SUPREME COURT OF THE UNITED STATES

No. 09–10876

DONALD BULLCOMING, PETITIONER *v.* NEW MEXICO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

[June 23, 2011]

JUSTICE SOTOMAYOR, concurring in part.

I agree with the Court that the trial court erred by admitting the blood alcohol concentration (BAC) report. I write separately first to highlight why I view the report at issue to be testimonial—specifically because its "primary purpose" is evidentiary—and second to emphasize the limited reach of the Court's opinion.

I

A

Under our precedents, the New Mexico Supreme Court was correct to hold that the certified BAC report in this case is testimonial. 2010–NMSC–007, ¶18, 226 P. 3d 1, 8.

To determine if a statement is testimonial, we must decide whether it has "a primary purpose of creating an out-of-court substitute for trial testimony." *Michigan* v. *Bryant*, 562 U. S. ___, ___ (2011) (slip op., at 11). When the "primary purpose" of a statement is "not to create a record for trial," *ibid.*, "the admissibility of [the] statement is the concern of state and federal rules of evidence, not the Confrontation Clause," *id.*, at ___ (slip op., at 12).

This is not the first time the Court has faced the question of whether a scientific report is testimonial. As the Court explains, *ante*, at 14–15, in *Melendez-Diaz* v. *Massachusetts,* 557 U. S. ___ (2009), we held that "certificates

of analysis," completed by employees of the State Laboratory Institute of the Massachusetts Department of Public Health, *id.*, at ___ (slip op., at 2), were testimonial because they were "incontrovertibly . . . '"solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact,"'" *id.*, at ___ (slip op., at 4) (quoting *Crawford* v. *Washington*, 541 U. S. 36, 51 (2004), in turn quoting 2 N. Webster, An American Dictionary of the English Language (1828)).

As we explained earlier this Term in *Michigan* v. *Bryant*, 562 U. S. ___ (2010), "[i]n making the primary purpose determination, standard rules of hearsay . . . will be relevant." *Id.*, at ___ (slip op., at 11–12).[1] As applied to a scientific report, *Melendez-Diaz* explained that pursuant to Federal Rule of Evidence 803, "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status," except "if the regularly conducted business activity is the production of evidence for use at trial." 557 U. S., at ___ (slip op., at 15–16) (citing Fed. Rule Evid. 803(6)). In that circumstance, the hearsay rules bar admission of even business records. Relatedly, in the Confrontation Clause context, business and public records "are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Melendez-Diaz*, 557 U. S., at ___ (slip op., at 18). We concluded, therefore, that because the purpose of the certificates of analysis was use at trial, they were not

---

[1] Contrary to the dissent's characterization, *Bryant* deemed reliability, as reflected in the hearsay rules, to be "relevant," 562 U. S., at ___ (slip op., at 11–12), not "essential," *post*, at 5 (opinion of KENNEDY, J.). The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation.

properly admissible as business or public records under the hearsay rules, *id.*, at ___ (slip op., at 15–16), nor were they admissible under the Confrontation Clause, *id.*, at ___ (slip op., at 18). The hearsay rule's recognition of the certificates' evidentiary purpose thus confirmed our decision that the certificates were testimonial under the primary purpose analysis required by the Confrontation Clause. See *id.*, at ___ (slip op., at 5) (explaining that under Massachusetts law not just the purpose but the "*sole purpose* of the affidavits was to provide" evidence).

Similarly, in this case, for the reasons the Court sets forth the BAC report and Caylor's certification on it clearly have a "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 562 U. S., at ___ (slip op., at 11). The Court also explains why the BAC report is not materially distinguishable from the certificates we held testimonial in *Melendez-Diaz*. See 557 U. S., at ___ (slip op., at 2, 4–5).[2]

The formality inherent in the certification further suggests its evidentiary purpose. Although "[f]ormality is not the sole touchstone of our primary purpose inquiry," a statement's formality or informality can shed light on whether a particular statement has a primary purpose of use at trial. *Bryant*, 562 U. S., at ___ (slip op., at 19).[3]

---

[2]This is not to say, however, that every person noted on the BAC report must testify. As we explained in *Melendez-Diaz*, 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 . . . . It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence . . . ." 557 U. S., at ___, n. 1 (slip op., at 5, n. 1).

