in accord with *Crawford,* is, as the lower courts found, the Toxicology Report, which concludes that Appellant's blood alcohol content was .159%. The Commonwealth considers Dr. Blum to be the author and signatory of the testimonial statement, and, therefore, the requisite witness pursuant to the Confrontation Clause in accord with *Melendez-Diaz,* 557 U.S. 305, *Bullcoming,* 131 S.Ct.

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[9] According to *amici,* an analyst can make an error during any one of several steps of gas chromatography, which they believes [sic] would not be uncovered by cross-examination of a surrogate witness, including preparing the sample, loading the machine, selecting the test parameters, and interpreting the results.

2705, and *Williams v. Illinois,* ___ U.S. ___, 132 S.Ct. 2221 (2012) (plurality). *Williams,* which was decided after the Superior Court decided Appellant's appeal and will be discussed below, is the third United States Supreme Court decision on the Confrontation Clause as it pertains to scientific reports. The Court was presented with an alleged Confrontation Clause violation based on the testimony of a state laboratory DNA expert who opined that the defendant's DNA matched a DNA profile created by Cellmark Laboratories, where the Cellmark report was not itself admitted into evidence. In a plurality opinion, a majority of justices agreed that the expert's reference to the Cellmark report did not violate the Confrontation Clause.

The Commonwealth argues that in order to mischaracterize Dr. Blum as a surrogate witness, Appellant has distorted his role and testimony regarding the blood alcohol test results. Rather than a mere surrogate, the Commonwealth considers Dr. Blum to be the author of the Toxicology Report. He was, according to the Commonwealth, the assigned forensic toxicologist, who based his expert opinion on his review of the entire file, including the raw data contained in the test printouts, compared the results of the three tests, ensured that they supported each other, verified the correctness of the procedures as logged by the technicians, and certified and authored the Report. The Commonwealth further argues that the lab technicians in this case performed no analysis on the blood specimen; rather, they prepared it for

insertion into a machine, which generated raw data that was placed into the file. In this respect, the Commonwealth distinguishes this case from the custodian of records disapproved of in *Barton-Martin* or the surrogate witness disapproved of in *Bullcoming*. The Commonwealth further argues that the "end-game" for Appellant and his *amici* is to require the Commonwealth to call every individual involved in the chain of custody of a lab sample as a witness in order to satisfy the Confrontation Clause.

In an *amicus curiae* brief filed on behalf of the Commonwealth, the Pennsylvania District Attorneys Association (PDAA) argues that expert opinion testimony such as Dr. Blum's, which relies on information provided by persons not in court, has never been held to violate the Confrontation Clause. *See, e.g., Commonwealth v. Daniels,* 390 A.2d 172 (Pa. 1978) (approving of the admission of expert opinion testimony based on out-of-court sources of information and recognizing that "all expert opinion is based on 'hearsay' to some extent."); *Commonwealth v. Baumhammers,* 960 A.2d 59, 95 n. 28 (Pa. 2008) (holding, in the alternative, that expert opinion that relied on statements of persons who did not testify was not "testimonial" within the meaning of *Crawford,* and not violative of the Confrontation Clause).

The PDAA further argues that this case is factually distinguishable from *Melendez-Diaz* and *Bullcoming,* where either no expert testified at all, or the expert offered no independent opinion and merely introduced the out-of-court statement of someone else

in the form of a sworn or certified report. The PDAA also asserts, as does the Commonwealth, that this Court should consider the plurality opinion in *Williams* to permit a testifying expert witness who is offering an opinion to consider an informal statement by a lab technician regarding test results, without running afoul of the Confrontation Clause.

The PDAA refutes Appellant's argument that there were myriad questions about the blood tests that he was unable to direct to Dr. Blum by contending that, contrary to this argument, these questions would have been a fruitful ground for impeaching Dr. Blum had Appellant chosen to ask them. Further, if Appellant wanted the testimony of the lab technicians who ran the tests, the PDAA argues that he was free to subpoena them and solicit whatever answers he sought; but that their appearance or absence does not alter the fact that Dr. Blum was a competent witness to testify in support of the proffered report.

Appellant responds by presenting a "proposed workable rule" with regard to who must testify about the results of lab tests: if anyone alters or physically analyzes a sample, runs the machine, or interprets the result, that person must appear to testify at trial for purposes of the Sixth Amendment. In proposing this rule, Appellant asserts that forensic science analysis is conducted in two basic ways: the "cradle to grave" system, where only one person handles and tests the sample; and the assembly line system, where multiple individuals perform discrete tasks. According to Appellant, six people were involved with

the receipt, handling, preparation, and analysis of his blood sample. He suggests that the prosecutor could alleviate its burden to call all of these individuals (who would be required to testify under his proposed rule) by choosing a lab that utilizes the cradle to grave system, instead of one that, like NMS Labs, favors the assembly line system.

Whether the admission of the Toxicology Report violated Appellant's rights under the Confrontation Clause is a question of law, for which our standard of review is *de novo* and our scope of review is plenary. *See, e.g., Commonwealth v. Cannon,* 22 A.3d 210 (Pa. 2011).

The Confrontation Clause of the Sixth Amendment, made applicable to the States *via* the Fourteenth Amendment, *Pointer v. Texas,* 380 U.S. 400, 403 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."[10] In *Crawford,* 541 U.S. at 51, the Court held that the Sixth Amendment guarantees a defendant's right to confront those "who 'bear testimony'" against him, and defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." The Confrontation Clause, the

[10] Although Appellant has not premised his argument on Article I, Section 9 of the Pennsylvania Constitution, it similarly provides: "In all criminal prosecutions the accused hath a right . . . to be confronted with the witnesses against him. . . ."

High Court explained, prohibits out-of-court testimonial statements by a witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination.[11] *Id.* at 53-56.

To further elucidate the distinction between testimonial and nontestimonial statements, the Court in *Davis v. Washington,* 547 U.S. 813 (2006), addressed two types of statements to police and held that whether a statement is testimonial depends on its "primary purpose:"

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

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[11] The Court described the class of testimonial statements covered by the Confrontation Clause as follows:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Crawford, 541 U.S. at 51-52 (internal citations omitted).

> circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822.[12]

Although *Crawford* and *Davis* did not involve expert evidence, the Court subsequently decided a trio of cases directly bearing on application of the Confrontation Clause to expert testimony premised on scientific evidence. In *Melendez-Diaz,* the Court addressed the applicability of the primary purpose test to scientific reports, where the state courts had admitted into evidence affidavits reporting the results of forensic analysis identifying material seized from the defendant as cocaine, without any live testimony regarding the composition of the substance. These analysts' affidavits, entitled "certificates of analysis," were sworn before a notary public by analysts at the state laboratory as required by state law. 557 U.S. at 308. The Court had "little doubt that the documents at issue in this case fall within the

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[12] The Court reiterated the primary purpose test in *Michigan v. Bryant,* ___ U.S. ___, 131 S.Ct. 1143 (2011), when it held that the primary purpose of statements made by the victim to police who found him mortally wounded in a parking lot was to enable police assistance to meet an ongoing emergency. *Id.* at 1150. Therefore, the victim's statements were not testimonial, and were admissible at trial in the absence of the victim's testimony without running afoul of the Confrontation Clause. *Id.*

'core class of testimonial statements'" described in *Crawford,* because they were a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 310, (citing *Crawford,* 541 U.S. at 51).[13] Additionally, the Court reasoned that the affidavits were made for "the *sole purpose*" of providing "*prima facie* evidence of the composition, quality, and the net weight of the analyzed substance." *Melendez-Diaz,* 557 U.S. at 311 (emphasis in original; internal citation omitted).

Because "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment," the Court held that "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to 'be confronted with' the analysts at trial." *Id.* The Court later described this holding as follows: "Absent stipulation, . . . the prosecution may not introduce [a forensic laboratory report stating that a substance was cocaine] without offering a live witness competent to testify to the truth of the statements made in the report." *Bullcoming,* 131 S.Ct. at 2709 (citing *Melendez-Diaz,* 557 U.S. 305).

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[13] In this regard, the Court explained that the fact in question, addressed by the certificates of analysis, was whether the substance found in the defendant's possession was, as the prosecution claimed, cocaine, which was the precise testimony the analysts would be expected to provide if they were called to testify at trial. *Melendez-Diaz,* 557 U.S. at 311.

Observing that "[c]onfrontation is one means of assuring accurate forensic analysis," and, indeed, the only means constitutionally guaranteed, the Court observed that "[f]orensic evidence is not uniquely immune from the risk of manipulation," and that because many labs are administered by law enforcement agencies, "[a] forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz,* 557 U.S. at 318.[14] The Court suggested that an incompetent or fraudulent analyst subject to cross-examination may reconsider his false testimony. *Id.* at 319 ("Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. . . . And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.").

To illustrate this point, the Court observed that the affidavits submitted at the defendant's trial merely identified the analyzed substance as cocaine, and provided no information about "what tests the analysts performed, whether those tests were routine,

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[14] Indeed, as the Court observed, "[o]ne study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." *Melendez-Diaz,* 557 U.S. at 319 (citing Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L.Rev. 1, 14 (2009)).

and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." *Id.* at 320. Because "[a]t least some of that methodology [utilized by the laboratory in that case] requires the exercise of judgment and presents a risk of error that might be explored on cross-examination," *id.,* the Court found "little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology – the features that are commonly the focus in the cross-examination of experts." *Id.* at 321.

