

No. 10-8505

In The
Supreme Court of the United States

—◆—
SANDY WILLIAMS,

Petitioner,

v.

ILLINOIS,

Respondent.

—◆—
**On Writ Of Certiorari To The
Supreme Court Of Illinois**

—◆—
**BRIEF OF *AMICI CURIAE* CALIFORNIA
PUBLIC DEFENDERS ASSOCIATION,
CALIFORNIA DUI LAWYERS ASSOCIATION
AND THE MEXICAN AMERICAN BAR
ASSOCIATION (OF LOS ANGELES COUNTY)
IN SUPPORT OF PETITIONER**

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DONALD J. BARTELL
Counsel of Record
BARTELL & HENSEL,
Attorneys at Law
5053 La Mart Drive,
Suite 201
Riverside, CA 92507
Tel: (951) 788-2230
Fax: (951) 788-9162
djbartell@pacbell.net

JOHN N. AQUILINA
3895 12th Street
Riverside, CA 92501
Tel: (951) 682-1700
Fax: (951) 682-1315
aquilina@sbcglobal.net

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae the California Public Defenders Association (CPDA), California DUI Lawyers Association (CDLA) and the Mexican American Bar Association (of Los Angeles County) (MABA) respectfully requests permission to file the attached *Amici Curiae* Brief in support of the Petitioner, Sandy Williams. This Court's decision with respect to the question presented in this case will likely have significant impact in criminal litigation in California. Many members of CPDA, CDLA and MABA represent defendants in criminal prosecutions in California. Therefore, CPDA, CDLA and MABA seek to make this Court aware of their concerns with regard to the impact this case may have on criminal defendants' Sixth Amendment rights.

CPDA is the largest association of public defenders and private criminal defense attorneys in the State of California. CPDA has approximately 4000 members. Collectively, its members deal with forensic evidence and prosecution expert witnesses on a regular basis and, as such, have an interest in the outcome of this case.

¹ Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief. The parties consented to the filing of this brief. Under Rule 37.3(a), both parties to this case have provided consent for the filing of *amicus* briefs in support of either party, which is on file with the Clerk's office.

CDLA is a non-profit corporation. CDLA has over 300 members. CDLA holds continuing education seminars around the state on topics related to driving under the influence charges. CDLA also maintains a website that has information pertaining to a variety of areas of interest in the DUI field. Collectively, the members of CDLA deal with forensic experts on an extensive and regular basis in California.

The Mexican American Bar Association (of Los Angeles) is a non-profit corporation. It is committed to the advancement of Latinos in the Legal Profession. The Association has put on numerous legal seminars. The Association has over 800 members. Many of the members represent people in criminal prosecutions in the state of California. In some of these cases expert witnesses may be called on behalf of the prosecution. As such, there is an interest in the outcome of the current case before the Court.



SUMMARY OF ARGUMENT

If an expert witness for the prosecution is allowed to render an opinion based upon the testimonial hearsay of a non-testifying expert, then the burden will fall on the defendant to try and secure the non-testifying expert's attendance in court if the defendant wants to confront the non-testifying expert. In many instances it will not be possible for the defendant to secure such attendance. The reason for this begins with the observation that the Constitution

does not require the prosecution to provide pretrial disclosure of evidence to a defendant that is not exculpatory in nature. Consequently, the first time a defendant may discover the full basis of the testifying expert's opinion is during trial. If that opinion is based upon another expert's opinion who did not testify, time constraints and other procedural hurdles may make it practically impossible for a defendant to subpoena the witness who did not testify.

Allowing prosecution experts to render opinions based upon the testimonial hearsay of non-testifying experts will inevitably lead some prosecutors to select experts based upon their ability to perform well in front of a jury. This also will allow prosecutors to avoid calling an expert witness who did the actual analysis in a case, but has problems with their past work or problems with their qualifications. This was not the intent of the Confrontation Clause.



ARGUMENT

I. Permitting A Prosecution Expert To Base An Opinion On The Testimonial Hearsay Of A Non-Testifying Expert Would Place The Burden On The Defense To Try And Secure The Non-Testifying Expert's Testimony Which In Many Cases Would Be Impossible.

Allowing an expert witness to render an opinion in court based upon facts developed to prosecute a

defendant by a non-testifying witness violates the Confrontation Clause. In many instances, the process would make it virtually impossible for the defense to secure the presence of the non-testifying witness who the in-court expert relied upon in rendering an opinion. Securing attendance of prosecution witnesses at trial should not be the obligation of a defendant. As this Court has previously stated “[m]ore fundamentally the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.” *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2540 (2009).