[3]By looking to the formality of a statement, we do not "trea[t] the reliability of evidence as a reason to exclude it." *Post*, at 5 (KENNEDY, J., dissenting). Although in some instances formality could signal reliability, the dissent's argument fails to appreciate that, under our Confrontation Clause precedents, formality is primarily an indicator of testi-

I agree with the Court's assessment that the certificate at issue here is a formal statement, despite the absence of notarization. *Ante*, at 14–15; *Crawford*, 541 U. S., at 52 ("[T]he absence of [an] oath [is] not dispositive"). The formality derives from the fact that the analyst is asked to sign his name and "certify" to both the result and the statements on the form. A "certification" requires one "[t]o attest" that the accompanying statements are true. Black's Law Dictionary 258 (9th ed. 2009) (definition of "certify"); see also *id.*, at 147 (defining "attest" as "[t]o bear witness; testify," or "[t]o affirm to be true or genuine; to authenticate by signing as a witness").

In sum, I am compelled to conclude that the report has a "primary purpose of creating an out-of-court substitute for trial testimony," *Bryant*, 562 U. S., at ___ (slip op., at 11), which renders it testimonial.

B

After holding that the report was testimonial, the New Mexico Supreme Court nevertheless held that its admission was permissible under the Confrontation Clause for two reasons: because Caylor was a "mere scrivener," and because Razatos could be cross-examined on the workings of the gas chromatograph and laboratory procedures. 226 P. 3d, at 8–10. The Court convincingly explains why those

---

monial purpose. Formality is not the sole indicator of the testimonial nature of a statement because it is too easily evaded. See *Davis* v. *Washington*, 547 U. S. 813, 838 (2006) (THOMAS, J., concurring in judgment in part and dissenting in part). Nonetheless formality has long been a hallmark of testimonial statements because formality suggests that the statement is intended for use at trial. As we explained in *Bryant*, informality, on the other hand, "does not necessarily indicate . . . lack of testimonial intent." 562 U. S., at ___ (slip op., at 19). The dissent itself recognizes the relevance of formality to the testimonial inquiry when it notes the formality of the problematic unconfronted statements in Sir Walter Raleigh's trial. *Post*, at 7–8 (opinion of KENNEDY, J.).

rationales are incorrect. *Ante*, at 9–13. Therefore, the New Mexico court contravened our precedents in holding that the report was admissible via Razatos' testimony.

II

Although this case is materially indistinguishable from the facts we considered in *Melendez-Diaz*, I highlight some of the factual circumstances that this case does *not* present.

First, this is not a case in which the State suggested an alternate purpose, much less an alternate *primary* purpose, for the BAC report. For example, the State has not claimed that the report was necessary to provide Bullcoming with medical treatment. See *Bryant*, 562 U. S., at ___ , n. 9 (slip op., at 15, n. 9) (listing "Statements for Purposes of Medical Diagnosis or Treatment" under Federal Rule of Evidence 803(4) as an example of statements that are "by their nature, made for a purpose other than use in a prosecution"); *Melendez-Diaz*, 557 U. S., at ___, n. 2 (slip op., at 6, n. 2) ("[M]edical reports created for treatment purposes . . . would not be testimonial under our decision today"); *Giles* v. *California*, 554 U. S. 353, 376 (2008) ("[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules").

Second, 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. Razatos conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing. App. 58. The court below also recognized Razatos' total lack of connection to the test at issue. 226 P. 3d, at 6. 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 need not ad-

dress what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.

Third, this 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. See Fed. Rule Evid. 703 (explaining that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted). As the Court notes, *ante*, at 12, the State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration. Rather, the State explains, "[a]side from reading a report that was introduced as an exhibit, Mr. Razatos offered no opinion about Petitioner's blood alcohol content . . . ." Brief for Respondent 58, n. 15 (citation omitted). Here the State offered the BAC report, including Caylor's testimonial statements, into evidence. We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.

Finally, this is not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph. The State here introduced Caylor's statements, which included his transcription of a blood alcohol concentration, apparently copied from a gas chromatograph printout, along with other statements about the procedures used in handling the blood sample. See *ante*, at 10; App. 62 ("I certify that I followed the procedures set out on the reverse of this report, and the statements in this block are correct"). Thus, we do not decide whether, as the New Mexico Supreme Court suggests, 226 P. 3d, at 10, a State could introduce (assuming an adequate chain of custody foundation) raw data generated by

a machine in conjunction with the testimony of an expert witness. See Reply Brief for Petitioner 16, n. 5.

This case does not present, and thus the Court's opinion does not address, any of these factual scenarios.

* * *

As in *Melendez-Diaz*, the primary purpose of the BAC report is clearly to serve as evidence. It is therefore testimonial, and the trial court erred in allowing the State to introduce it into evidence via Razatos' testimony. I respectfully concur.