In dissent, Justice Kennedy noted that the Majority's holding was problematic in several respects, one of which resulted from the lack of an accepted definition of "analyst:"

> Consider how many people play a role in a routine test for the presence of illegal drugs. One person prepares a sample of the drug, places it in a testing machine, and retrieves the machine's printout – often, a graph showing the frequencies of radiation absorbed by the sample or the masses of the sample's molecular fragments. A second person interprets the graph the machine prints out – perhaps by comparing that printout with published, standardized graphs of known drugs. Meanwhile, a third person – perhaps an independent contractor – has calibrated the machine and, having done so, has certified that the machine is in good working order. Finally, a fourth person – perhaps the laboratory's

> director – certifies that his subordinates followed established procedures.
>
> It is not at all evident which of these four persons is the analyst to be confronted under the rule the Court announces today.

Melendez-Diaz, 557 U.S. at 332 (Kennedy, J., dissenting) (internal citations omitted).

Responding to this point, the Majority stated "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz,* 557 U.S. at 311, n.1.

Although *Melendez-Diaz* established that scientific reports are testimonial and are subject to the requirements of the Confrontation Clause, and provided that when such reports are admitted into evidence, "the analyst" must testify, 557 U.S. at 311, it was *Bullcoming* which took the Court a step closer to resolving who is, or, more precisely, who is not, an appropriate witness. *Bullcoming* presented a scenario in which the prosecution in a DUI case relied on a forensic laboratory report certifying the results of blood alcohol analysis generated by gas chromatography and signed by the lab analyst who performed the test. During the trial, which pre-dated *Melendez-Diaz,* the prosecution did not call the analyst who signed the certification, indicating that he had been placed on leave; instead, it called another analyst

"who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on [the defendant's] blood sample." *Bullcoming,* 131 S.Ct. at 2709.

The question before the Court was "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." *Id.* at 2710. The Court, in a five-to-four decision, held "that surrogate testimony of that order does not meet the constitutional requirement. The 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." *Id.*

In rejecting the admission of surrogate testimony, which the New Mexico Supreme Court had considered adequate to satisfy the Confrontation Clause in that case, the Court opined that such testimony could not operate as an exception to the Confrontation Clause. *Id.* at 2716 ("[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."). Nor could cross-examining the surrogate witness reveal what the analyst "knew or observed about the events

his certification concerned, i.e ., the particular test and testing process he employed," or "expose any lapses or lies" on the analyst's part. *Id.* at 2715. Because the testifying analyst had no first-hand knowledge of the test that was conducted, or the reasons why the testing analyst was on leave, and because the state did not assert that the testifying analyst had any independent opinion concerning the defendant's blood alcohol content, the witness was constitutionally inadequate. *Id.* at 2715-16.

In reaching this conclusion, the Majority considered that the analyst who tested the defendant's blood indicated that the sample was received intact, that the forensic report number and the sample number corresponded, that he performed a particular test in accord with a precise protocol, that no circumstance or condition affected the integrity of the sample or the validity of the analysis, that "the statements in [the analyst's portion of the report] are correct," and that he had "followed the procedures set out on the reverse of th[e] report." *Id.* at 2710. The Supreme Court held that each of these representations were proper material for cross-examination. *Id.* at 2714.

The Court additionally rejected the state's argument that the blood analysis report was not testimonial in character, and held instead that the report at issue in that case was testimonial despite the lack of an oath, which had attended the affidavits at issue in *Melendez-Diaz,* because it was created solely for evidentiary purposes and had sufficient formalities

attending it. *Bullcoming,* 131 S.Ct. at 2717 ("Like the analysts in *Melendez-Diaz,* analyst Caylor tested the evidence and prepared a certificate concerning the result of his analysis. Like the *Melendez-Diaz* certificates, Caylor's certificate is 'formalized' in a signed document, headed a 'report.') (internal citations omitted).

Justice Sotomayor authored a Concurring Opinion indicating her agreement with the Majority Opinion that the trial court erred by admitting the BAC report, and wrote separately, *inter alia,* "to emphasize the limited reach of the Court's opinion." *Bullcoming,* 131 S.Ct. at 2719 (Sotomayor, J., concurring in part). Because Justice Sotomayor was the fifth vote for the Majority Opinion, her Concurring Opinion limiting the reach of the Majority Opinion is of particular importance. She explained 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," *Bullcoming,* 131 S.Ct. at 2722 (Sotomayor, J., concurring); nor was this a case "in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Id.* Finally, Justice Sotomayor noted that *Bullcoming* was not a case "in which the State introduced only machine-generated results, such as a printout from a gas chromatograph." *Id.* Rather, the state introduced, through the testimony of one analyst, the statements of the testing analyst, "which included his transcription of the blood alcohol concentration, apparently

copied from a gas chromatograph printout, along with other statements about the procedures used in handling the blood sample." *Id.*

Justice Kennedy, joined by three other Justices, authored a dissent which, *inter alia,* called into question the Majority's approach as applied in the context of forensic and scientific testing that involves multiple participants. *Bullcoming,* 131 S.Ct. at 2725 (Kennedy, J., dissenting) ("It is not even clear which witnesses' testimony could render a scientific report admissible under the Court's approach.").

Shortly after *Bullcoming,* the Supreme Court announced *Williams,*132 S.Ct. 2221, a divided opinion in which the High Court attempted to refine further the primary purpose test in a factual scenario which Justice Sotomayor had specifically recognized was not encompassed in the *Bullcoming* holding. *Bullcoming,* 131 S.Ct. at 2722 (Sotomayor, J., concurring in part) ("[*Bullcoming*] is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence.").

The facts in *Williams* arose during a rape prosecution in which a state laboratory analyst testified as an expert witness that she obtained a DNA profile of the rapist from Cellmark Laboratories, an independent lab that tested semen from a vaginal swab taken from the victim. The expert testified that she compared the Cellmark report to the defendant's recorded DNA profile, and concluded that they matched.

Because the Cellmark report itself was not introduced into evidence, the defendant contended that the expert's testimony relying on that report violated the Confrontation Clause as interpreted in *Crawford.* The prosecution argued that it was introducing the testifying expert's reference to the Cellmark report only to show the basis for her expert conclusions about the DNA profile match. *Williams* resulted in four opinions, none of which garnered a majority for its legal rationale.

The lead opinion supported by four Justices in *Williams,* which was authored by Justice Alito, applied the primary purpose test to hold that the disputed Cellmark report was not testimonial, and the expert's reliance on this report was a permissible and familiar instance of an expert relying on hypothetical facts not in evidence. *Williams,* 132 S.Ct. at 2228 (Opinion Announcing the Judgment of the Court (OAJC)) ("Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause."). The OAJC stated that an analyst creating a DNA profile may know that the result will affect a criminal case, but does not know the circumstances or the person accused, and is therefore unlike the "accusing" witness-analysts in *Melendez-Diaz* and *Bullcoming. Id.* at 2250-51.

In this regard, the OAJC explained that the DNA profile, like statements of many laboratory analysts, do not easily fit within the linguistic scope of the term

"testimonial statement," and noted that in every post-*Crawford* case in which the Court found a Confrontation Clause violation, the statement at issue had the primary purpose of accusing a targeted individual; unlike the DNA report, which sought not to accuse the defendant in particular "but instead to generate objectively a profile of a then-unknown suspect's DNA from the semen he left in committing the crime." *Id.* at 2251. Under the circumstances of *Williams,* according to the OAJC, "there was no 'prospect of fabrication' and no incentive to produce anything other than a scientifically sound and reliable profile." *Williams,* 132 S.Ct at 2244 (citing *Bryant,* 131 S.Ct. at 1157).

Justice Thomas cast the fifth vote for the disposition but did not join the OAJC's rationale. Instead of employing a primary purpose analysis, Justice Thomas maintained that Cellmark's statements "lacked the requisite 'formality and solemnity' to be considered 'testimonial,' *id.* at 2255 (Thomas, J., concurring), and therefore were distinguishable from the laboratory reports the Court determined were testimonial in *Melendez-Diaz* and *Bullcoming. Id.* at 2260.[15]

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[15] The four dissenting justices rejected the analysis of the OAJC and Justice Thomas, and opined instead that Confrontation Clause jurisprudence mandated that testimony against a defendant be subject to cross-examination, a requirement that fully applies to forensic evidence such as the Cellmark report at issue therein. *Williams,* 132 S.Ct. at 2264 (Kagan, J., dissenting) ("Forensic evidence is reliable only when properly produced, and

(Continued on following page)

Accordingly, the OAJC would permit the use of an informal statement prepared by someone with no accusatory purpose as the basis for in-court expert testimony, and Justice Thomas, who supplied the fifth vote to affirm, would hold that any informal statement is admissible without violating the Confrontation Clause solely because it was informal. Although the Commonwealth and its *amicus* rely on *Williams* as supporting their arguments, we view *Williams* with caution. When a fragmented Court decides a case and no single legal rationale explaining the results garners a majority, then "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. United States,* 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia,* 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

The narrowest grounds for the Court's affirmance of the lower court in *Williams,* a disposition on which the lead opinion and Justice Thomas were in agreement, is their conclusion that the Cellmark report was not testimonial. It is irrelevant for our purposes to determine the narrowest commonality of their respective legal rationales for reaching this conclusion, because the lead opinion and Justice Thomas were also in agreement that the facts of *Williams*

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the Confrontation Clause prescribes a particular method for determining whether that has happened.").

were distinct in this regard from the facts of *Melendez-Diaz* and *Bullcoming.* Specifically, in finding that the Cellmark report was not testimonial, the lead opinion synthesized *Williams* with *Melendez-Diaz* and *Bullcoming* as follows:

> This conclusion [that the defendant's Sixth Amendment confrontation right was not violated] is entirely consistent with *Bullcoming* and *Melendez-Diaz.* In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in *Bullcoming* that the defendant's blood alcohol level exceeded the legal limit and in *Melendez-Diaz* that the substance in question contained cocaine. Nothing comparable happened here.

