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1 P R O C E E D I N G S

2 (10:15 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 09-10876,
5 Bullcoming v. New Mexico.

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER
8 ON BEHALF OF THE PETITIONER

9 MR. FISHER: Mr. Chief Justice, and may it
10 please the Court:

11 The text, purpose, and history of the
12 Confrontation Clause make it clear that the prosecution
13 cannot introduce one person's testimonial statements
14 through the in-court testimony of someone else. Thus,
15 having held in Melendez-Diaz that a lab analyst's
16 statements in a forensic lab report are testimonial,
17 this is an easy case.

18 The State violated the Confrontation Clause
19 by introducing lab analyst Curtis Caylor's statements in
20 a forensic lab report without putting him on the stand.
21 The New Mexico Supreme Court resisted this analysis,
22 straightforward as it is, on the ground that
23 Mr. Bullcoming, as the defendant, had the opportunity to
24 cross-examine a substitute or a surrogate witness,
25 Mr. Razatos.

1 But a surrogate witness procedure violates
2 all four components of the right to confrontation. It
3 quite obviously violates the defendant's right to have
4 the witness testify in his presence, in the presence of
5 the jury so the jury can observe it, and under oath, as
6 happened in this case.

7 JUSTICE GINSBURG: Mr. Fisher, when you say
8 "in the presence," do you -- do you mean it necessarily
9 must be in the courtroom, or would a video-conferencing
10 set-up be permissible so that the technician or the
11 analyst could testify from the lab, rather -- but it
12 would be screened in -- in the courthouse?

13 MR. FISHER: Well, the default rule under
14 the Confrontation Clause is in presence, in the
15 courtroom. Now, in Maryland v. Craig, this Court held
16 in a child witness setting -- of course, very different
17 than this case -- that closed-circuit TV would be
18 permissible, and I believe, you know, in a future case,
19 if the State perhaps made some sort of showing that the
20 lab analyst couldn't come to court for some reason, and
21 certainly if the defendant stipulated, and maybe even if
22 the defendant didn't stipulate, a court could
23 accommodate --

24 JUSTICE GINSBURG: The defendant didn't give
25 his consent, so we don't -- that's not a concern, but

1 let's -- let's suppose defendant doesn't stipulate. Is
2 this adequate to meet the Confrontation Clause?

3 MR. FISHER: I don't think it would be
4 adequate, Justice Ginsburg, with at least some -- absent
5 at least some showing of unavailability of the witness
6 or -- making the witness unable to come to court.

7 Now -- now, there is an amicus brief in the
8 case, I believe, that suggests some flexibility that
9 trial judges might employ in -- in accommodating lab
10 analysts' schedules.

11 JUSTICE SCALIA: What about police
12 witnesses? What about not requiring the officer who --
13 who took the confession or who witnessed the alleged
14 crime -- not requiring him to appear because he's busy?

15 MR. FISHER: Well, that's never been --

16 JUSTICE SCALIA: Can't make it. He's out on
17 the beat. So can we have him appear by television?

18 MR. FISHER: That's never been the rule,
19 Justice Scalia, and I don't think there would be a need
20 to --

21 JUSTICE SCALIA: Why -- why is a lab
22 technician different?

23 MR. FISHER: I don't think -- I don't think
24 one is, and you don't have to reach that in this case,
25 because the State never attempted to make any showing

1 that Mr. Caylor was unavailable for any reason. This --

2 CHIEF JUSTICE ROBERTS: Mr. Fisher, what if
3 you had two people doing this procedure? They're
4 sitting in, you know, chairs right next to the other.
5 The one, you know, takes the blood samples from the
6 vials, puts them in another vial, and puts the aluminum
7 stuff on and crimps it. The other one then takes the
8 vials and puts them in the machine and runs it. Do you
9 have to have both of them testify?

10 MR. FISHER: Only if the State wants to
11 present statements from them both.

12 CHIEF JUSTICE ROBERTS: No, they want to --

13 MR. FISHER: They both --

14 CHIEF JUSTICE ROBERTS: They want to present
15 the results of the blood analysis --

16 MR. FISHER: I think --

17 CHIEF JUSTICE ROBERTS: -- the numbers the
18 machine spits out.

19 MR. FISHER: I think in that scenario, if
20 both people were there for the whole thing, the State
21 could have either one of them testify. What the State
22 couldn't do --

23 CHIEF JUSTICE ROBERTS: Even though one --

24 MR. FISHER: -- and this is the rule --

25 CHIEF JUSTICE ROBERTS: Even though one

1 didn't do it? Even though the question is going to be,
2 did you put the aluminum on and crimp it, and the answer
3 is going to be, no, Joe did it; he sits right next to
4 me?

5 MR. FISHER: That's right. The
6 Confrontation Clause is a purely procedural right, Mr.
7 Chief Justice.

8 CHIEF JUSTICE ROBERTS: I'm sorry. That's
9 right. Does -- do they both have to testify, then, or
10 not?

11 MR. FISHER: They do not have to. The
12 Confrontation Clause is a purely procedural right. It
13 all depends on what -- whose statements the State wants
14 to introduce. So, if the State is satisfied to prove
15 its case by having somebody testify, saying, I watched
16 the thing go into the machine and I watched this result
17 come out and I saw that it wasn't tampered with and it
18 was Mr. Bullcoming's sample, then that would be fine.
19 And in fact, what some labs do --

20 JUSTICE KENNEDY: I -- I don't understand
21 that. How is that any different than the supervisor of
22 the lab saying, I know what these people do, I -- I
23 watch them on a day-to-day basis, and they perform their
24 work correctly?

25 MR. FISHER: Again, the question, Justice

1 Kennedy, is not who the State has to bring in. The
2 question is whose statements the State wants to
3 introduce. Here, the State wanted to introduce
4 Mr. Caylor's statements, and so it therefore needs to --

5 JUSTICE KENNEDY: What the State wanted to
6 introduce is the result of the exam, and the Chief
7 Justice gives you the hypothetical. Say, two people are
8 necessary for the exam. You say only one has to be
9 there if both saw it?

