



One of the basic tenets of the American judicial system is the important, necessary, and indispensable protections of an accused's right to Confrontation ensured by the Sixth Amendment to the US Constitution. The founders of this country felt it was of paramount importance that the accused have the right to confront their accuser(s). Through the evolution of the US judicial precedent, certain requirements have been established at the State and Federal levels of our Judicial system in an effort to ensure the Constitutional rights of the accused are protected.

Following the decision by the United States Supreme Court in Crawford v. Washington, 124 S.Ct 1354 (2004)<sup>1</sup>, the US Supreme Court released three decisions addressing the constitutionality and application of the Confrontation Clause in a forensic setting. In Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), in a 5-4 decision, the US Supreme Court held that, standing on its own, a *sworn certificate* of analysis attesting that certain materials were a controlled substance was a *testimonial statement* and accordingly, as a testimonial statement, invoked the accused's right to confrontation, and the Court did not create a forensic-testing exception.

In Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011), the Court, again in a 5-4 decision, held that the Confrontation Clause applied to an *unsworn* forensic-laboratory report certifying the defendant's blood-alcohol level, where the report was specifically created to serve as evidence in a criminal proceeding, and that there was an adequate level of formalities in the creation of the report. The prosecutor in Bullcoming presented an analyst to introduce the issued forensic report and to subsequently testify to its contents. The analyst had not personally performed any testing in the case, had not observed the testing, nor was a reviewer in the case. The US Supreme Court held that the Confrontation clause "does not permit the prosecution to introduce a forensic laboratory report containing a *testimonial certification*, made in order to prove a fact at a criminal trial, through

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<sup>1</sup>In Crawford, the Court specifically framed the Confrontation Clause by expressly addressing the admission of hearsay evidence and required the opportunity for cross-examination of prior testimonial statements.



the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification.” (Bullcoming at 2707).

In Williams v. Illinois, 132 S.Ct. 2221 (2012), the Court held, in a plurality opinion, that the Confrontation Clause was not violated where an expert was allowed to offer an opinion based on a DNA-profile report prepared by persons who did not testify and who were not available for cross-examination. Williams involved a bench trial in which a forensic specialist from a state laboratory testified that she had matched a DNA profile prepared by an outside, unaffiliated laboratory to a profile of the defendant prepared by the state's lab. The outside lab's DNA report was not admitted into evidence, and the testifying analyst was allowed to refer to the DNA profile as having been produced from the semen sample taken from the victim as the outside lab's DNA report was not being offered for the truth of the matter asserted.

Following the decisions in the trio of Confrontation Clause cases decided by the Supreme Court, two primary issues arise in the analysis of the admissibility of a forensic report and the subsequent testimony of forensic personnel. First, is a forensic report, by its nature, a testimonial statement, and secondly, if so, who can or needs to testify for the admission of the forensic report at trial? While the US Supreme Court has not definitively provided clarity as to whether an *unsworn* forensic report is testimonial<sup>2</sup>, Alabama has provided guidance regarding the scope of required testimony for admission of a forensic report. “Under the Confrontation Clause ‘the government is not required to produce every witness who laid hands on the evidence.’ United States v. Eady, 591 Fed. App'x 711, 718 (11th Cir. 2014) (internal quotation marks omitted) (citing Melendez–Diaz v. Massachusetts, 557 U.S. 305, 311 n. 1 (2009) ) (‘[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....’).” Rush v.

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<sup>2</sup> Ex parte Ware, 181 So.3d 409, 416 (Ala.,2014)(holding “In light of the foregoing, a case can be made for both sides of the issue whether the DNA-profile report in this case is “testimonial” under the “holdings” of Melendez–Diaz, Bullcoming, and Williams. The issue is a challenging one. We need not resolve it, however...”



Wright, 2018 WL 4375150, at \*7 (N.D.Ala., 2018). See also Ex parte Ware, 181 So.3d 409, 416 (Ala. 2014)(holding “The United States Supreme Court has not squarely addressed whether the Confrontation Clause requires in-court testimony from all the analysts who have participated in a set of forensic tests, but Bullcoming and Williams suggest that the answer is ‘no.’”).