Williams, 132 S.Ct. at 2240 (OAJC).

Justice Thomas similarly distinguished the facts of *Williams* from *Melendez-Diaz* and *Bullcoming*:

> The Cellmark report is distinguishable from the laboratory reports that we determined were testimonial in *Melendez-Diaz* and in *Bullcoming.* In *Melendez-Diaz,* the reports in question were "sworn to before a notary public by [the] analysts" who tested a substance for cocaine. In *Bullcoming,* the report, though unsworn, included a "Certificate of Analyst" signed by the forensic analyst who tested the defendant's blood sample. The analyst "affirmed that '[t]he seal of th[e] sample

> was received intact and broken in the laboratory,' that 'the statements in [the analyst's block of the report] are correct,' and that he had 'followed the procedures set out on the reverse of th[e] report.' "

Id. at 2260 (Thomas, J., concurring). Accordingly, the lead opinion and concurring opinion regarded the Cellmark report as non-testimonial, and not analogous to the reports admitted in *Melendez-Diaz* and *Bullcoming*. As explained below, we view the Toxicology Report at issue in this case as similar to the scientific reports in *Melendez-Diaz* and *Bullcoming,* and, guided by these opinions, hold that it is likewise testimonial. We therefore find *Williams* distinguishable, and of little assistance in deciding the matter before us.

Starting with the premise that "if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness," *Bullcoming,* 131 S.Ct. at 2713, we consider whether the Toxicology Report is testimonial. Examining the facts of the testimonial statements considered in *Melendez-Diaz* and *Bullcoming,* we conclude that it is. The fact at issue at Appellant's trial was whether he was driving while intoxicated; the Toxicology Report addressed this fact by identifying the alcohol content of his blood, serving the identical function of live, in-court testimony. *See Melendez-Diaz,* 557 U.S. at 311 (holding that where

the fact in question was the content of the substance found on the defendant, the certificates of analysis identifying the substance as cocaine were testimonial statements). Moreover, the report was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, *see Crawford,* 541 U.S. at 52, and was plainly created for an "evidentiary purpose." *Bullcoming,* 131 S.Ct. at 2717 (a document created solely for an evidentiary purpose, made in aid of a police investigation, is testimonial); *Melendez-Diaz,* 557 U.S. at 311 (forensic reports available for trial are testimonial statements).[16]

In all material respects, the Toxicology Report at issue herein resembles those in *Melendez-Diaz* and *Bullcoming,* because here, as in those cases, a law enforcement officer provided evidence to a laboratory for scientific testing, which produced a report concerning the result of this analysis formalized in a signed document. *See Bullcoming,* 131 S.Ct. at 2717; *Melendez-Diaz,* 557 U.S. at 310. In accord with *Melendez-Diaz* and *Bullcoming,* therefore, the Toxicology Report in the instant case is testimonial, and "the analysts were witnesses for purposes of the Sixth

[16] *Cf. Commonwealth v. Dyarman,* 73 A.3d 565, 570 (Pa. 2013) (holding that the calibration and accuracy certificates for the device used to test an individual's BAC are nontestimonial because they were not prepared for the primary purpose of providing evidence in a criminal case and their admission into evidence did not violate the defendant's Confrontation Clause rights).

Amendment." Before the Report could be introduced as evidence, Appellant was entitled "'to be confronted with' the analysts at trial." *Melendez-Diaz,* 557 U.S. at 311. It is to this requirement we now turn.

Although *Melendez-Diaz* established that scientific reports are testimonial and are subject to the requirements of the Confrontation Clause, and provided that when such reports are admitted into evidence, "the analyst" must testify, 557 U.S. at 311 it left unresolved precisely who the analyst is or, in circumstances involving multiple analysts, which analyst or analysts must testify. Although Appellant had the right to confront "the analyst," *see Melendez-Diaz,* 557 U.S. at 311 we acknowledge the concern raised by Justice Kennedy in dissent in *Melendez-Diaz*: "There is no accepted definition of analyst, and no established precedent to define that term." *Melendez-Diaz,* 557 U.S. at 332 (Kennedy, J., dissenting). Certainly, the intrinsic difficulty in identifying who is the analyst and who must, therefore, testify, is illustrated by the facts of this case.

After Appellant's blood was drawn by the phlebotomist at the hospital, it was sent to NMS Labs, where an employee received the blood sample on August 21, 2009. Shortly thereafter, Ms. Silcox removed a small portion of the blood sample for an enzymatic assay test, and another NMS Labs employee placed the blood sample back into storage. In due course, Ms. Chacko removed the blood sample to extract two aliquots for the two gas chromatography tests, and another employee placed the sample back

into storage. Yet another employee inventoried the sample. And, of course, Dr. Blum analyzed the data in the case file, determined the validity of the tests by comparing them to the others, decided which of the three tests results to report, certified the results, and signed the Toxicology Report.

Reflecting the number of people who handled Appellant's blood sample, when Appellant initially objected to Dr. Blum's testimony about the results of the blood tests, he argued that the phlebotomist from the hospital and the NMS Labs employee who logged receipt of the blood sample should both be made available to testify. After trial, his post-sentence motion was premised on the absence of these two individuals in addition to Ms. Chacko. In his brief to this Court, Appellant has focused on Ms. Chacko's absence, arguing she is the analyst who must testify. *See, e.g.,* Appellant's Brief at 6 ("It is *she* [Ms. Chacko] who performed the actual blood analysis." (emphasis in original)). In his reply brief, Appellant proposes a "workable rule" which would require that "if anyone alters or physically analyzes a sample, runs the machine, or interprets the result, that person must appear to testify. . . ." Appellant's Reply Brief at 1.

Because it is not entirely clear from U.S. Supreme Court precedent which of the individuals involved in producing the Toxicology Report is the analyst for purposes of the Confrontation Clause, both parties herein present compelling arguments. In support of Appellant's argument that Ms. Chacko must testify is the Court's concern in *Melendez-Diaz*

with errors and omissions in the testing process. 557 U.S. at 318-19 (suggesting that the person who interprets a machine's printout is an analyst and identifying "drylabbing," where a forensic analyst reports the results of tests that were never performed, as an example of a fraudulent analysis that may be uncovered during cross-examination). Additionally, in *Bullcoming,* the Court characterized the representations made by the testing analyst in the report as appropriate for cross-examination, and held that surrogate testimony was insufficient because cross-examining that witness would not reveal what the analyst knew or observed about the particular test and testing process he employed. 131 S.Ct. at 2714-15.

There is also, however, support for the Commonwealth's position that Dr. Blum is the analyst because he engaged in the critical analysis of the three numbers produced by three tests, run on two types of machines, by two different lab technicians, on different days; determined the facial validity of the tests by comparing the results; decided which result to report in the Toxicology Report; and signed his name to the report. *See Bullcoming,* 131 S.Ct. at 2715 ("the analysts who write reports that the prosecution introduces must be made available for confrontation . . . ").

This is a circumstance that is factually distinct from either *Melendez-Diaz,* which involved no live testimony in support of the certificates of analysis, or *Bullcoming,* which involved the use of surrogate testimony by another analyst in the same lab with no

connection to the laboratory report, in that here, two lab technicians collaborated with and provided raw data on the three tests to the testifying expert, their supervisor, who examined this data and formed his own independent expert opinion, and expressed this opinion in both the Toxicology Report and his live, in-court testimony.

Indeed, the facts presented herein fall within one of the scenarios identified by Justice Sotomayor as being outside the "limited reach" of the Majority Opinion in *Bullcoming*: where the person testifying is a supervisor, reviewer, or someone with a personal but limited connection with the scientific test at issue. 131 S.Ct. at 2719 (Sotomayor, J., concurring in part) ("It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results."). We will therefore review in more detail the particular facts presented to examine Dr. Blum's role in reporting Appellant's BAC in the Toxicology Report.

The Toxicology Report itself is a three-page document indicating on the first page the date it was issued, the requesting police department, Appellant's name, the positive findings of a BAC of .159%, which represents approximately five drinks, testing codes, information about the specimen received, and a certification that the author will be available for court testimony. On the second page, the Report provides "detailed findings," which include the types of tests that were conducted and the reported BAC of .159%.

In a section for "reference comments," the Report includes assumptions regarding how it reports the approximate number of drinks, and the certification by Dr. Blum that he "directly participated in the determination of the results by reviewing and certifying that the analytical data including internal standards and calculations utilized in reporting the results in this case are accurate and correct." Reproduced Record (R.R.) at 165. This section further provides that the specimen was tested for the presence of ethanol as follows: "Blood Alcohol Concentration (BAC) analysis performed by Enzymatic Assay and duplicate, internally standardized, Headspace Gas Chromatography (GC). The reported result is the lower of the two Headspace GC results." *Id.* The third page includes Dr. Blum's electronic signature. Ms. Chacko's name does not appear on the Toxicology Report, nor does Ms. Silcox's.