10 MR. FISHER: If only -- if the State is only
11 introducing one person --

12 JUSTICE KENNEDY: But it -- but it's hearsay
13 as to what the first person did with -- with crimping --

14 MR. FISHER: I don't --

15 JUSTICE KENNEDY: -- crimping the thing.
16 It's not direct testimony from that person. You didn't
17 say, are you experienced in crimping? Did you use your
18 right hand or your left hand? Is there a danger of
19 spillage? And so on. All that is beyond the ability of
20 the defense to ask.

21 MR. FISHER: No, I -- Justice Kennedy, I
22 don't think it's hearsay. It's simply being an
23 eyewitness and saying: Here's what I watched. I
24 watched this person put it into the machine, and this is
25 the result that I saw come out.

1 Now, again, the only question is whose
2 statements the State wants to introduce. By all means,
3 Mr. Chief Justice and Justice Kennedy, if the State
4 wanted to introduce statements from both of the lab
5 analysts who worked together on the case, they would
6 need to bring them both in, but if they only want to
7 introduce one lab --

8 JUSTICE SCALIA: The State takes its
9 chances, right? I mean, as to how much it has to bring
10 in, in order to persuade the jury?

11 MR. FISHER: That's right. That's the
12 decision the State makes in every case, whether it be
13 multiple police investigators, multiple eyewitnesses,
14 or --

15 JUSTICE KENNEDY: You always take your
16 chances with a business record. That's a given, of
17 course. Of course, the State takes a chance with the --
18 with the admission of any admissible hearsay testimony
19 that the jury will be -- that you'll make the argument
20 to the jury that you should discount it if the person
21 isn't there. That's always true.

22 MR. FISHER: I'm not sure I -- I disagree
23 with anything you said, but the rule of the
24 Confrontation Clause applies to a particular kind of
25 statements, testimonial statements. And our rule today

1 and the one that resolves this case is, if the State
2 wants to introduce a witness's testimonial statements,
3 it needs to bring that witness to court.

4 Now, footnote 1 in Melendez-Diaz --

5 JUSTICE KENNEDY: Now, I take it it's a
6 testimonial statement that this blood that was taken at
7 the hospital was the blood of the defendant. That's a
8 testimonial statement?

9 MR. FISHER: Yes, I believe it would be,
10 Justice Kennedy.

11 JUSTICE KENNEDY: And so I assume that in
12 this case, the nurse and the police officer were both
13 present.

14 MR. FISHER: Yes, and, in fact --

15 JUSTICE KENNEDY: But I assume under your
16 position, you could not have a record showing that
17 the -- the nurse withdrew the sample at 10:08 p.m. on
18 such-and-such a date and that she followed the regular
19 procedure. That would be insufficient if the State
20 wanted to introduce just a certificate or just -- just
21 that record?

22 MR. FISHER: I think that's what footnote 1
23 in Melendez-Diaz says. If the defendant wants to
24 challenge the chain of custody, then the State needs to
25 bring in the witnesses. Now, I think it's an

1 interesting fact in this case, and it shows why that
2 rule isn't so --

3 JUSTICE ALITO: Well, that's not -- I don't
4 think that's what Melendez-Diaz' footnote 1 says. It
5 says that the State may be able to prove chain of
6 custody by testimony other than the actual individuals
7 who handled the sample, and then it has to take its
8 chances as to whether the trier of fact is going to
9 believe -- is going to believe that. Isn't that right?

10 MR. FISHER: I think that's right. I think
11 what footnote 1 says is the defendant -- when the State
12 chooses whose testimony it wants to introduce, the
13 defendant has the right to insist that that be done
14 live.

15 JUSTICE KENNEDY: It does -- it does not --

16 JUSTICE SCALIA: Does not Melendez-Diaz also
17 say that if the defendant wants to challenge the -- the
18 chain of custody, the State can adopt rules that
19 requires the defendant to assert that challenge or his
20 intention to make that challenge, or his intention to
21 make that challenge, prior to the trial so that the
22 State will know whether it has to introduce any live
23 testimony?

24 MR. FISHER: Of course, that's correct under
25 the notice and demand regimes that Melendez-Diaz

1 approved of. And the Public -- the PDS brief in this
2 case showed that many States do use those regimes. Now,
3 Justice Kennedy, I did want to --

4 JUSTICE KENNEDY: But the chain -- the chain
5 of custody does involve a testimonial statement that
6 this is the blood, that I took it out at 10:05 p.m. on
7 Saturday evening. That's a testimonial statement. It's
8 the defendant's blood.

9 MR. FISHER: Yes, it can, Justice Kennedy,
10 but chain of custody is proved by live witnesses every
11 day in -- every day in courtrooms across the country --

12 JUSTICE BREYER: But it's not just --

13 MR. FISHER: -- long before Melendez-Diaz or
14 Crawford.

15 JUSTICE BREYER: It's not just chain of
16 custody. I think the Chief Justice is trying to get at
17 this problem, or I am: Lab technician Jones looks at a
18 vial, and it's blue. She says to Smith, "it's blue."
19 Smith turns a lever on a machine to B.

20 Jason sees the B and goes into court -- you
21 make him go into court; that's our case. And what I
22 wonder is, is the defendant now entitled to the
23 following instruction: Jury, because he's in court, he
24 can say that the machine read B, but that proves nothing
25 about the vial, nothing. All it proves is what someone

1 said in the laboratory to another person, and those two
2 people aren't in court.

3 Now, that's -- you see, that's the problem,
4 I think, of the intermediate step. I'd either like to
5 be told I'm wrong about that, you don't have to have
6 them, or explain whatever you'd like.

7 MR. FISHER: If I understand your
8 hypothetical correctly, I think that if the defendant
9 wanted -- the defendant can certainly make that argument
10 to a jury, and the defendant, if he wanted to insist --
11 if the prosecution wanted to tie the results -- let's
12 bring it back to the facts of this case -- wanted to tie
13 the .21 to Mr. Bullcoming by saying that was
14 Mr. Bullcoming's sample, then they'd need to bring
15 somebody into court if the defendant insisted upon it.

16 But the one thing I want to add is that the
17 Public Defender Service brief makes clear, and the facts
18 of this case make clear, it's going to be very rare that
19 a defendant wants to do that. The defendant in this
20 case wanted to stipulate to the nurse's blood draw and
21 that it was his blood that was drawn in the hospital.
22 It was the State that insisted on putting her on the
23 stand. It happens in courtrooms all across the country.

