DUI NOTES

By Mitch Stone

Bullcoming!

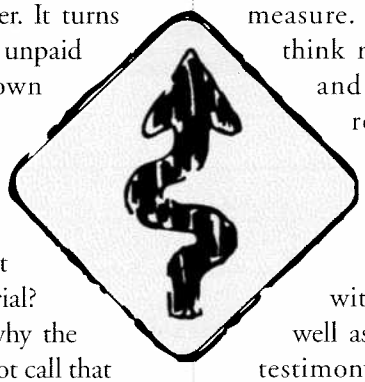
No, this is not a warning to anyone who has mistakenly ventured into a cow pasture and is about to be gored. It is not the punchline to a joke having to do with reproduction and farm animals, and it is not the answer to a question concerning the national sport of Spain.

It does, however, have everything to do with DUI defense, but you already knew that since after all this column is entitled "DUI Notes" in a publication that for the most part concerns criminal defense. So, what is *Bullcoming*? Well, among the other things noted above it is the name of the petitioner in a recent case that the United States Supreme Court decided concerning blood alcohol content (BAC) forensic laboratory reports and the Confrontation Clause.[1]

Bullcoming began as a typical minor accident DUI case. Bullcoming was driving a Ford Taurus when he ran into the back of a red AMC Matador.[2] The driver of the Matador was apparently waving something out the window which enraged Bullcoming right before the accident.[3] Before the police arrived, Bullcoming decided he had better be bullgoing, and so he left the scene. However, he was run down and corralled by officers with a lot more horsepower.

Bullcoming refused the breath test so the police obtained a warrant to draw blood.[4] Bullcoming's blood tested at a .21. Because the blood alcohol content was over .16 Bullcoming was charged with aggravated DWI.[5] In addition to the blood test results, the forensic BAC report also contained information about the arrest and the blood draw procedures as well as the chain of custody.[6]

Inexplicably, at the trial the prosecution decided not to call the analyst who conducted the test and prepared the report. The prosecution made no record suggesting the particular analyst was unavailable for trial either. It turns out, that analyst was on unpaid leave for some unknown reason.[7]



Hmmm? Is it possible that this analyst had some baggage that the prosecution did not want dragged into the trial? One can only wonder why the prosecution decided to not call that analyst but instead called a "surrogate" analyst who was familiar with the blood testing procedures as well as the gas chromatograph used to test the blood but who did not witness the testing of the blood or the creation of the report. The prosecution used this surrogate analyst to introduce the report into evidence as a business record.[8]

Apparently, in so doing the prosecution believed that the Confrontation Clause did not apply to the state of New Mexico. After all, the Constitution of the United States was written well before New Mexico was even a state. Moreover, this was a DUI case, so even if it did apply there would most certainly be an exception for a DUI case. Had not the United States Supreme Court decided *Berkemer v. McCarty*?[9] If *Miranda* did not apply to roadside questioning why should *Crawford*[10] apply in a DUI case?

Well, they were right. At least as far as the state of New Mexico was concerned. In fact, the trial court allowed the report into evidence over objection even though the defense cited the Sixth Amendment and threw in a discovery violation argument for good measure. The trial court did not think much of either argument and ultimately deemed the report "non-testimonial and prepared routinely with guarantees of trustworthiness."[11]

The jury was impressed with this piece of paper as well as the surrogate's bolstering testimony, enough so to convict Bullcoming. However, Bullcoming was not bullgoing anywhere without a bullfight. He appealed, and while his appeal was pending the United States Supreme Court decided *Melendez-Diaz* v. *Massachusetts*,[12] which held that forensic affidavits verifying a substance was cocaine were indeed testimonial and subject to the Confrontation Clause under the Sixth Amendment.[13]

Although seemingly right on point, the New Mexico Supreme Court found a way around the *Melendez-Diaz* decision. They held that the BAC report was testimonial but the analyst who ran the test and prepared the report was actually nothing more than a scrivener

who transcribed the results that the gas chromatograph generated. Therefore the true accuser according to the New Mexico Supreme Court was the machine itself and not the analyst. Moreover, since the surrogate analyst did testify and was available for cross examination about the machine and the laboratory procedures that were set forth on the report, the right to confrontation was not violated. [14] Bullcoming kept going all the way to Washington DC. In granting certiorari the United States Supreme Court addressed the following question:

> *Does the Confrontation Clause 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 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?*[15]

In a 5-to-4 decision, the United States Supreme Court decided in Bullcoming's favor. The majority reasoned that the analyst who conducted the testing of the blood was more than a mere scrivener. The analyst had done more than transpose information onto a report. In fact the Court held that analyst's certification on the report,

> *... reported more than a machine-generated number: It represented that he received Bullcoming's blood sample intact with the seal unbroken; that he checked to make sure that the forensic report number and the sample number corresponded; that he performed a particular test on Bullcoming's sample, adhering to a precise protocol; and that he left the report's remarks section blank, indicating that no circumstance or condition affected the sample's integrity or the analysis' validity.*[16]

In that respect, the report contained information that could only be explored through live testimony from a witness with knowledge. As such without the analyst the defense could not effectively cross examine the report to attack the reliability of the result. Furthermore, the analyst was on unpaid leave with no explanation. Since the surrogate analyst could not answer questions as to why that occurred it left the defense unable to reveal the potential that the analyst had been incompetent or dishonest. In rejecting the argument that Bullcoming did have an opportunity to bring up these matters with the surrogate analyst and therefore received a "fair trial" on a whole the majority held that,