According to Dr. Blum's trial testimony, he reviewed the case folder, verified the chain of custody information and examined the personal identification information. Additionally, he checked the testing that was performed and the data that resulted, evaluated the analytical data from the duplicate gas chromatography and the enzymatic assay, compared the results of the two gas chromatography tests, compared the result of the enzymatic assay test to the two gas chromatography tests, ensured that these numbers supported each other, and reported the lowest of the two gas chromatography test results as Appellant's BAC.

With regard to the two gas chromatography tests and the enzymatic assay, Dr. Blum explained that the purpose of doing more than one type of test is to be certain about the results that are reported:

> We have concerns certainly that we want to be certain about the results that we report. And the two different analyses allow us – they are based on two different physical chemical properties, so it helps us to identify the presence of ethyl alcohol. It serves as confirmation not only of the testing procedures but confirmation of the specimen itself because it requires two different people to handle the specimen at two different times to be certain that the sample that we test is correct.

Notes of Testimony, 8/30/2010, p. 47.

Dr. Blum further explained that while the lab generally tests the blood sample using two different types of tests, the purpose of the enzymatic assay is to verify the results of the gas chromatography. *Id.* at 49 ("If the enzymatic assay is within 20 percent of the headspace [gas chromatography] analysis we feel that's agreeable, that they are likely the same sample."). Moreover, the two gas chromatography tests have to be within a certain percentage of each other. *Id.* at 50. As recounted by Dr. Blum, the lab's practice is to report the lower of the two numbers resulting from the duplicate gas chromatography, which, in this case, was .159%. Dr. Blum reduced his findings to writing by electronically signing the Toxicology

Report. Consistent with his conclusion in the Toxicology Report, he testified that Appellant's BAC was .159%.

Based on these facts, we hold that Dr. Blum is the analyst who determined Appellant's BAC. Although he relied on the raw data produced by the lab technicians and utilized this raw data in reaching an expert opinion premised on his evaluation of the case file, he is the only individual who engaged in the critical comparative analysis of the results of the gas chromatograph tests and the enzymatic assay and determined Appellant's BAC. Dr. Blum was at the top of the inferential chain, and utilized the data that preceded his analysis in reaching his conclusion. He reached the conclusion in the Toxicology Report based on his analysis of the raw data, certified the results, and signed his name to them. As lab supervisor, moreover, Dr. Blum was generally familiar with standard procedures and able to identify any deviations from this procedure or any problems with the particular lab technician. Accordingly, Dr. Blum supervised Ms. Chacko and Ms. Silcox, evaluated and validated the entire record, decided which number to report as Appellant's blood alcohol content, and signed his name to the report. He was, therefore the certifying analyst who authored the Toxicology Report, and the analyst whom Appellant had a right to confront.

Although Dr. Blum did not handle Appellant's blood sample, prepare portions for testing, place the prepared portions in the machines, or retrieve the

portions after testing, these facts are not dispositive, and do not account for Dr. Blum's involvement in utilizing the information provided by his subordinates, legitimately relying on their work and that of other employees in the lab who logged receipt of the sample, checked the integrity of the sample, ensured proper storage, and of the phlebotomist who drew Appellant's blood at the hospital. The Commonwealth complied with *Melendez-Diaz* by introducing the Toxicology Report with a witness competent to testify to the truth of the statements made in the report, and complied with *Bullcoming* by assuring Appellant's right to be confronted with the in-court testimony of the scientist who evaluated the raw data in the case file and signed the certification.

These facts distinguish this case from *Bullcoming,* where the Court specifically disapproved of the surrogate testimony offered in that case in part because the state did not assert that the witness had any independent opinion concerning the defendant's blood alcohol content. *Bullcoming,* 131 S.Ct. at 2716 (holding that surrogate testimony is unconstitutional when the surrogate played no role in the test). Rather, the testifying witness merely read the analyst's report into evidence and offered no independent opinion about the defendant's blood alcohol levels. In contrast, the facts herein, as discussed above, show that Dr. Blum was involved to a sufficient degree in analyzing Appellant's blood alcohol content and certifying the results of his analysis in the Toxicology Report. His analysis did not simply parrot another

analyst, *see Bullcoming*; rather, he was involved with reviewing all of the raw testing data, evaluating the results, measuring them against lab protocols to determine if the results supported each other, and writing and signing the report. Indeed, it was he who ultimately certified Appellant's BAC at .159%, and it was he who was cross-examined as to this conclusion. Dr. Blum therefore had direct involvement in reaching the reported BAC, and was not a "mere surrogate" who "played no role in producing the BAC report. . . ." *Bullcoming,* 131 S.Ct at 2722.

We hold, therefore that Dr. Blum's expert opinion was contained in the Toxicology Report and was the result of his independent verification of the chain of custody and his independent analysis of the three test results produced by two lab technicians running two types of tests at different times. We agree with the Commonwealth and the Superior Court that the testimonial document was the certified Toxicology Report prepared and signed by Dr. Blum, and that the Commonwealth met its obligation to present the analyst who signed the certificate to testify at trial, consistent with *Bullcoming*.

Our holding in this regard is consistent with other decisions that have held that the live, in-court testimony of an analyst who was involved in reaching a scientific conclusion was permissible under the Confrontation Clause even where other, nontestifying analysts provided data to the testifying analyst. *See, e.g., Smith v. Florida,* 28 So.3d 838 (Fla. 2010) (no Confrontation Clause violation in admission of DNA

tests because supervisor evaluated raw test results, compared samples, made conclusions, and testified at trial); *Leger v. Georgia,* 732 S.E.2d 53 (Ga. 2012) (supervisor of DNA testing who selected what DNA to analyze, interpreted the data, and prepared the report was the proper witness to testify for confrontation purposes and not the analysts who performed the tests); *Rector v. Georgia,* 681 S.E.2d 157 (Ga. 2009) (finding no Confrontation Clause violation where the state's toxicologist was not a mere conduit for another doctor's findings, having reviewed the data and testing procedures to determine the accuracy of the report); *Grim v. Mississippi,* 102 So.3d 1073 (Miss. 2012) (holding that "a supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where that person was 'actively involved in the production of the report and had intimate knowledge of analyses even though [he or] she did not perform the tests first hand.'"); *New Jersey v. Rehmann,* 17 A.3d 278 (N.J.Super. 2011) (prosecution did not violate the Confrontation Clause by failing to call as a witness the individual who operated the gas chromatograph because the expert witness who testified authored the certification of the results and drew his own conclusions from the raw data provided by the gas chromatograph); *United States v. Boyd,* 686 F. Supp. 2d 382, 386 (S.D.N.Y. 2010) (" . . . where the defendant had ample opportunity to confront the Government witness who undertook the final, critical stage of the DNA analysis, and where that witness was personally familiar with each of the prior steps, testified that the analysis included safeguards to

verify that errors would not result in a false positive, and demonstrated that the prior steps were essentially mechanical in nature, the Confrontation Clause is satisfied.").

Considering the Superior Court decision in *Barton-Martin,* which Appellant relies upon, we note that in addition to not binding this Court, *Barton-Martin* is factually distinguishable, not inconsistent with our opinion, and therefore does not persuade us to reach a different result. In *Barton-Martin,* the defendant objected to the in-court testimony of the laboratory administrative director and custodian of records, and argued that he was entitled to confront, instead, the laboratory technician who performed the test and prepared the lab report. *Barton-Martin,* 5 A.3d 363. The trial court admitted the lab report as a business record. *See* Pa.R.E. 803(6). On appeal, the Superior Court reversed and held that absent a showing the laboratory technician who performed the test was unavailable and the defendant had a prior opportunity for cross-examination, the laboratory technician's failure to testify in the Commonwealth's case-in-chief violated the defendant's confrontation rights. The court held that a custodian of records did not satisfy the Confrontation Clause, and that it is the analyst's statements in the report that constitute the testimonial statement triggering the right of confrontation.

Here, in contrast, Dr. Blum did not testify as the custodian of records, nor was the lab report admitted as a business record. Instead, as explained above, Dr.

Blum is the analyst whose statements in the Toxicology Report constitute the testimony triggering the right to confrontation. Accordingly, the nature of the witness and the legal rationale in *Barton-Martin* are dissimilar to this case.

In addition, in consideration of the lab scandals detailed by *amici* and their assertion that cross-examining the lab technician who ran a scientific test may cause errors to be revealed, we observe that if a defendant believes that such errors exist, or possibly exist, the defendant may subpoena the lab technician who ran the test, or, indeed, anyone else, as appropriate, to prove such impropriety. Our holding does not affect a defendant's ability in this regard. However, the remote potentiality of misconduct should not serve as a basis to permit every defendant in every case to engage in a proverbial fishing expedition, when it is not constitutionally mandated.

Finally, we observe in closing that Appellant's preferred "cradle-to-grave" system of scientific and forensic testing, which involves fewer individuals than the alternative assembly line system, and possibly even only a single individual who handles and tests the specimen, would likely have the undesired consequence of making errors more likely. In contrast, using multiple lab technicians to run different tests with different samples on different days, using those test results to check the validity of other results, and having a third party scrutinize the entire process and render the testimonial conclusion on the laboratory's behalf, makes errors, omission, and fraud

less likely, and reduces the likelihood that a single incompetent or dishonest analyst could influence scientific tests.