24 JUSTICE KENNEDY: Well, but if you want to
25 tell us, don't worry, it won't happen, I think that's an

1 unacceptable argument. You're saying the defense has
2 certain rights, and we have to presume there is a
3 defense attorney who's going to afford his client every
4 right the Constitution has. So the fact that we're not
5 supposed to worry because it won't happen very often is
6 (a) it seems to me, an unlikely hypothetical; and (b) it
7 seems to me, irrelevant to your argument.

8 MR. FISHER: Well, Justice Kennedy, I will
9 gladly accept (b) if we want to say that consequences
10 are irrelevant, because I think that's what -- the Sixth
11 Amendment is what it is, but I think the only thing I
12 would add is that all I can say is, empirically, in the
13 States that have followed the rule we advocate today,
14 long before Crawford or Melendez-Diaz, it simply is a
15 manageable burden. I'm not saying it's no burden. But
16 it is a thoroughly manageable --

17 JUSTICE SCALIA: Mr. Fisher, I thought -- I
18 thought the Court put this worry behind us in Crawford.
19 Wasn't the same worry raised in Crawford?

20 MR. FISHER: Well, I think it was raised
21 even more pointedly in Melendez-Diaz when it comes to
22 lab analysts. I think in both places the Court, yes,
23 set that aside.

24 JUSTICE SCALIA: Said, yes, it may be
25 something of a risk, but the States have managed it in

1 the past, and there's no reason to think they can't
2 manage it in the future.

3 MR. FISHER: I think that's what
4 Melendez-Diaz --

5 JUSTICE SOTOMAYOR: Counsel, there are
6 different types of hearsay involved here or different
7 types of statements. There's the report itself, which
8 was Exhibit 1 that was introduced, and it has certain
9 certifications by the analyst, that he followed certain
10 procedures, et cetera. I'm assuming that you're
11 claiming that those -- those are the Confrontation
12 Clause violations, that exhibit itself, because it is
13 attesting or certifying to something.

14 MR. FISHER: Yes.

15 JUSTICE SOTOMAYOR: The witness is not at
16 trial here.

17 MR. FISHER: Yes, Mr. Caylor's
18 certifications in this -- in the lab report, not only
19 that the blood -- that the blood had a .21 blood alcohol
20 content, but also that --

21 JUSTICE SOTOMAYOR: Well, that's where I
22 want --

23 MR. FISHER: Oh, but --

24 JUSTICE SOTOMAYOR: That -- the "also" is
25 what I summarized in saying that he followed certain

1 procedures, that it was in accordance with law, et
2 cetera.

3 MR. FISHER: And also that it was
4 Mr. Bullcoming's blood sample and that the sample had
5 not been tampered with.

6 JUSTICE SOTOMAYOR: Right.

7 MR. FISHER: That's the totality of the --

8 JUSTICE SOTOMAYOR: All right.

9 JUSTICE ALITO: But as to those persons
10 who --

11 JUSTICE SOTOMAYOR: Now -- if I might just
12 finish my question.

13 JUSTICE ALITO: Okay. Go ahead. Yes.

14 JUSTICE SOTOMAYOR: Let's assume that the
15 raw data, the graphs that were made, were reviewed by a
16 separate witness, and he reviewed the data and says,
17 this data shows that the blood level concentration was
18 .21, or two-point whatever it was. Would that violate
19 the Confrontation Clause, using the raw data itself?

20 MR. FISHER: I want to be clear that raw --
21 by "raw data," you mean the printout from a machine?

22 JUSTICE SOTOMAYOR: The printout from the
23 machine.

24 MR. FISHER: It's used a few different ways
25 in the briefing.

1 JUSTICE SOTOMAYOR: That wasn't introduced
2 here; am I correct?

3 MR. FISHER: It was neither -- it was not
4 introduced, and there's nothing in the record to show
5 that Mr. Razatos even reviewed it.

6 JUSTICE SOTOMAYOR: All right. But let's
7 assume --

8 MR. FISHER: So what he did is just read the
9 report.

10 JUSTICE SOTOMAYOR: Let's assume he just
11 took the raw data at trial. I know we now have a chain
12 of custody, and someone will have to prove that this is
13 the data related --

14 MR. FISHER: Right.

15 JUSTICE SOTOMAYOR: -- to Mr. Bullcoming.
16 But if that expert then read that data and testified
17 that this was of a certain amount or percentage of
18 alcohol, would that violate the Confrontation Clause?

19 MR. FISHER: Probably not. Provided, as you
20 say, the chain of custody had been either properly
21 proved or stipulated to, I think an expert could take
22 the stand and say, I'm looking at a graph, and here's
23 what the graph shows me. Now, you might get into --

24 JUSTICE GINSBURG: And that's what -- that's
25 the New Mexico Supreme Court suggested, didn't they?

1 They said bring the printout from the gas -- whatever --
2 chromatograph, and then have an expert who was not the
3 one who certified -- it was not Caylor -- but that
4 here's the graph that came out of the machine, and this
5 is the way this process operates.

6 I -- in your answer to Justice Sotomayor,
7 did you mean to agree with the New Mexico Supreme Court
8 when they said printout plus an analyst who didn't do
9 this particular run but knows how the process works?

10 MR. FISHER: No, Justice Ginsburg. I'm
11 certainly not here today to agree with the New Mexico
12 Supreme Court. What they said doesn't -- doesn't make
13 any sense in this case because (a) the printout was
14 never introduced into evidence or looked at, and (b) it
15 would matter a great deal -- and this is how I continue
16 my answer. It mattered a great deal what was on the
17 printout. If the printout is nothing more than a graph,
18 then I don't think you can say that's a testimonial
19 statement. If a printout comes out of a machine that
20 also says at the top blood sample was Donald
21 Bullcoming's, here's the test that was run, et cetera,
22 those may well be testimonial statements that the
23 analyst triggered the machine to spit out.