> *More fundamentally, the Confrontation 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. Although the purpose of Sixth Amendment rights is to ensure a fair trial, it does not follow that such rights can be disregarded because, on the whole, the trial is fair.*[17]

Importantly, in this decision the Court acknowledged that quantitative analysis such as a blood alcohol content test requires that the analyst be aware of acceptable analytical practices and understands the procedures to be followed as well as the reasons for the procedures. The majority wrote:

> *...analysts use gas chromatograph machines to determine BAC levels. Operation of the machines requires specialized knowledge and training. Several steps are involved in the gas chromatograph process, and human error can occur at each step.*[18]

Further, a footnote in the opinion noted that laboratories have been known to make mistakes,

> *Nor is the risk of human error so remote as to be negligible ... 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.*[19]

This language is obviously very powerful information that can be referenced in any DUI case. The fact that the United States Supreme Court recognizes the potential for problems with accuracy and reliability in BAC tests can be cited in response to the arguments for blind acceptance of the machines that are used to convict DUI defendants every day.

Interestingly, the four dissenting justices did not agree that the analyst who conducted the test played a significant part in the testing. Rather they felt that the analyst merely transposed numbers from the machine to paper and as such he was more a witness in the chain of custody rather than an accuser that required confrontation. Additionally, the dissent questioned the logic in limiting states from creating their own rules and laws concerning hearsay exceptions and procedures to afford fair trials to the accused. The dissent also referenced the problem of requiring analysts to testify in every case since it is terribly inconvenient and expensive for any given state to adhere to such a requirement. Finally, the dissent refers to *Crawford* and its progeny as a "misstep" that was not "preordained," which suggests they are calling for a reversal of the requirements set forth under the *Crawford* line of cases.[20]

The reality is that five of the nine justices saw fit to ensure the right to confront the accuser is protected even in DUI cases. However, four dissenting justices view this issue differently which means the future of the Sixth Amendment Confrontation Clause cases may see a change.

Until then, this decision has some immediate applications in DUI cases in Florida. It is now unlikely that the State would try to enter a breath, blood or urine test into evidence without calling the breath test operator or FDLE analyst to the stand. However, if they try they will need to prove the witness is unavailable and the defendant had the opportunity to confront the witness prior to trial.

Where an immediate application

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of *Bullcoming* will occur is in the area of maintenance and inspection certifications. Trial courts have allowed the prosecution to enter breath test maintenance and inspection reports as business records for years. However, now it should be argued that the reports are prepared in anticipation of litigation and contain information that only the inspector who ran the tests and prepared the reports can reveal through live testimony.

That means the state should have to call the department inspector as well as the agency inspector rather than be permitted to enter the records into evidence through a records custodian. In this respect, a comparison to the scenario in *Bullcoming* makes sense. The agency inspector cannot testify about the procedures that the department inspector followed if he or she was not there. Only the actual inspector can provide information about how the inspections were performed and what condition the machine was in when inspected.

With *Bullcoming* the criminal defense bar has more ammunition to prohibit trial by documents and affidavits. This is important to fair trials because, let's face it, anyone who has tried a case knows that outcomes can change dramatically when the proof is contingent on live testimony. Ensuring the jury has the opportunity to view how a witness acts on the stand as well as what he or she says during cross examination can make all the difference in the world. Allowing any type of report to substitute for live testimony invites convictions. *Bullcoming* is yet another tool to ensure against that.

[1] *Bullcoming v. New Mexico*, 564 U. S. ____ (2011).

[2] The record did not indicate the make and models of the cars involved so I used some poetic license in determining those facts so don't quote me on that.

[3] I completely made that up so don't quote that one either.

[4] Sound familiar? This scenario is thankfully on hold for now in Florida thanks to the recent decision that determined such blood warrants to be contrary to the search warrant statute since blood is not used to commit the offense of DUI rather it is seized for evidentiary purposes. *State v. Geiss*, __ So.3d__ (Fla 5th DCA 2011).

[5] In New Mexico the BAC over .16 is considered a more serious crime, not just grounds for enhanced penalties within the same crime as Florida statute 316.193 provides.

[6] *Bullcoming*, @___.

[7] *Id.*

[8] *Id.*

[9] *Berkemer v. McCarty*, 468 U.S. 420 (1984). The roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" for the purposes of the Miranda rule. Although an ordinary traffic stop curtails the "freedom of action" of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. A traffic stop is usually brief, and the motorist expects that, while he may be given a citation, in the end he most likely will be allowed to continue on his way.... However, if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he is entitled to the full panoply of protections prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966).

[10] *Crawford v. Washington*, 541 U.S. 36 (2004), is a United States Supreme Court decision that reformulated the standard for determining when the admission of hearsay statements in criminal cases is permitted under the Confrontation Clause of the Sixth Amendment. The Court held that cross-examination is required to admit prior testimonial statements of witnesses that have since become unavailable

[11] *Bullcoming*, @___.

[12] 557 U. S. ____, (2009).

[13] *Bullcoming*, @___.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

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