Accordingly, we affirm the order of the Superior Court, and hold that the testimony of the forensic toxicologist who analyzed the test results of Appellant's blood, determined the BAC by comparing these results, and authored the Toxicology Report, satisfied Appellant's right to confrontation.

Mr. Chief Justice Castille, Messrs. Justice Saylor and Eakin, Madame Justice Todd and Mr. Justice McCaffery join the opinion.

Judgment Entered 10/30/2013

/s/ Elizabeth Zich
CHIEF CLERK

2012 PA Super 34

COMMONWEALTH OF PENNSYLVANIA, Appellant v. GEORGE WILLIAM YOHE, II, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 315 MDA 2011

Appeal from the Order entered January 13, 2011
in the Court of Common Pleas of
York County Criminal Division
at No. CP-67-CR-0007492-2009

BEFORE: PANELLA, MUNDY, AND FITZGERALD,* JJ.

OPINION BY MUNDY, J.:

FILED FEBRUARY 16, 2012

The Commonwealth appeals from the order entered January 13, 2011 granting the post-sentence motion filed by Appellee, George William Yohe, II, and awarding him a new trial. Because we conclude the trial court erred in determining Appellee was entitled to a new trial on the basis his constitutional right of confrontation was violated, we reverse.

On August 19, 2009, Officer Scott George of the Northeast Regional Police Department performed a traffic stop of Appellee's vehicle for equipment

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* Former Justice specially assigned to the Superior Court.

violations. Upon observation of Appellee, Officer George suspected he had been driving under the influence of alcohol (DUI) and performed field sobriety tests. Appellee was then arrested and transported to Memorial Hospital where a phlebotomist drew a blood sample for chemical analysis. Officer George filed a criminal complaint charging Appellee with two counts of DUI under 75 Pa.C.S.A. § 3802(a)(1) and (b).[1]

The case proceeded to a bench trial on August 30, 2010. At trial, the Commonwealth presented the testimony of Officer George and Dr. Lee Blum, a toxicologist and assistant laboratory director at National

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[1] We note that 75 Pa.C.S.A. § 3802(a)(1) and (b) provides as follows.

> **(a) General impairment.** –
>
> (1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.
>
> . . .
>
> **(b) High rate of alcohol.** – An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. § 3802(a)(1), (b).

Medical Services (NMS Labs) where Appellee's blood sample was analyzed. Appellee objected to Dr. Blum's testimony regarding the report of the analysis of Appellee's blood alcohol level and later to the admission of that toxicology report on the grounds it violated his right to confrontation guaranteed under the 6th amendment of the U.S. Constitution. N.T., 8/30/10, at 47, 62. The trial court overruled Appellee's objections. ***Id.*** at 49, 62. At the conclusion of the trial, the trial court found Appellee guilty of DUI under 75 Pa.C.S.A. § 3802(b) and not guilty of DUI under 75 Pa.C.S.A. § 3802(a)(1). ***Id.*** at 96.

On October 25, 2010, the trial court sentenced Appellee to a term of incarceration of 48 hours to six months and a fine of $500.00. Certified Record (C.R.) at 18, 19. On the same day, Appellee filed a post-sentence motion reasserting his objection to the admission of Dr. Blum's testimony and the toxicology report on constitutional right-of-confrontation grounds. C.R. at 20. On January 13, 2011, the trial court entered an order, together with an opinion in support, granting Appellee's post-trial motion and awarding a new trial. C.R. at 25. On January 26, 2011, the Commonwealth filed a motion for reconsideration. C.R. at 26. On January 28, 2011, Appellee filed a motion for reconsideration requesting the judgment of sentence be vacated rather than a new trial ordered. The trial court did not act on the motions for reconsideration. ***Id.*** On February 11, 2011, the Commonwealth filed a

notice of appeal.[2] C.R. at 27. On February 18, 2011, the trial court directed the Commonwealth to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). C.R. at 28. The Commonwealth timely complied on March 9, 2011. C.R. at 30. On May 6, 2011, the trial court filed an opinion in support of its January 13, 2011 order, which both incorporated by reference and amplified its January 13, 2011 opinion, pursuant to Pa.R.A.P. 1925(a). C.R. at 33.

On appeal, the Commonwealth raises one general question with four sub-issues for our review.

> I. Did the trial erred [sic] in granting [Appellee's] post[-]sentence motion when the trial court ruled that [Appellee's] blood test and blood alcohol content were imporperly [sic] admitted at trial because an analyst who performed the tests did not testify?

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[2] The Commonwealth claims the trial court committed an error of law in granting a new trial on the ground that the forensic blood-alcohol report was admitted in violation of Appellee's right of confrontation. Accordingly, this is an interlocutory appeal as of right pursuant to Pa.R.A.P. 311(a)(6). This Court has jurisdiction to decide such interlocutory appeals. ***Commonwealth v. Dorm***, 971 A.2d 1284, 1285 (Pa. Super. 2009) (citation omitted). Additionally, the Commonwealth has certified that the trial court's order terminates or substantially handicaps further prosecution of this case. ***See*** Notice of Appeal, C.R. at 27; ***see also*** Pa.R.A.P. 311(d).

A. Did [t]he [t]rial [c]ourt err in holding that the Commonwealth did not call an analyst to testify when the Commonwealth called a forensic toxicologist to render an expert opinion concerning the conclusions produced by him, which included [Appellee's] blood alcohol content, thereby qualifying as an analyst[?]

B. Did [t]he [t]rial [c]ourt err in finding that ***Melendez-Diaz v. Massachusetts*** and ***Commonwealth v. Barton-Martin*** required the Commonwealth to call witnesses other than the forensic toxicologist to testify regarding opinions and/or conclusions as a result of the blood analysis, which included [Appellee's] blood alcohol content[?]

[C]. Did [t]he [t]rial [c]ourt err in finding the forensic toxicologist's testimony regarding his opinion and/or conclusions as a result of the blood analysis, which included [Appellee's] blood alcohol content, inadmissible when the evidence was properly admitted pursuant to Pa.R.E. 702 and 703; in so ruling that [Appellee's] blood results inadmissible, the [t]rial court de facto held that Rules 702 and 703 violate the Confrontation Clause[?]

[D]. Did [t]he [t]rial [c]ourt err in holding the blood results inadmissible when the Commonwealth properly established the methodology and reliability of the testing procedures used by NMS Labs pursuant

> to the testimony of the forensic toxicologist, who also testified regarding his opinion and/or conclusions as a result of the blood analysis, including [Appellee's] blood alcohol content, and the Pennsylvania Bulletin, which is proper under the Confrontation Clause[?]

Commonwealth's Brief at 4-5.

The Commonwealth's first two sub-issues are interrelated so we shall address them together. At the heart of the Commonwealth's position is its contention that Dr. Blum was an appropriate witness to satisfy Appellee's right of confrontation under the Sixth Amendment to the United States Constitution and that the trial court erred as a matter of law in determining otherwise. Commonwealth's Brief at 10. "Whether Appellant was denied [his] right to confront a witness under the confrontation clause of the Sixth Amendment is a question of law for which our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Dyarman,*** ___ A.3d ___, 2011 WL 5560176 at *2 (Pa. Super. 2011), *citing* ***Commonwealth v. Atkinson,*** 987 A.2d 743, 745 (Pa. Super. 2009).

The Confrontation Clause in the Sixth Amendment to the United States Constitution applies to both federal and state[3] prosecutions and provides

[3] The Confrontation Clause applies to the states through application of the Fourteenth Amendment to the United States Constitution. ***Pointer v. Texas***, 380 U.S. 400, 403-406 (1965).

that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . . " U.S. Const. amend. IV. The Pennsylvania Constitution likewise provides that, "[i]n all criminal prosecutions the accused hath a right . . . to meet the witnesses face to face." Pa. Const. art. I, § 9.[4]

> To be sure, the Confrontation Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands not that evidence be reliable but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Commonwealth v. Holton, 906 A.2d 1246, 1252-1253 (Pa. Super. 2006) (citation omitted), *appeal denied,* 918 A.2d 743 (2007).

In ***Crawford v. Washington,*** 541 U.S. 36 (2004), the United States Supreme Court held that the

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[4] We have held that the Confrontation Clause of the Pennsylvania Constitution affords defendants the same rights as the Sixth Amendment of the United States Constitution. ***See Commonwealth v. Geiger,*** 944 A.2d 85, 97 n.6 (Pa. Super. 2008). Appellee did not allege state constitutional grounds in support of his post-trial motion. Accordingly, our discussion will be limited to Appellant's confrontation rights under the Confrontation Clause in the Sixth Amendment.

Confrontation Clause of the Sixth Amendment prohibits the use of testimonial hearsay obtained by police officers against a criminal defendant, even if such hearsay is reliable, unless the defendant has the opportunity to cross-examine the unavailable declarant. ***Id.*** at 54. Later, in ***Melendez-Diaz v. Massachusetts,*** 129 S.Ct. 2527 (2009), the United States Supreme Court addressed the "class of testimonial statements covered by the Confrontation Clause" delineated in ***Crawford***. ***Id.*** at 2531. Such testimonial statements included "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits [. . .] that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ***Id.,*** *quoting* ***Crawford, supra*** at 52.