24 So the Fourth Circuit has wrestled with this
25 issue in the Washington case, and you can -- you can

1 look at the majority and the dissenting opinions in that
2 case. I think that the question would arise in that
3 scenario, if the graphs were -- if the machine printouts
4 were introduced into evidence, the question would be,
5 are the machine printouts testimonial? And to the
6 extent they are, you'd have the same problem in this
7 case. To the extent they are not -- as the Fourth
8 Circuit suggested, at least to some degree they may not
9 be -- then you don't have a --

10 JUSTICE SOTOMAYOR: What part --

11 MR. FISHER: -- Confrontation Clause
12 problem.

13 JUSTICE SOTOMAYOR: What part do you see as
14 testimonial or not? What can an outside expert look at?

15 MR. FISHER: I think an expert can look at
16 anything. The only question is what's introduced into
17 evidence. There's no -- there's no Confrontation
18 Clause --

19 JUSTICE SOTOMAYOR: Well, I -- that --

20 MR. FISHER: -- barring an expert from
21 reviewing whatever he wants.

22 JUSTICE SOTOMAYOR: There's two different
23 issues: one, what can be introduced into evidence,
24 which is the reports themselves; and what can he or she
25 testify to is a different question. That's a form of

1 evidence. And so that's the line I'm trying to get you
2 to describe for me, which is, when does that testimony
3 become a violation of the Confrontation Clause?

4 MR. FISHER: In one of two scenarios,
5 Justice Sotomayor, the first which is the scenario we
6 have in this case, when the report is introduced and
7 it's testimonial. The second --

8 JUSTICE SOTOMAYOR: Let's assume the
9 hypothetical I proffered.

10 MR. FISHER: The second is that it's not
11 introduced. Then you have a Confrontation Clause
12 violation if the expert -- and this is the words many
13 lower courts have used -- is a mere conduit for
14 introducing the out-of-court testimonial statement.
15 So --

16 JUSTICE ALITO: Could we break this down in
17 -- in this way? I see three things that the -- three
18 statements that the -- the State was attempting to -- to
19 prove. The first was that the sample that was tested
20 was the sample that was taken from the defendant.
21 Second was that the standard procedures were followed in
22 this case, and the third was that the result was .21.
23 Would you agree with that? Those are the three things?

24 MR. FISHER: I think there's one other
25 thing, Justice Alito, which is that the sample had not

1 been tampered with --

2 JUSTICE ALITO: All right.

3 MR. FISHER: -- or contaminated.

4 JUSTICE ALITO: That the sample had not been
5 tampered with. Now, as to the first three, in other
6 words, everything other than the results, could the
7 State prove those things without having -- simply by
8 introducing testimony regarding the way things were
9 generally done in the lab, and ask the jury to infer
10 that the general procedures were followed in this
11 particular case?

12 MR. FISHER: I think that would be a
13 question of State law, Justice Alito.

14 JUSTICE ALITO: It wouldn't be a
15 Confrontation --

16 MR. FISHER: It wouldn't be a Confrontation
17 Clause question.

18 JUSTICE ALITO: All right. Now, in this
19 case, as I read the record, it seems to me that's what
20 the prosecutor was attempting to do. This is on page 50
21 of the Joint Appendix. The analyst is beginning to
22 testify, the second answer on page 50: So what we do is
23 we will get the sample in the mail, et cetera.

24 The analyst is beginning to testify about
25 standard lab procedures, and then defense attorney says,

1 "Your Honor, I'm going to object to what's done in the
2 status quo." I take that to mean what is generally
3 done. "I don't object to what was done in this case."

4 So the defense attorney is preventing -- is
5 objecting to the prosecution's attempting to discharge
6 its responsibility with respect to those first three
7 propositions through testimony about standard
8 procedures, and is insisting that the analyst provide
9 the testimony that you say was a violation of the
10 Confrontation Clause; namely, testifying as to what was
11 done in this particular case.

12 MR. FISHER: Justice Alito, I think if you
13 look earlier in the Joint Appendix, I believe it's at
14 page 40, where the State for the first time says we're
15 going to put Mr. Razatos on the stand instead of Mr.
16 Caylor, there's a -- there's an objection there as well
17 that says you can't then put the document into evidence
18 that Mr. Caylor wrote if he's not going to be on the
19 stand. That's the critical objection here.

20 Now, you're right, there's nothing wrong
21 with Mr. Razatos having taken the stand in this case,
22 there's nothing wrong with him having described typical
23 procedures in the lab. I think the objection you're
24 pointing was to the one that said -- again, as far as
25 the State law objection, saying he can't testify to

1 something he doesn't have personal knowledge about,
2 which is whether the procedures were followed in this
3 case. But Mr. -- Mr. Razatos could certainly take the
4 stand and testify to -- to general procedures. But at
5 page 54 and 55 of the Joint Appendix, he -- he simply
6 reads the report's results.

7 And so you have two Confrontation Clause
8 violations, really. You have the report being
9 introduced in the first instance, and then you have -- I
10 believe it's at 54 and 55 of the Joint Appendix. You
11 have the prosecutor asking Mr. Razatos, what was the
12 result? He says the result was .21. As the State
13 itself says at page 58, note 15 of its brief, there was
14 no independent analysis being applied there. All Mr.
15 Razatos was doing was repeating and giving the jury the
16 conclusions that Mr. Caylor had reached.

17 JUSTICE ALITO: But if the -- if the machine
18 had expelled a piece of paper that said .21, that piece
19 of paper would not be a -- introduction of that piece of
20 paper, the contents of the piece of paper, would not be
21 a violation of the Confrontation Clause?

22 MR. FISHER: If it said nothing more than
23 the .21 coming out of the machine, I think probably not.
24 Now, judge Michael in the First Circuit would disagree;
25 and so that's an issue that's not in this case, and I

1 think you could debate whether that should -- even that
2 should be considered hearsay of the operator.

3 JUSTICE ALITO: Well, how can -- how can you
4 debate it? The purpose of the Confrontation Clause is
5 to allow cross-examination. How are you going to
6 cross-examine the machine?

7 MR. FISHER: Well -- well, the question that
8 would arise there would be whether the .21 should be
9 treated as Mr. Caylor's statement. Let me -- if I give
10 you two hypotheticals, maybe it explains. On the one
11 hand, I don't think anyone would claim that a time stamp
12 on a fax machine, for example, is a human statement.
13 It's a machine statement, and so therefore it can't be
14 testimonial. On the other hand, if someone types out an
15 affidavit on a word processor and hits print, you can't
16 say, well, that's the machine talking, not the human.