In the aforementioned Ware case in Alabama, the Court found that a defendant’s right to confront the witnesses against him *was not violated when a reviewing analyst took “responsibility for the work that resulted in the report and that he had reviewed each of the analyses undertaken to determine that they were done according to standard operating procedures and that the conclusions drawn were accurate and appropriate.* [The reviewing analyst’s] testimony at trial provided Ware with an opportunity to cross-examine [the reviewing analyst] about any potential errors or defects in the testing and analysis, including errors committed by other analysts who had worked on the case.” Ware at 417.

In Chambers v. State, 181 So.3d 429, 436-437 (Ala.Crim.App. 2015), the Court held that a defendant’s right to confront the witnesses against him *was not violated when a reviewing analyst testified regarding the reports issued in a case.* In that case, testimony explained that, “DFS took a ‘team approach’ and that a ‘certain individual will screen evidence and then they will cut it, put it into a tube and then the next individual will take that to the DNA testing process and they will run that, and then another individual ... will come behind them and actually take the case packet, which is all the DNA testing process paperwork and write a report from all of that paperwork.” The Court found that the reviewing analyst’s “testimony about the DFS processes, including her technical and administrative review of [the reporting analyst’s] work that included the entire case packet and her independent conclusions based on her review of the entire case packet provided Chambers with ample opportunity to cross-examine [the reviewing analyst] regarding the DNA-analysis report.” Id. at 438.

In Taylor v. State, the Court similarly found no violation of a defendant’s right to confront when “although the technician who submitted the sample to be tested via the machine did not testify at the hearing ... the director of the laboratory, testified about the procedures used at the laboratory and that he supervised and



reviewed all test results.” Taylor v. State, 229 So.2d 269, 276 (Ala.Crim.App 2016). According to the Court, having the supervising laboratory director testify, again, gave the defendant “ample opportunity to cross-examine [the lab director] regarding the ... report.” Id.

In Hosch v. State, the Court likewise found no violation of a defendant’s right to confront when the trial court permitted a supervisor for the forensic biology section to testify regarding the report generated in a case when it was explained by the supervisor “that the division employs a team approach in the analysis of evidence submitted in each case, and that more than one analyst works on every case; that the analysts who work on the case must agree on the results before a report is generated; that she supervises the process in each case and is responsible for all reports provided by the division.” Hosch v. State, 155 So.3d 1048, 1114 (Ala.Crim.App.,2013). The Court explained, “[c]ontrary to Hosch's arguments, the trial court did not abuse its discretion when it admitted [the section chief’s] testimony or the forensic reports. This Court has previously held that admission of the report and testimony in these circumstances does not violate either the Confrontation Clause or any United States Supreme Court precedent.” Id., citing Ex parte Ware at 416.

The Court, in Ex parte Phillips, found no violation of a defendant’s right to confront when the testifying medical examiner referenced and relied on a urine pregnancy test the medical examiner did not personally conduct because “she had personal knowledge of both the manner in which the test was conducted and its results because she was present when the test was performed.” Ex parte Phillips, 2018 WL 5095002, at \*22 (Ala., 2018). In the scope of its analysis, the Court in Phillips cites the concurrence in Bullcoming (where there was surrogate testimony<sup>3</sup> offered) written by Justice Sotomayor who draws a distinction between a surrogate testimony and someone with a connection to the testing at issue. Sotomayor writes, “this 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,” and “[i]t would be a different case if, for example, a supervisor who observed an analyst

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<sup>3</sup> Bullcoming at 2710.



conducting a test testified about the results or a report about such results.” Phillips at \*22, citing Bullcoming, 131 S.Ct. at 2722. Additionally, the Middle District of Alabama has held, in Dorsey v. Myers, that “[t]he *Confrontation Clause does not require an expert to have performed the actual lab work to permissibly testify regarding conclusions he or she has drawn from the results of that lab work. An appropriately credentialed individual may give expert testimony on the significance of lab work performed by another analyst.*” Dorsey v. Myers, 2018 WL 6274033, at \*5 (M.D.Ala., 2018).

The judicial precedent established in Alabama since the trio of Confrontation Clause cases in the US Supreme Court has repeatedly affirmed that “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.” Rush at \*7, citing Melendez–Diaz at 311 n. 1. Neither the Alabama Supreme Court nor the Alabama Court of Criminal Appeals has required that “in-court testimony from all the analysts who have participated in a set of forensic tests” is required. Ware at 416.