In ***Melendez-Diaz,*** the defendant objected to the admission of certificates of analysis, describing results of forensic testing that determined certain seized substances to be cocaine. ***Id.*** Melendez-Diaz maintained he had a constitutional right to confront the analysts, who should have been required to testify in person. ***Id.*** The Supreme Court determined that the certificates of analysis were affidavits made under circumstances leading a reasonable person to believe they would be used at trial. ***Id.*** at 2532. Accordingly, the affidavits were recognized as testimonial statements and the analysts who prepared the certificates were recognized as witnesses for the purposes of the Sixth Amendment, who the defendant

had a right to confront. ***Id.*** Because that right was not afforded, the certificates were held to be inadmissible. ***Id.*** In ***Melendez-Diaz*** the prosecution offered no witnesses in support of the proffered certificates.

We turn now to examine two subsequent cases that address the issue of who is an appropriate witness to testify about a forensic report that qualifies as a testimonial statement under the Confrontation Clause. In ***Commonwealth v. Barton-Martin,*** 5 A.3d 363 (Pa. Super. 2010), *appeal denied,* 30 A.3d 486 (Pa. 2011), the defendant objected to the admission of a forensic blood alcohol test result without the testimony of the laboratory technician who performed the test and prepared the lab report. ***Id.*** at 365. At trial, the Commonwealth presented testimony from a witness who was the laboratory administrative director and custodian of records for the Hospital where the analysis was performed. ***Id.*** at 366. The witness testified as to lab procedures but admitted that "she was not the technologist who analyzed [the defendant's] blood." ***Id.*** The trial court admitted the report as a business record. ***Id.*** at 368.

On appeal, the ***Barton-Martin*** Court concluded the blood-alcohol test was "the very type of *ex parte* out-of-court report ruled inadmissible (without the opportunity for confrontation) in ***Melendez-Diaz***." ***Id.*** Accordingly, this Court held as follows.

> [P]ursuant to the Supreme Court's holding in ***Melendez-Diaz***, absent a showing that the laboratory technician was unavailable,

> and the Appellant had a prior opportunity to cross-examine her, the laboratory technician's failure to testify in the Commonwealth's case-in-chief violated Appellant's Sixth Amendment right to confrontation. Because no showing of unavailability and prior cross examination was made, the admission of Appellant's BAC test results in this matter was an error of law.

Id. at 369. The *Barton-Martin* Court noted that a mere custodian of records, otherwise unconnected to the performance of the analysis of the blood sample at issue, does not satisfy the confrontation clause. ***Id.*** at 369 n.5. It is the "analyst's statements" in the report that constitute the "testimonial statement" triggering the right of confrontation. ***Id.*** at 368, *quoting* ***Melendez-Diaz***, ***supra*** at 2540; ***cf. Dyarman***, ***supra*** (holding calibration logs, establishing chain of custody and accuracy of equipment, not used to establish an element of a crime or for particular prosecution are not testimonial statements requiring confrontation).

In ***Bullcoming v. New Mexico,*** 131 S.Ct. 2705 (2011), the United States Supreme Court addressed a similar scenario to that presented in ***Barton-Martin***.[5] In ***Bullcoming,*** the defendant was charged with driving while intoxicated. ***Id.*** at 2709. At trial, a forensic laboratory report of the defendant's blood-alcohol

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[5] ***Bullcoming*** was decided after the trial court issued its May 6, 2011 opinion.

level, as analyzed and prepared by the New Mexico Department of Health, Scientific Laboratory Division (SLD), was offered into evidence. ***Id.*** at 2711-2712. The report was completed, signed and certified by an analyst who was not called to testify. ***Id.*** Instead, another analyst from SLD testified as to the procedures and equipment used but admitted he had no involvement with the specific sample at issue. ***Id.*** at 2712. The Supreme Court recognized "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution . . . is 'testimonial,' and therefore within the compass of the Confrontation Clause." ***Id.*** at 2713-2714. The ***Bullcoming*** Court held as follows.

> As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. Because the New Mexico Supreme Court permitted the testimonial statement of one witness . . . to enter into evidence through the in-court testimony of a second person . . . we reverse that court's judgment.

Id. at 2713. Further, the Supreme Court reasoned, "surrogate testimony of the kind [the testifying witness] 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. Nor could such surrogate testimony expose any lapses or lies on the

certifying analyst's part." ***Id.*** at 2715. "The comparative reliability of an analyst's testimonial report does not dispense with the Clause. The analysts who write reports introduced as evidence must be made available for confrontation even if they have the scientific acumen of Mme. Curie and the veracity of Mother Teresa." ***Id.*** at 2709. "The . . . analyst who must testify is the person who signed the certificate." ***Id.*** at 2716, *quoting* ***Melendez-Diaz***, ***supra*** at 2545 (KENNEDY, J., dissenting).

With this authority in mind, we turn to the circumstances of the instant case. As noted above, Appellee's blood sample was sent to NMS labs for analysis. Dr. Blum testified that in his role as a forensic toxicologist at NMS Labs he performs case assignments, case evaluations, reviews of analytic testing, writing of reports, and court testimony. N.T., 8/30/11, at 39. Specifically regarding Appellee's blood sample, Dr. Blum testified as follows.

> Q. And do you recall the name of the patient for the blood that you received?
>
> A. George W. Yohe II.
>
> Q. Now, Doctor, did you actually review anything relative to Mr. Yohe's blood on August 21st of 2009?
>
> A. Not on August 21, 2009, no, sir.
>
> Q. What date specifically would you have undertaken review of anything relative to this case?

A. It was the date the report was signed. I believe it was the end of August, perhaps August 31st. At that time I had in hand the case folder which contains the chain of custody documents and the analytical data for the headspace chromatography and then there's information available for this particular patient in our laboratory information system.

Q. Now, Doctor, if you can describe or explain exactly what you do when you review concerning BAC analysis, what's the process or procedure you go through specifically?

A. Again, I have the case folder in front of me. I look at the report. That would be the final report. Prior to finalizing, I check the demographic information, that the information in the report, the name of the individual, the client, any identifying numbers are, all coincide with that of the documentation. I look at the chains of custody. There is an external chain of custody from the requesting agency. I see that's completed. I see that the internal chain of custody is completed by our staff and that the external chain of custody and the internal chain of custody, the people who sign the external chain of custody are the same people that sign the internal chain of custody. I check the testing that was performed. I review the data that's available. I review that the data coincide one with the other.

> In the case of the blood alcohol testing, we do the headspace gas chromatography in duplicate. I see that the two numbers agree. I look and make sure it's a clean enzymatic assay, and see that they agree with the headspace analysis. I make certain that the number that appears on the headspace gas chromatography is the result that will be reported. I look over the report. And if everything seems okay, then I sign it.

N.T., 8/30/11, at 41-42. Dr. Blum went on to testify he performed this review in the instant case and electronically signed the report. ***Id.*** at 51. He noted that the Lab performed two headspace gas chromatography tests and one enzymatic assay on Appellee's blood sample. ***Id.*** at 49-50. Dr. Blum explained the purpose for this procedure in the following exchange.

> Q. Doctor, what's the purpose of doing more than one type of test of a blood sample?
>
> A. We have concerns certainly that we want to be certain about the results that we report. And the two different analyses allow us – they are based on two different physical chemical properties, so it helps us to identify the presence of ethyl alcohol. It serves as a confirmation not only of the testing procedures but confirmation of the specimen itself because it requires two different people to handle the specimen at two different times to be certain that the sample that we test is correct.

Id. at 46-47.

On cross-examination, Dr. Blum acknowledged that he did not personally handle or observe the testing performed.

> Q. What you are testifying to is all according to procedure, because you didn't specifically observe them do these things; correct?
>
> A. That's correct.
>
> . . .
>
> Q. At what point in time do you get hands on this specimen?
>
> A. I look at the documentation associated with the specimen.
>
> Q. So you never actually do anything with the specimen?
>
> A. Correct.
>
> Q. So you never saw Mr. Yohe's tube of blood that came to NMS?
>
> A. Correct.

Id. at 57-58.

In view of this testimony, Appellee argued, in his motion for new trial, that the blood-alcohol analysis report was a testimonial statement and that Dr. Blum's testimony could not satisfy his right to confrontation relative to that report because Dr. Blum had not personally conducted the testing. ***See*** C.R. at 20. We are therefore presented with factual circumstances distinct from those presented in

Barton-Martin and ***Bullcoming*** and must determine whether the Confrontation Clause is satisfied by the testimony of a witness who certifies blood-alcohol test results and signs the report of those results but did not observe, prepare or conduct the actual testing procedures. The trial court, after reviewing the relevant precedents, formulated the question before it as follows. "The dilemma then becomes whether the Supreme Court literally meant that the analysts who performed the tests must testify as to the results or whether [i]t meant that the results could not be admitted as evidence without some accompanying testimony."[6] Trial Court Opinion, 1/13/11,

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[6] The trial court's observation reflects the tension between the Majority and the Dissent in ***Melendez-Diaz*** relative to the practical application of its holding. The Majority noted as follows. "[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." ***Melendez-Diaz***, ***supra*** at 2532 n.1. The Dissent questioned the practical scope of the decision of the Majority in part as follows.