17 So the question arises in the lab context
18 whether a .21 or anything else that comes out of the
19 machine has enough human influence that it ought to be
20 treated as the -- as the person's statement.

21 Now, you don't have to resolve that in this
22 case, and what's important to emphasize is that that
23 hypothetical of the .21, even though the State would
24 like it to be this case, is really miles away for the
25 reason you said, because the State proved a lot more

1 than .21 by Mr. Caylor's lab report, and that's why
2 these hypotheticals I think are important.

3 JUSTICE ALITO: But all of those other
4 things could potentially be proven by indirect evidence,
5 by establishing standard procedures and asking the jury
6 to infer that the standard procedures were followed in
7 this case. They might -- they might believe that; they
8 might not --

9 MR. FISHER: The State could --

10 JUSTICE ALITO: They might make the
11 inference; they might not.

12 MR. FISHER: The State could make that
13 choice, but it would be a considerably weaker case,
14 Justice Alito, not just because they wouldn't have
15 anyone saying that the procedures were actually followed
16 in this case, but also in this case it would be a far
17 weaker case because they'd have somebody on the stand
18 who would now be subject to cross-examination as to why
19 he had been recently put on unpaid leave.

20 JUSTICE ALITO: But as to this case, didn't
21 the defendant actually testify that he was drunk at the
22 time of -- at the time when the blood was extracted? He
23 took the stand and he testified that after the accident
24 he went off into the woods and he came upon people who
25 were drinking vodka and he drank, they drank -- what was

1 it -- a gallon of vodka together, and then he went back
2 to the scene and his blood was tested?

3 MR. FISHER: That was --

4 JUSTICE ALITO: Isn't that correct?

5 MR. FISHER: That was his defense, Justice
6 Alito, and here's why the lab report is still important,
7 though. Because you're right, he did admit he was
8 drunk. But remember, he was not convicted simply of
9 DUI; he was convicted in New Mexico law of aggravated
10 DUI. And to have aggravated DUI you need to have up to
11 a .16 blood alcohol count. So the report is the only
12 the State could have proved over .16, even if Mr.
13 Bullcoming admitted that he had been drinking that day.

14 So that's why it's important in this case.
15 That's why he wanted to challenge -- that's one reason
16 why he wanted to challenge the report.

17 Let me come back to the -- to the important
18 point, I think, though, that what the State wants to be
19 able to do -- I don't want to ascribe a bad motive, but
20 what the State's rule would allow States to do is to
21 insulate people from cross-examination, not just Mr.
22 Caylor in this case, but -- but -- but please pay
23 attention to, for example, the Dungo case that's cited
24 in our opening brief, from California. That's a case
25 where a coroner had been fired from his job, blacklisted

1 by law enforcement, and prohibited from testifying in
2 many counties because he falsified his reports, his
3 autopsy reports, by writing them with the police report
4 sitting right next to him.

5 JUSTICE ALITO: But the State can't --

6 MR. FISHER: And --

7 JUSTICE ALITO: The State can't immunize
8 those people from testifying. You could have subpoenaed
9 Caylor, couldn't you? You could have asked for a
10 continuance and -- and a subpoena, and brought him in to
11 testify? It's just a question of who has to take the
12 step, right?

13 MR. FISHER: Well, we -- we could have, but
14 Melendez-Diaz makes clear that doesn't satisfy the
15 Confrontation Clause. And when you deal especially with
16 a garden variety DUI case there is only so much time and
17 resources at issue, and that's why the Confrontation
18 Clause I think is especially important in a case like
19 this, that the prosecution bring its witnesses into
20 court.

21 And if I could just finish the Dungo story,
22 in the -- in the California Court of Appeal, when they
23 reviewed that case, they said the prosecutor's intent in
24 that case had been to shield Mr. -- I'm sorry, the --
25 the actual analyst in that case from cross-examination.

1 And, in fact, the supervisor when he took the stand at
2 the preliminary hearing told -- told the court the
3 reason why they have me here is the prosecutors find it
4 too hard to have this person in court. So that would be
5 perfectly permissible, if -- if the State win this case
6 today and surrogate testimony were allowed.

7 JUSTICE GINSBURG: How do you answer the
8 practical situation that Caylor, who did this particular
9 run, does some dozens day in and day out, and he will
10 have no memory, in fact, of this particular test. So
11 having him there -- he knows how the process operates;
12 he doesn't remember this particular one -- how does
13 having him there -- what could be elicited on
14 cross-examination of him that couldn't be from his
15 supervisor?

16 MR. FISHER: Let me give you two answers,
17 Justice Ginsburg, but first let me say we don't know
18 whether somebody doesn't remember it until he's put on
19 the stand. What the NACDL brief says is that even
20 though analysts don't ordinary remember run-of-the-mill
21 tests like this, that do remember if something went
22 wrong or if something went haywire. So we don't know
23 that.

24 But assuming you're right that --

25 JUSTICE SCALIA: Wasn't it the case that

1 these tests are unusual in this particular jurisdiction?

2 MR. FISHER: That's my understanding,
3 Justice Scalia. So that's another reason why he may
4 have remembered.

5 But even if he didn't, there's two things
6 that could be importantly probed here. One is his
7 credibility. And I've explained why that was a very
8 serious issue in this case, because he was put on unpaid
9 leave.

10 The other is his competence. Again,
11 Melendez-Diaz says it's important to have the person on
12 the stand to explain how he does his job, for the jury
13 to observe his professionalism, for him to explain
14 here's my understanding of these procedures, et cetera.
15 That could be very important, and if I could leave you
16 with one thing before I --

17 JUSTICE SCALIA: Well, I assume that even if
18 he doesn't remember, his testimony is not worthless to
19 the prosecution. He -- the prosecution can bring out
20 his high qualifications, and he can testify: It -- this
21 is always the way I do it. I do it this way all the
22 time. I don't remember this particular incident.