Yet this burden shifting is what is likely to happen if prosecution experts are allowed to give opinions in court based upon testimonial hearsay. Prosecutors would then be free to have their experts give opinions which are based upon the testimonial hearsay of another witness who, as a practical matter, may be beyond the defendant’s reach.

A. The First Time A Defendant May Discover What The Prosecution’s Expert Is Relying Upon To Render An Opinion Is During Trial.

How this will transpire in real life trial practice begins with the observation that there is no federal constitutional requirement for the prosecution to provide the defense with evidence that helps establish the defendant’s guilt. The Due Process Clause

only requires the prosecution to disclose material evidence favorable to the defense on the issue of guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Constitution does not require the prosecution to provide discovery of unfavorable evidence. Thus, unfavorable testimonial hearsay that a prosecution expert intends to rely upon in rendering an opinion need not be disclosed to the defense. As this Court noted, “[i]t does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

As a result, the first time a defendant in any given case may fully discover what the prosecution expert is basing his or her opinion on is during the expert’s testimony at trial. If the basis of the expert’s opinion involves the testimonial hearsay of a non-testifying expert the defense has very limited options to challenge that hearsay. This is particularly true if the disclosure of the testimonial hearsay is made during the time management storm of a jury trial.

Having unexpected witnesses turn up in a trial is not an unheard of event. This Court’s recent decision in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011) is demonstrative. In that case counsel for the accused learned only moments before the witness took the stand that another expert (other than the one who did the forensic analysis) was going to testify. *Id.*

at p. 2712. This is by no means an atypical event. It is particularly common in the prosecution of misdemeanor offenses where a prosecutor will indicate that one of a number of analysts from the crime laboratory may testify and the one who will actually testify will be based upon availability. As mentioned, the Constitution does not require disclosure of unfavorable witnesses. To the extent state statutes may mandate pre-trial disclosure these statutes, of course, may be changed. In California the prosecution must provide to the defense any expert reports, examinations, tests, experiments or comparisons the prosecution intends to offer into evidence at trial. Cal. Pen. Code § 1054.1(f).

B. There Are Many Problems The Defense Would Have In Trying To Secure The Attendance Of Prosecution Witnesses That A Prosecution's Expert Relied Upon In Rendering An Opinion.

Consider what will happen in a state court prosecution if the testimonial hearsay that a prosecution expert relies upon derives from a federal actor who created the testimonial hearsay during the course of his or her federal duties. For example, suppose that the prosecution's expert is relying upon a report prepared by an analyst from the FBI crime laboratory. If the prosecution does not call the FBI analyst, and the defendant wanted to confront the analyst, a state court would have no authority to compel the federal analyst's attendance. *See U.S. ex*

rel. Touhy v. Ragen, 340 U.S. 462 (1951). A state court simply lacks jurisdiction to use its contempt powers in this setting. *Swett v. Schenk*, 792 F.2d 1447, 1451 (9th Cir. 1986).

To be sure there is an arguable process in which a defendant can attempt to secure the attendance of this FBI analyst. This process stems from 5 U.S.C. § 301, the so-called “housekeeping statute.” This statute allows the head of an executive department to promulgate regulations for the conduct of its employees and use of its records, including responding to subpoenas. A state court defendant seeking the testimony of the FBI analyst could make a request under the housekeeping statute for the analyst’s appearance through these regulations.

If the head of the department denies the defendant’s request to have the analyst testify the defendant has the option to file a civil lawsuit under the Administrative Procedure Act (APA) to challenge the denial of the request, or seek a federal mandamus action. *See In re Boeh*, 25 F.3d 761, 764 n. 3 (9th Cir. 1994). Attempting to undertake either of these remedies during trial, or even near trial, is so daunting an undertaking as to render them essentially useless. This cannot have been the vision of the Confrontation Clause.