> It could be argued that the only analyst who must testify is the person who signed the certificate. Under this view, a laboratory could have one employee sign certificates and appear in court, which would spare all the other analysts this burden. But the Court has already rejected this arrangement. The Court made clear in ***Davis*** **[*v. Washington*,** 547 U.S. 813 (2006)] that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second:
>
> "[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be

(Continued on following page)

at 4. The trial court ultimately concluded Appellee was correct for the following reasons.

> The witness from whom the testimony found in the lab report derives is the analyst who actually performed the analysis on the [Appellee's] blood sample. As such, it is that analyst, and that analyst alone, who the United States Supreme Court and Pennsylvania Superior Court require to testify at a trial where the report is offered as evidence.
>
> . . .
>
> In this case, [Appellee] was limited in his cross-examination of Dr. Blum in a manner that he would not have been limited in cross-examination of the analyst who performed the test. While credibility of the analyst is certainly an issue, it is not the sole reason for requiring that he or she be subject to

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> evaded by having a note-taking policeman [here, the laboratory employee who signs the certificate] *recite* the unsworn hearsay testimony of the declarant [here, the analyst who performs the actual test], instead of having the declarant sign a deposition. Indeed, if there is one point for which no case-English or early American, state or federal-can be cited, that is it." 547 U.S., at 826 [ ].
>
> Under this logic, the Court's holding cannot be cabined to the person who signs the certificates. If the signatory is restating the testimonial statements of the true analysts – whoever they might be – then those analysts, too, must testify in person.

Id. at 2525-2546 (KENNEDY, J., dissenting).

> confrontation; the manner of testing requires some exercise of judgment, which presents a risk of error that could be addressed on cross-examination.

Trial Court Opinion, 5/6/11, at 3-4. "Therefore, the [trial c]ourt maintains that, despite Dr. Blum's testimony regarding the reliability of the testing procedures employed by the laboratory, [Appellee] is still entitled to confront the witness against him, namely the analyst who performed the blood test." ***Id.*** at 6. Accordingly, the trial court held "that the evidence of the lab report and test results that were offered at trial were improperly admitted. The improper admission violated [Appellee's] rights under the Confrontation Clause of the United States Constitution and, as such, is grounds for a new trial." ***Id.*** at 4-5.

The Commonwealth argues the trial court erred in so holding.

> The testimony of the lab technicians, as argued necessary by [Appellee] in his post[-]sentence motion and relied upon by the [t]rial [c]ourt in its order granting [Appellee's] post[-]sentence motion, go towards the weight of the evidence and is not a Confrontation Clause issue under the Sixth Amendment to the United States Constitution. Dr. Blum was the 'analyst' or the person who reviewed the raw data from the machines and generated an expert report based on his review of the raw data that was generated. Therefore, Dr. Blum is

> the witness that [Appellee] had a right to confront.

Commonwealth's Brief at 10. We agree.

Instantly, it is clear that Dr. Blum did not handle Appellee's blood sample, prepare portions for testing, place the prepared portions in the testing machines, or retrieve the portions after testing. N.T., 8/30/11, at 57-58. However, it is equally clear that Dr. Blum did review the entire file, compare the results of the three independent test printouts on the three aliquots[7], certify the accuracy of the results, and sign the report. ***Id.*** at 41-42, 51. Accordingly, Dr. Blum is the analyst who prepared the certificate in anticipation for use at Appellee's trial. We concede that Dr. Blum is in a similar position as the testifying witnesses in ***Barton-Martin*** and ***Bullcoming*** in that he did not personally handle the defendant's blood sample, prepare the aliquots, or physically place the aliquots in the testing apparatuses. However, unlike the testifying witnesses in ***Barton-Martin*** and ***Bullcoming***, Dr. Blum did certify the results of the testing and author the report sought to be admitted as evidence against Appellee. We conclude this distinction is dispositive of the issue presented.

As declared in ***Bullcoming***, it is the certification and the written report that constitute the "testimonial statement" triggering the Sixth Amendment right

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[7] An aliquot is an extracted portion of the original sample upon which the testing is performed.

of confrontation. ***Bullcoming***, ***supra*** at 2713-2715. Appellee is not limited in his cross-examination of Dr. Blum as suggested by the trial court simply because there may be questions he cannot answer due to the fact he did not perform a specific task in the course of processing Appellee's blood sample. What is relevant to Appellee's right of confrontation is the basis for the findings in the report and the certification of those results. Dr. Blum, as the certifying analyst and signatory to the report, is the person who can respond to questions about the reasons for his certification and the bases for the factual assertions in the report. The fact that NMS Labs chose not to have the individual who physically performed the testing certify the results and author the report may be an issue relevant to the weight of the certification, but it is not a confrontation issue. This is true so long as Dr. Blum's certification is based on a true analysis and not merely a parroting of a prior analysis supplied by another individual. ***See id.*** at 2713. Here Dr. Blum reviewed the raw data from the analysis machines, compared the three BAC results, and verified the correctness of the procedures as logged by the technicians. Based on his analysis of these materials, Dr. Blum certified the results as reflected in the report he signed.

In light of the foregoing, we conclude that the trial court erred as a matter of law when it determined that the blood-alcohol report of the blood sample taken from Appellee was inadmissible on the ground that Appellee was not afforded his right to

confront the source of the testimonial statement through the testimony and cross-examination of Dr. Blum.[8] Accordingly, we reverse the order of January 13, 2011 and reinstate the October 25, 2010 judgment of sentence.

Order reversed. Judgment of sentence reinstated. Jurisdiction relinquished.

Judgment Entered.

/s/ Milan K. Mrkobrad
Deputy Prothonotary

Date: February 16, 2012

[8] In light of our determination, we need not address the Commonwealth's additional issues.

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-67-CR-**
v.	:	**7492-2009**
GEORGE WILLIAM YOHE, II	:	
Defendant	:	

APPEARANCES:

For Commonwealth: Justin F. Kobeski, Esquire
Assistant District Attorney

For Mr. Yohe: Shawn M. Dorward, Esquire

ORDER

AND NOW, this 12th day of January 2011, it is hereby ORDERED that the Defendant's Post-Sentence Motion is GRANTED and that the Defendant is granted a NEW TRIAL.

BY THE COURT:

/s/ Michael E. Bortner
MICHAEL E. BORTNER, JUDGE

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No.**
v.	:	**CP-67-CR-7492-2009**
GEORGE W. YOHE, II	:	
Defendant	:	

APPEARANCES:

For Commonwealth: Justin F. Kobeski, Esquire
Assistant District Attorney

For Mr. Yohe: Shawn M. Dorward, Esquire

Opinion In Support of Order

The Defendant was found guilty of Driving Under the Influence of Alcohol, High Rate, 75 Pa. Cons. Stat. Ann. § 3802(b), following a non jury trial before this Court on August 30, 2010. On October 25, 2010, this Court sentenced the Defendant to serve forty-eight hours to six months in the York County Prison, to pay a $500 fine and court costs, to pay Act 37 fees, and to complete a drug and alcohol evaluation. Also on October 25, 2010, the Defendant filed a Post-Sentence Motion in Arrest of Judgment. Pending the resolution of the Defendant's Post-Sentence Motion, this Court issued a Stay of Sentence Order on November 30, 2010. After thorough review and consideration of the applicable case law, this Court has Granted the Defendant's Post-Sentence Motion and now issues this Opinion in support of that Order.

The Defendant's Post-Sentence Motion encompasses two issues. First, whether the results of the blood test were improperly admitted because the analyst did not testify and was not available for cross-examination. Second, whether the verdict was against the greater weight of the evidence because no weight could be afforded to the blood results without testimony from the phlebotomist and the analyst. This Court finds that the results of the blood test were improperly admitted because the Defendant had a constitutional right to confront the analyst but that the verdict was not against the greater weight of the evidence because some weight could be afforded to the blood results even without testimony from the phlebotomist and the analyst.

I. Confrontation

The Defendant first argues that the results of the blood test were improperly admitted because the analyst did not testify at the trial and was not available for cross-examination. The arguments made by both counsel for the Defendant and counsel for the Commonwealth during the Suppression Hearing focused mainly on chain of custody issues with regards to the blood test results, but the real issue is confrontation. The United States Supreme Court addressed that issue at length in the fairly-recent decision of *Melendez-Diaz v. Massachusetts. Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (U.S. 2009).

In *Melendez-Diaz*, police seized material from a defendant and had it analyzed for drug content. *Id.* at 2530. At trial, the prosecution admitted into evidence "Certificates of Analysis" that were sworn to before a notary public by the analysts who ran the tests. *Id.* at 2531. Those certificates, coupled with the bags of material that were seized, were all that was admitted to show that the bags contained cocaine; the prosecution did not offer any live testimony regarding the results of the drug test. *Id.* The Supreme Court ultimately held that the defendant was entitled to confront the analysts if their reports were to be admitted as evidence against him. *Id.* at 2542.

The Supreme Court stated that "a witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.* at 2531 (citing *Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354 (2004)). The class of testimonial statements covered by the Confrontation Clause includes affidavits and "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 2531 (citing *Crawford*, 541 U.S. at 51-52).