23 All of that can be persuasive to the jury,
24 can't it?

25 MR. FISHER: Of course, it can, Justice

1 Scalia. And on the flip side, even if he doesn't
2 remember, cross-examination is very important.

3 If I could leave you with one thing that I
4 think isn't highlighted in the brief maybe the way it
5 should have been. There's a line of cases from this
6 Court, California v. Green, Delaware v. Fensterer, and
7 United States v. Owens, that all hold that if a witness
8 takes the stand and doesn't remember anything, that the
9 Confrontation Clause is still -- is still satisfied, as
10 long as that witness is on the stand for the reason
11 Justice Scalia explained and because the jury can
12 observe them, et cetera.

13 And so, the flip side of that has to be --
14 it's the holding of Owens most recently is that those
15 are meaningful things that the Confrontation Clause
16 requires. And so the flip side of those cases has to be
17 that if the witness takes the stand and doesn't
18 remember, the ineffectiveness potentially of a
19 cross-examination there doesn't matter, either.

20 If I could reserve what little time I have
21 left.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Fisher.

24 General King.

25 ORAL ARGUMENT OF GARY K. KING

1 ON BEHALF OF THE RESPONDENT

2 MR. KING: Mr. Chief Justice, and may it
3 please the Court:

4 As the Court said in Michigan v. Bryant, a
5 police interrogation resembles an ex parte examination
6 when the primary purpose of the examination is to
7 create, quote, an out-of-court substitute for trial
8 testimony, end quote.

9 A public record not prepared by a police
10 officer is not the product of structured interrogation.
11 It is neither ex parte nor is it an examination.

12 JUSTICE SCALIA: I don't understand that.
13 You mean so long as all -- all hearsay by non-police
14 officers can be admitted without, without confrontation,
15 just because they're not police officers?

16 MR. KING: No, Your Honor, I don't believe
17 that that's the --

18 JUSTICE SCALIA: I didn't think that was
19 your point, because it's certainly not true, is it?

20 MR. KING: It is not my point, Your Honor.

21 Your Honor, the point that I am making is
22 that in this case, the document, the report that we're
23 talking about is a public record, and that
24 differentiates it from the affidavit in Melendez-Diaz,
25 and so the case that --

1 JUSTICE SOTOMAYOR: I'm sorry, could you
2 tell me what that means? Why is it different than the
3 affidavit? It's certified, and my understanding of the
4 dictionary meaning of certification is that that's an
5 attestation as to the truth of the statements contained
6 therein. That's the common definition.

7 So I'm assuming it's the equivalent of an
8 affidavit. So how is it different than the
9 Melendez-Diaz lab report?

10 MR. KING: Your Honor, and I understand, and
11 I'll answer your question with regard to your
12 expectation that the certification is the same as the
13 affidavit. It's not our position that they're exactly
14 the same, but there are several --

15 JUSTICE SOTOMAYOR: Tell me why not.

16 MR. KING: There are other distinguishing --
17 distinguishing features that are significant between the
18 affidavit in Melendez-Diaz and the report in this case.
19 For one, the affidavit in Melendez-Diaz was prepared
20 pursuant to an statute in Massachusetts that called for
21 the preparation of an affidavit from the lab at some
22 point in time after the actual test was done, and it was
23 to be used specifically as an in-court statement to
24 replace the live in-court testimony of the affiant.

25 In our case, the report being a public

1 record was a record that is kept contemporaneously by
2 the analyst in the lab, it is, in this case, the .21 is
3 a single data point that is taken from the raw data in
4 the machine and recorded on a standard document that's
5 provided by the --

6 JUSTICE SOTOMAYOR: Can any --

7 JUSTICE SCALIA: And that was prepared just
8 for fun, not for use in trial?

9 MR. KING: No, Your Honor. I believe
10 that -- that that statement is planned to be used in
11 trial, and --

12 JUSTICE SCALIA: So what difference does it
13 make whether the statute requires it to be taken to be
14 used at trial or whether the police send it over to be
15 used at trial as a use of the State? What difference
16 does that make?

17 MR. KING: Your Honor, I think the key is to
18 look at the purpose of the analyst who was preparing the
19 report, who is a public employee, who is just carrying
20 out, as our court said, copying the information from the
21 machine onto the report. And so, that's significantly
22 different than the amount of analysis that was done
23 by -- by the -- the witness in --

24 JUSTICE SOTOMAYOR: I'm sorry. He's not
25 simply looking at a number and putting it on a report.

1 He's certifying to certain things. He's certifying to
2 following certain steps, that the evidence wasn't
3 tampered with. He's certifying that he's complied with
4 all the requirements of New Mexico law with respect to
5 the report, so he's just not copying a number.

6 MR. KING: That's correct, Your Honor.

7 In -- in this case the certification doesn't necessarily
8 make the report testimonial. There -- there are several
9 other examples of -- of cases where -- where evidence is
10 introduced at court that -- that have certifications.

11 For instance, it may be necessary for a
12 public records custodian to provide a copy of a birth
13 certificate in -- in a trial, and in that case, the
14 custodian always has a certification that says I
15 certify --

16 JUSTICE SOTOMAYOR: Isn't the difference
17 between those two documents is that one was prepared
18 primarily for the purposes -- this lab report, for
19 prosecution purposes, and the birth certificate is not
20 prepared for that? It's prepared to mark the birth of a
21 person, then it's used for many other purposes besides
22 trial; is that correct?

23 MR. KING: That is correct with regard to
24 the birth -- birth certificate, Your Honor.

25 JUSTICE SOTOMAYOR: So tell me what makes

1 this certificate not primarily for the purpose of use in
2 the prosecution of an individual? Would they have
3 tested this blood if -- if it wasn't to prosecute him?

4 MR. KING: Your Honor, in -- in this case,
5 no. This -- this case is all about a sample that was
6 sent to the lab to be tested for this. But I think you
7 made it clear in Michigan v. Bryant that -- that there
8 might be a variety of purposes that should be analyzed
9 in order to decide whether or not the statement is
10 testimonial or not.

11 In this case, the purpose of the -- of the
12 lab analyst is significantly different from the purpose
13 of the police officer who requested the analysis. The
14 lab analyst does this for a living, and it's -- it's
15 their public duty. The lab in this case is -- is
16 operated by the State Department of Health, scientific
17 lab division, and -- and they do a variety of different
18 kinds of analysis.