In a state criminal case the process for subpoenaing a witness, who is not a federal agent, but is located out-of-state is not a simple undertaking either. Suppose for example, a defendant in a California state court wanted to subpoena the analyst who

the state's expert was relying upon in a criminal prosecution. Suppose further that the analyst resides in Virginia. In California the procedure for trying to obtain an out-of-state witness is set forth in Cal. Pen. Code §§ 1334 *et seq.*, The Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases. The State of Virginia has similar provisions. The procedure requires the defense to first present an application to the trial court for an order and certificate for the attendance of the witness. Assuming the trial court endorses the order and authorizes the issuance of the certificate, counsel must then present the order and certificate to the foreign court where the witness dwells. This may require the assistance of out-of-state counsel since defense counsel may not be a member of the Virginia bar where the witness resides.

If at the hearing in Virginia the court determines that an appearance in the requesting state will not cause undue hardship to the witness, and that the witness is determined to be material and necessary, then the court can order the witness to attend the out-of-state trial. *See* Va. Code Ann. § 19.2-274. If, on the other hand, the Virginia court determines the travel would cause the witness undue hardship, under the Uniform Act the defendant would not be entitled to confront the witness. Again, all of the burdens and risks in attempting to secure a prosecution witness land on the defendant's path, not on that of the prosecution.

In presenting the above hypotheticals *amici* have assumed that the accused and his counsel are financially able to undertake these efforts. While such undertakings may be feasible for an affluent defendant from West Los Angeles, it may not be so readily available for a lower socioeconomic defendant from across town in East L.A. Is a court going to authorize funds for a defendant to hire a civil attorney to pursue a civil suit under the APA? What of the defendant, who is not indigent, yet was barely able to afford to retain private counsel? Will this person be able to secure court ordered funding to hire an out-of-state lawyer? Might a court rule that since the defendant cannot show that the sought after witness has exculpatory evidence, funds will not be granted as there is no obvious material need for the witness? Will the defendant's right to confront his or her accusers depend on the defendant's ability to prove to a court before cross-examination of the witness what the cross-examination will reveal? None of these questions should ever need to be asked (let alone answered) if the basic proposition is adhered to that the prosecution should be required to produce prosecution witnesses.

If that basic rule is not followed then only if all of the above referenced legal obstacles can be surmounted, and then only if all of this can be done in a timely fashion, and then only if the out-of-state witness complies with the court order, will a defendant's right of confrontation be realized. Placing all of these procedural millstones on a defendant just so the

defendant can exercise a constitutional right does not seem to be in harmony with the concept of fundamental rights.

The right of confrontation is a fundamental right. Long ago Sir Matthew Hale confirmed this tenet when he commented that confrontation emanates from the “[P]ersonal Appearance and Testimony of Witnesses.” Matthew Hale, *The History of the Common Law of England* 258 (1713). It does not emanate from the appearance of someone other than the true witness.

The *amici* suggest that in a criminal prosecution an expert witness should be allowed to base opinions on inadmissible material that experts normally rely upon except if the evidence is testimonial in nature and has not been produced in court. Similar limitations in other contexts have already been placed on experts to protect other rights.

For example, 23 U.S.C. § 409 prohibits in general terms the admission into evidence of certain reports and data that were collected to help assess the safety of roadways and railway-highway crossings. One of the purposes of the statute is to allow for candor in addressing dangerous highway conditions without having the fear that any information obtained during this process will be used in later litigation. *Robertson v. Union Pac. R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992). In order to protect the purpose of the statute the court in *Robertson* affirmed the district court’s order that precluded the appellant’s expert from

basing his opinion on information compiled from material referenced in 23 U.S.C. § 409. *Id.*, at p. 1435.

For a similar ruling prohibiting an expert from forming an opinion based upon statutorily privileged information see the California Supreme Court's decision in *Fox v. Kramer*, 22 Cal.4th 531 (2000). If the law can prohibit experts from basing opinions that would violate statutorily protected rights, it seems the law should not permit experts to render opinions that would do harm to constitutionally protected rights.

II. ALLOWING PROSECUTION EXPERTS TO TESTIFY BASED ON THE TESTIMONIAL HEARSAY OF ANOTHER EXPERT WILL RESULT IN THE USE OF SURROGATE WITNESSES.

Allowing experts to render opinions based upon the testimonial hearsay of another expert will be an invitation for prosecutors to forego calling the expert who performed a given analysis. Prosecutors will consider calling experts whose main criteria is that they present well. Central casting will start to infiltrate courtrooms in America.

In some regard, this casting call has already been sent out and answered. In the course of trial, rather than presenting the testimony of an expert who conducted an analysis of the evidence in question, prosecutors are already retaining selected expert witnesses to testify on behalf of the experts who did the analysis. In doing so not only does the testifying

expert relate his or her opinion, but in many instances during the course of direct or cross-examination the expert inevitably ends up, at least inferentially, relating to the jury the findings and conclusions of the absentee expert.