The documents at issue in *Melendez-Diaz* were clearly affidavits, being "declaration[s] of facts written down and sworn to by the declarant before an

officer authorized to administer oaths," and were admitted into evidence without any accompanying testimony. *Id.* at 2532 (citing *Black's Law Dictionary* 62 (8th ed. 2004)). The document at issue in the instant case, the analyst's report, was a testimonial statement subject to the Confrontation Clause, having been compiled for the express purpose of being used at trial, and was admitted into evidence accompanied by the testimony of Dr. Lee Blum, the toxicologist and Assistant Laboratory Director at NMS Labs whose electronic signature also appears at the end of the report. (Commonwealth's Ex. 6.) *See Melendez-Diaz*, 129 S. Ct. at 2531.

The Supreme Court, in *Melendez-Diaz*, found that, under their decision in *Crawford*, "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." *Melendez-Diaz*, 129 S. Ct. at 2532 (citing *Crawford*, 541 U.S. at 54). The Court did not hold, however, "and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Id.* at 2532 n.1. Therefore, while not everyone involved with the sample must testify, the report of findings cannot be admitted as evidence without accompanying testimony.

Because no one testified in *Melendez-Diaz*, the Supreme Court focused on the necessity of testimony by the analysts who actually performed the tests that led to the results documented in the report. The dilemma then becomes whether the Supreme Court literally meant that the analysts who performed the tests must testify as to the results *or* whether It meant that the results could not be admitted as evidence without some accompanying testimony. To resolve this issue, this Court turns to the Supreme Court's rationale in *Melendez-Diaz*, as well as the Superior Court's findings in *Commonwealth v. Barton-Martin. Commonwealth v. Barton-Martin*, 5 A.3d 363 (Pa. Super. Ct. 2010).

"[T]here are other ways – and in some cases better ways – to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available." *Melendez-Diaz*, 129 S. Ct. at 2536. According to the Supreme Court, confrontation is one way to assure we have accurate forensic analysis in a case since "the analyst who provides false results may, under oath in open court, reconsider his false testimony." *Id.* at 2537. Furthermore, the prospect of confrontation will deter fraudulent analysis in the first place," as well as "weed out" the incompetent analyst. *Id.*

Dr. Blum testified at trial regarding the results of the blood test and was cross-examined by the Defendant. However, the Defendant's cross-examination

of Dr. Blum was limited in ways that cross-examination of the analyst who performed the tests would not have been. The veracity of the analyst and the processes he used are important, as are the analyst's knowledge and capabilities, since he is the one who conducted the test. The Supreme Court made clear that the need to address the credibility of the analyst is not the sole reason for requiring that he be subject to confrontation. The Court "would reach the same conclusion if all analysts always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa." *Melendez-Diaz*, 129 S. Ct. at 2537 n.6. It is the Court's belief that at least "some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." *Id.* at 2537.

Therefore, looking at the Supreme Court's rationale, it becomes evident that the analyst alone can testify as to how he conducted the test and obtained the results documented in the report. This conclusion is also supported by the decision of the Pennsylvania Superior Court in *Barton-Martin.*

In *Barton-Martin*, the defendant was charged with driving under the influence. At trial, the Commonwealth presented the testimony of Michelle Lee, the laboratory administrative director and custodian of records at the hospital. On cross-examination, Lee admitted that she never performed any tests on the defendant's blood; furthermore, the analyst who did perform tests on the defendant's blood was not called to testify during the Commonwealth's case-in-chief.

Barton-Martin, 5 A.3d at 366. As a result, the Superior Court found that the defendant's rights had been violated under the Confrontation Clause and that the results of the blood test were inadmissible. *Id.* at 365.

The Superior Court concluded that "the Supreme Court expressly held that the certificates in question were not typical business records capable of admission through the testimony of a custodian. *Id.* at 369 n.5. Therefore, the holding of *Melendez-Diaz* applies in cases where some lab personnel testify regarding the lab results just as it does in cases where no lab personnel testify. While the analyst's testimony may not be necessary for chain of custody purposes, it is necessary for confrontation purposes. And while Dr. Blum is, in the instant case, a toxicologist and the Assistant Laboratory Director, and although he does review analyses of blood tests on a daily basis, he, much like Ms. Lee in *Barton-Martin*, did not perform any tests on the Defendant's blood specimen. Despite Dr. Blum's ability to testify regarding laboratory testing protocol, he could not testify regarding the testing of this Defendant's blood sample.

Therefore, the results of the Defendant's blood test were improperly admitted because the analyst did not testify and was not available for cross-examination.

II. Weight of Evidence

The Defendant further argues that the verdict was against the greater weight of the evidence because no

weight could be given to the blood test results without hearing testimony from the phlebotomist and the analyst.

Since the evidence of the test results was improperly admitted because the analyst did not testify, the issue of the weight to be given to the test results is moot.

For the reasons set forth above, this Court hereby grants the Defendant's Post-Trial Motion in Arrest of Judgment.

BY THE COURT:

Dated:
January 13, 2011

/s/ Michael E. Bortner
MICHAEL E. BORTNER, JUDGE

[LOGO] **NMS** **CONFIDENTIAL**

LABS

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Robert A. Middleberg. PhD, DABFT,
DABCC-TC, Laboratory Director

Toxicology Report

Report Issued
08/31/2009 11:01

To: **40395**
Northeastern Regional
Police Department
Chief Darryl Albright
5570 Board Road
Mount Wolf, PA 17347

Patient Name
YOHE II, GEORGE W.

Patient ID	NP
Chain	11030031
Age	Not Given
Gender	Male
Workorder	09185812

Positive Findings:

Compound	Result	Units	Matrix Source
Ethanol	159	mg/dL	Blood
Blood Alcohol Concentration (BAC)	0.159	% w/v	Blood
Approximate # of Drinks:	5		Blood

See Detailed Findings section for additional information

Summary:

Based on the concentration of Ethyl Alcohol found in this case, it can be stated with reasonable scientific certainty that at and around the time of specimen collection, the subject's alertness, judgment, perception, coordination, response time and sense of care and caution were impaired rendering the individual unfit to operate a motor vehicle safely.

I certify that I will be available for courtroom testimony at the time of trial.

Testing Requested:

Analysis Code	Description
0175B	Alcohol, Blood (Forensic)

Specimens Received:

ID	Tube/Container	Volume/ Mass	Collection Date/Time	Matrix Source	Miscellaneous Information
001	Gray Top Tube	8.5 mL	08/19/2009 23:05	Blood	
002	Gray Top Tube	8 mL	08/19/2009 23:05	Blood	

All sample volumes/weights are approximations.

Specimens received on 08/21/2009.

Detailed Findings:

Analysis and Comments	Result	Units	Rpt. Limit	Specimen Source	Analysis By
Ethanol	Confirmed	mg/dL	30	001 – Blood	EZA
Ethanol	159	mg/dL	10	001 – Blood	Headspace GC
Blood Alcohol Concentration (BAC)	0.159	% w/v	0.010	001 – Blood	Headspace GC
Approximate # of Drinks:	5			001 – Blood	Headspace GC

Other than the above findings, examination of the specimen(s) submitted did not reveal any positive findings of toxicological significance by procedures outlined in the accompanying Analysis Summary.

Reference Comments:

1. Approximate # of Drinks: – Blood:

   This is an estimate of the number of drinks equivalent to this individual's blood alcohol at the time the sample was collected. It is based on consumption of typical alcoholic drinks in an adult of average size weighing approximately 155 lbs. A standard drink equals:

   1.5 oz of 40% (80 proof) spirits, or
   5 oz of 12% wine, or
   12 oz of 5% beer.

   Each of these drinks contains about the same amount of alcohol. The amount of any given alcohol-containing beverage consumed to reach a particular BAC will vary depending on the individual's gender, actual weight, time since drinking started, time of last drink, drinking history and other factors. For a comprehensive analysis of drinking pattern please contact the Expert Services Group at NMS Labs.

2. Blood Alcohol Concentration (BAC) – Blood:

   I certify that:

   I directly participated in the determination of the results by reviewing and certifying that the analytical data including internal standards and calculations utilized in reporting the results of this case are accurate and correct.

3. Ethanol (Ethyl Alcohol) – Blood:

   Ethyl alcohol (ethanol, drinking alcohol) is a central nervous system depressant and has effects so-related, e.g.. Impaired judgment, reduced alertness and impaired muscular co-ordination.

   Blood Alcohol Concentration (BAC) analysis performed by Enzymatic Assay and duplicate, internally standardized, Headspace Gas Chromatography (GC). The reported result is the lower of the two Headspace GC results.

   NMS Labs is an approved Laboratory for Alcohol analysis in the Commonwealth of Pennsylvania.

Sample Comments:

001 Police Department: SCOTT GEORGE

001 I certify that NMS Labs has taken custody of the evidentiary material, and that all specimen integrity seals were in order.

Chain of custody documentation has been maintained for the analyses performed by NMS Labs.

Unless alternate arrangements are made by you, the remainder of the submitted specimens will be discarded six (6) weeks from the date of this report; and generated data will be discarded five (5) years from the date the analyses were performed.

Workorder 09185812 was electronically signed on 08/31/2009 10:20 by:

/s/ Lee M. Blum
Lee M. Blum, Ph.D., DABFT
Forensic Toxicologist

Analysis Summary and Reporting Limits:

Acode 0175B – Alcohol, Blood (Forensic)

-Analysis by Enzymatic Assay (EZA) for:

Compound	Rpt. Limit	Compound	Rpt. Limit
Ethanol	30 mg/dL		

-Analysis by Headspace Gas Chromatography (GC) for:

Compound	Rpt. Limit	Compound	Rpt. Limit
Ethanol	10 mg/dL		