19 And so, the -- the analyst who does the test
20 wouldn't necessarily have the same purpose in -- in
21 creating their statement for that document. As a matter
22 of fact, the analyst would most likely be driven by the
23 desire as a scientist --

24 JUSTICE SOTOMAYOR: Does he do any testing
25 except for the police?

1 MR. KING: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: Who else do they test
3 for?

4 MR. KING: This lab also tests for, in this
5 particular case, the gas chromatograph analyses of blood
6 alcohol, they test for the office of the medical
7 examiner and -- and under New Mexico law, interestingly
8 enough, the -- the defendant can also ask for a test.
9 They would use the same form to ask for this test.

10 So, the analysis might be being done for a
11 defendant as well as for the State.

12 JUSTICE ALITO: Are these lab analysts civil
13 service employees? Are the lab analysts civil service
14 employees?

15 MR. KING: Yes, Your Honor, they are. They
16 work for the New Mexico Department of Health.

17 JUSTICE ALITO: Is there any way in which
18 your office or prosecutors or the police could cause
19 them not to get promotions if they weren't producing the
20 kind of lab reports that the police and the prosecution
21 might like?

22 MR. KING: No, Your Honor, they could not.
23 As a matter of fact, there -- there is a separation
24 between the operation of the Department of Health lab
25 and the police that even extends to the point of a

1 physical separation. Police officers are not allowed
2 into the lab area where -- where they are --

3 JUSTICE SCALIA: This analyst was fired, as
4 I recall. Was he fired, placed on administrative leave
5 or something?

6 MR. KING: No, Your Honor, the record
7 indicates that -- that Mr. Caylor was not available for
8 court because he was on leave without pay, which --

9 JUSTICE SCALIA: On leave without pay?

10 MR. KING: Uh-huh.

11 JUSTICE SCALIA: And do we know why it was
12 leave without pay?

13 MR. KING: We don't know why, Your Honor.

14 JUSTICE SCALIA: Does the defense know why
15 it was leave without pay? Could the defense have found
16 out in cross-examination that the reason he was leave
17 without pay because he was -- had shown himself to be
18 incompetent, and they were in the process of firing him?
19 I don't know whether that's true, but wouldn't that be
20 important to the defense?

21 MR. KING: Your Honor, I -- I think that the
22 defense would like to know the answer to that question.

23 JUSTICE SCALIA: And didn't -- and didn't
24 the prosecution intentionally set it up this way so that
25 this person would not have to testify, so that he could

1 not be cross-examined? Isn't that why they sent the
2 substitute to testify?

3 MR. KING: No, Your Honor. In this case,
4 that's -- that's not the case. I -- the -- this case
5 came about in a little bit of an unusual circumstance,
6 because both sides had been negotiating a plea agreement
7 and when the -- when the plea agreement was not
8 successful, the defendant asked for the trial to be
9 expedited and moved quickly to trial. So the defendant
10 didn't do as much discovery, I think, as you would
11 normally do in a case like that, but --

12 JUSTICE SCALIA: I don't know what the facts
13 are, but boy, it smells bad to me. It really does. And
14 even if that was not the case, the mere possibility that
15 it could have been the case shows why you should have to
16 bring this person in if you want to introduce his
17 testimony.

18 MR. KING: Your Honor, I think that the key
19 here is that if you would not look at the -- at any of
20 the qualities of the declarant in deciding whether the
21 statement is testimonial or not. And so once -- once
22 the Court makes the determination as to whether it is
23 testimonial or not, you wouldn't -- even if you would
24 like to ask those questions, you wouldn't have the
25 opportunity to ask those questions.

1 In this case, factually, it might also be
2 that Mr. Caylor was on unpaid leave because he had run
3 out of his regular leave time, and he decided to do
4 that. We -- it would all be speculation --

5 JUSTICE SCALIA: I agree that whether it's
6 testimonial does not depend upon whether there's
7 skullduggery or not, but the possibility of
8 skullduggery, even in machine -- machine situations such
9 as this, is a good reason for saying this is
10 testimonial.

11 MR. KING: Your Honor, I think that's why
12 it's -- it's important that this is a public records
13 case, because that is one of the assumptions that courts
14 have made for hundreds of years with regard to the fact
15 that there is -- there is a duty by the person who's
16 taking down the information to -- to observe in a
17 regular manner, to record in a regular manner, and so
18 that's important here.

19 JUSTICE GINSBURG: That was the principal
20 thrust of your brief, that this isn't testimonial at
21 all. You have not said because it was unsworn, because
22 you recognize the certification is the same, but you're
23 trying to equate it to a business record, public record?

24 MR. KING: Yes, Your Honor.

25 JUSTICE GINSBURG: You do have the hurdle

1 that this record was created for a specific purpose. It
2 was created to provide evidence for use in a criminal
3 prosecution.

4 MR. KING: Your Honor, I don't believe that
5 that is the only purpose that this form 705 could be
6 used for. It is the common purpose for this form, but
7 it is a form that the lab uses in every circumstance.
8 And indeed, as I said, in New Mexico law, the defendant
9 can ask for a second test. They can have that done.
10 It's done at the State's expense. They can have it done
11 at any laboratory that they want to.

12 But if they have the report done at the
13 State lab, and they're entitled to have that done, they
14 would utilize the same form.

15 CHIEF JUSTICE ROBERTS: Well, does the --

16 JUSTICE KAGAN: Well, what are the other --

17 CHIEF JUSTICE ROBERTS: Does the analyst
18 know whether he's being asked to do one for the
19 prosecution or the defendant?

20 MR. KING: Not necessarily, Your Honor. I
21 -- I actually don't know the answer to that specifically
22 except that the form -- and if you look at it, it's in
23 the Joint Appendix -- does have some information in part
24 A that -- that indicates that there is a police officer
25 that -- that sent the test to the lab. There's a nurse

1 that did that in this case.

2 CHIEF JUSTICE ROBERTS: Oh, so they would
3 know the difference, right?

4 MR. KING: They -- I think that the same
5 information would be on the form whether the defendant
6 submitted it or whether the -- or whether the
7 prosecution submitted it, and --

8 JUSTICE SCALIA: Well, not the same
9 information. One would say the police submitted it and
10 the other one would say the defendant submitted it,
11 right?

12 MR. KING: Your Honor --

13 JUSTICE SCALIA: So if the police submitted
14 it, the -- the person doing the -- the test would know
15 that the police submitted it, I assume.