This practice of presenting otherwise inadmissible testimonial hearsay evidence under the guise of the opinion of an expert witness should not be condoned. To do so would simply allow the prosecutor to present a selected and favorable expert to testify and relate an opinion based upon work done entirely by another. If such prosecutorial practices are permitted, it will open the door to prosecutors hiring expert witnesses to testify at trial regardless of any flaw in the credentials or work done by the absentee expert. A more calculating prosecutor would be permitted to hire an expert witness only to testify in front of the jury, so long as he or she presents well and has no known “baggage.”

Such is what occurred in *People v. Dungo*, 98 Cal.Rptr.3d 702 (Cal. Ct. App.).² In *Dungo*, the prosecution presented Dr. Robert Lawrence as a witness in place of Dr. George Bolduc, who actually conducted the autopsy of the murder victim. Although Dr. Lawrence was not present at the autopsy, he was permitted to

² Review of this opinion has been granted by the California Supreme Court (S176886), wherein supplemental briefing has been requested by the court in light of this Court’s decision in *Bullcoming v. New Mexico* (July 13, 2011).

testify as to the cause of death, and this shielded Dr. Bolduc's poor professional history from the trier of fact. In this regard, during a pre-trial hearing, evidence was presented outside the presence of the jury that Dr. Bolduc had been fired from Kern County, he had been allowed to resign "under a cloud" from Orange County, and that Stanislaus and San Joaquin County prosecutors refused to have him testify in homicide cases. As explained by Dr. Lawrence in the course of that hearing, "if Dr. Bolduc testifies 'it becomes too awkward [for the district attorney] to make them easily try their cases. And for that reason, they want to use me instead of him.'" *People v. Dungo, supra*, 98 Cal.Rptr.3d at p. 704.

In *Dungo*, the prosecutor utilized the surrogate expert witness to introduce the testimonial hearsay of the absentee expert who actually conducted the autopsy. As a result, Dr. Bolduc and his "baggage" were not presented to the jury. By presenting Dr. Bolduc's testimonial hearsay opinion through the testimony of the surrogate expert, the prosecutor effectively deprived the defense of an opportunity to confront and cross-examine Dr. Bolduc, the absentee expert, regarding his qualifications, competency, findings, and opinions.

Similarly, in *Bullcoming v. New Mexico, supra*, 131 S.Ct. at p. 2715 this Court noted that "Razatos [the surrogate expert] had no knowledge of the reason why Caylor [the testimonial hearsay declarant] had been placed on unpaid leave." Additionally, the Court highlighted that "Razatos acknowledged that 'you

don't know unless you actually observe the analysis that someone else conducts, whether they followed [the] protocol in every instance.'" *Id.*, at p. 2715, n. 8.

As demonstrated in *Dungo* and *Bullcoming*, and as every trial lawyer knows, a trial is not a static event. Trials do not take place in a coroner's office. Trials do not take place in the crime lab. Trials take place in a court room. A trial is a living, breathing event. It is subject to boredom, drama, and unexpected turn of events. Witnesses change stories, unforeseen rulings occur, and newly discovered evidence appears. All of which make trials dynamic occurrences.

In trial, it is cross-examination that causes the most dynamic friction. Witnesses exaggerate and emote. They concede and confess. And, they fidget, fib, and forget. If the law insulates a witness who has prepared testimonial evidence from confrontation, then none of these things, not one of them, will ever be seen by the jury.

Throughout the country, trial courts recognize the importance of the jury actually observing, witnessing, and assessing those proffering testimonial evidence. For example, in assessing the credibility of witnesses, jurors are advised to consider the witness' opportunity and ability to perceive, the witness' memory, the manner in which he or she testifies, his or her interest, bias or prejudice, and other relevant factors. Of course, this cannot occur when a hired expert acts as a surrogate in relating the testimonial hearsay of an absentee witness. *See* Ninth Circuit

Model Criminal Jury Instructions, No. 3.9; California Jury Instructions, CALCRIM 226.

Permitting the utilization of an absentee expert to relate the testimonial hearsay of another conceals all of the factors which the trier of fact needs to assess the accuracy, truthfulness, biases, and reliability of the hearsay declarant. Such is the specific information which could only be disclosed by cross-examination of the hearsay declarant. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2537 (2009).

Further, even those attorneys well-adept at cross-examination will be unable to uncover from the testifying surrogate expert witness, deficiencies in the qualifications, findings, and opinions of the concealed absentee expert. As noted in *Crawford v. Washington*, 541 U.S. 36, 49 (2004), “[N]othing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . . ,” quoting R. Lee, *Letter IV by the Federal Farmer* (Oct. 15, 1787), reprinted in 1 B. Schwartz, *The Bill of Rights: A Documentary History* 235, 469, 473 (1971).

Supplementing these principles, in *Bullcoming v. New Mexico*, this Court further stated that 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.” *Id.*, at p. 2716.

Allowing the prosecution to present a hired surrogate expert witness to present the testimonial

hearsay of an absentee witness precludes the trier of fact from truly assessing the credibility, reliability or outright fraud committed by the absentee witness. Presentation at trial of the testimonial hearsay through the surrogate is even more aggravated when the surrogate has no personal knowledge of the absentee expert or any fraud committed by the later expert. Mere cross-examination of the expert who is presented cannot serve as a proper, let alone competent, substitute for ascertaining the truth.

As noted by this Court in *Melendez-Diaz v. Massachusetts*, *supra*, 129 S.Ct. at pp. 2536-2537, despite the expectation that science is pure and expert witnesses are devoid of fraudulent intentions, such is not reality. Referencing a study conducted under the auspices of the National Academy of Sciences, this Court found that “[F]orensic evidence is not uniquely immune from the risk of manipulation,” nor is “neutral scientific testing” necessarily neutral or reliable. National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward*, Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, National Research Council of the National Academies, 6-1 (Prepublication Copy Feb. 2009).³

³ See also, “Lab Chief’s Fraud Casts Doubt on Blood Test Results in DUI Cases,” San Francisco Chronicle, Jason VanDerbeken (May 25, 2010) [coroner’s supervising toxicologist fraudulently vouched for hundreds of blood-test results in drunk
(Continued on following page)

It is “[C]onfrontation [which] is designed to weed out not only the fraudulent analyst, but the incompetent one as well.” 129 S.Ct. at p. 2537. A procedure which allows a Government surrogate expert to relate or rely upon the testimonial hearsay of an absentee expert not only deprives the accused of his rights of confrontation, but renders the trial a theatrical performance by an expert witness hired from central casting, rather than a search for the truth clothed with the protections of due process of law.

In *Melendez-Diaz v. Massachusetts*, this Court held that the introduction of a laboratory certificate in lieu of the actual testimony of the analysts conducting the test deprives the accused of the fundamental constitutional right of confrontation as guaranteed by the Sixth Amendment. *Id.*, 129 S.Ct. at p. 2542. For the Government to present a surrogate expert witness at trial to relate or rely upon the testimonial hearsay of an absentee expert is a distinction without a difference. The result is the same –

driving cases in California and Washington, resulting in the dismissal of hundreds of cases]; “State v. Taylor and the North Carolina Bureau of Investigation Lab Scandal,” Mike Klinkosum, *The Champion* (May 2011) [falsified blood tests and results]; “A Deadly Twist at Houston’s Crime Lab,” Randall Patterson, *Houston Press News* (November 26, 2008) [unqualified police crime laboratory analysts falsifying DNA results]; “Scrutiny of lab worker prompts review of some 3,000 Cases” John Asbury, *Riverside Press-Enterprise* (February 25, 2009) [analyst for Bio-Tox Laboratories admitted to previous fraud, forgery and perjury].

a deprivation of the accused's Sixth Amendment rights of confrontation.

As Professor Wigmore declared – cross-examination is still the “the greatest legal engine ever invented for the discovery of truth.” *See Perry v. Leeke*, 488 U.S. 272, 283, n. 7 (1989), citing 5 J. Wigmore, *Evidence* (J. Chadbourn rev. 1974) § 1367, p. 29. The fuel that makes that engine go, however, is the right to confront those who prepared the facts.

◆

CONCLUSION

Based upon the foregoing arguments the judgment of the Illinois Supreme Court should be reversed.

DONALD J. BARTELL

Counsel of Record

BARTELL & HENSEL, Attorneys at Law

5053 La Mart Drive, Suite 201

Riverside, CA 92507

djbartell@pacbell.net

JOHN N. AQUILINA

3895 12th Street

Riverside, CA 92501

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