16 MR. KING: If you look at the form, Your
17 Honor, it would have the same information, but we're
18 not -- we're not here today arguing that the analyst
19 wouldn't know that the police submitted this form. But
20 it is an arm's length request, and once again, the Court
21 addressed that in your most recent case, in Michigan v.
22 Bryant, I believe because the -- the question is whether
23 or not there was an interrogation. One of the key
24 questions is whether there was an interrogation.

25 This clearly does not look like a case where

1 there was an interrogation by the police. It was a
2 request on a standard form that was -- that was sent.
3 And so the purpose test, it appears from Michigan v.
4 Bryant, would not even apply in cases where there's not
5 a police interrogation.

6 JUSTICE SCALIA: Why is a key question
7 whether this was an interrogation? Does the
8 Confrontation Clause apply only to confrontations? To
9 interrogations? I mean, if a -- if a witness, before
10 the police ask any questions, blurts out, you know,
11 "Jones did it," can that statement get in because it has
12 not been in response to an interrogation?

13 MR. KING: Your Honor, the analysis would be
14 somewhat different. That's the point, is that --

15 JUSTICE SCALIA: It would be different
16 because interrogation doesn't make any difference. That
17 is not the condition for the application of the -- of
18 the Confrontation Clause.

19 MR. KING: Your Honor, we -- it appears that
20 it does make some difference with regard to Michigan v.
21 Bryant, and it's new to all of us.

22 JUSTICE SCALIA: If it were an
23 interrogation, the factors mentioned in Michigan v.
24 Bryant would be relevant, presumably, but since this
25 wasn't an interrogation, I don't see how that has any --

1 any relevance whatever.

2 MR. KING: Well, the relevance, Your Honor,
3 I think, is since it's not an interrogation, then --
4 then you have to look at, and I think the Court has set
5 this out, you have to look at the nature of the evidence
6 and to make a determination as to whether the evidence
7 that's being presented is merely a substitute for live,
8 in-court testimony.

9 And there, back to the difference between
10 the affidavit in Melendez-Diaz and the report in this
11 case is, in our report, even if Mr. Caylor had been at
12 the trial and on the stand, it would have been necessary
13 to have the report as well. I think Justice Ginsburg
14 raised this point, is that six months after the
15 examination was done, to cross-examine the analyst and
16 ask him, do you remember what the result was six months
17 ago from this one test out of a hundred that he ran, he
18 will not remember without looking at the report. The
19 report is the best evidence in this case to prove the
20 point that is being made here, and --

21 JUSTICE SCALIA: Well, he'd look at the
22 report and say, gee, I don't remember; you know, I do a
23 lot of these reports. But then the prosecution in
24 direct would say, well, how do you do them? And he
25 would say, I always do this, I always do that, I always

1 do the other thing. Did you do it in this case? Well,
2 I don't specifically remember this case, but I always do
3 it. And that's the testimony that would go to the jury.
4 It would be pretty persuasive. Not as good as if he did
5 remember.

6 MR. KING: That's correct, Your Honor, and
7 so that's why the analysis of whether this is
8 testimonial or not is such an important analysis,
9 because if the -- the reasoning that the Court has had
10 for all of the hearsay exceptions, for excited
11 utterances or, in this case, for a public record, would
12 look at whether or not that evidence was the best
13 evidence to support the truth-finding purpose of the
14 trial. That's our -- that's our analysis, at least,
15 Your Honor.

16 And what we are arguing in this case is that
17 there is no difference between Mr. Caylor transferring
18 the .21 data from the machine to the piece of paper than
19 there would be if you took a photograph, for instance,
20 of the machine data and --

21 JUSTICE SOTOMAYOR: So why did you give the
22 data to the analyst at trial? If there wasn't a more
23 persuasive power in the lab certification, why didn't
24 you just have the new expert look at the printout from
25 the graph and say, this is what it says?

1 MR. KING: Procedurally, in this case, Your
2 Honor, this -- the trial at the District Court level
3 occurred before the Court's opinion in Melendez-Diaz.
4 And so I think that at this point in time, that it would
5 be more normal behavior for the -- for the State to
6 present the raw data as well.

7 In this case, Mr. Razatos --

8 JUSTICE SOTOMAYOR: That's that as well.
9 Don't you introduce the lab report because it -- it
10 gives more credence to the reliability of the result?
11 Because he's certifying that he followed certain
12 procedures, that he did certain things, that the sample
13 wasn't tampered with?

14 MR. KING: Yes, Your Honor.

15 JUSTICE SOTOMAYOR: Is it -- you're looking
16 for that testimony, correct? You're looking, at trial,
17 to that testimony to bolster the test?

18 MR. KING: Not using testimony in the sense
19 that we're talking about testimony here. I mean, you
20 might want that -- very well want that evidence in, not
21 different from other cases where if you had a -- it was
22 necessary to submit the judgment of a felony, for
23 instance, to show that a person in a later trial was a
24 felon with -- a felon in possession of a firearm, you
25 would have a certification from the court clerk that

1 would say, I certify that the copy of this document that
2 I'm submitting to the court is a true copy of -- that's
3 also not testimonial from -- for the purposes of the
4 Confrontation Clause I don't believe.

5 JUSTICE BREYER: You might want that in
6 order to show the machine says X, Y, Z, but that's only
7 as good as the stuff that was put into it. So you're
8 going to have to show that this was his blood put into
9 it. And many, many people might have handled it, and
10 there might be a routine so that they all check a box
11 when it's sealed and they get it.

12 Is it your understanding if you lose these
13 cases -- this case that you then have to take into court
14 all those people?

15 MR. KING: That's certainly a concern, Your
16 Honor. I -- if you look at this document, there are six
17 or seven people who have certifications on the -- on the
18 dire -- different statements on the document. There are
19 three certifications; there's one from the -- from the
20 woman who takes the samples into the lab that says she
21 received the samples; there's this one from Mr. Caylor;
22 there's one from -- from the reviewing analyst who
23 reviews it; and I gather that the -- that the Petitioner
24 is only challenging the -- that one certification
25 from -- from -- from Mr. Caylor.

1 JUSTICE SCALIA: The chain of custody wasn't
2 -- wasn't contested here, was it?

3 MR. KING: It was not. And this document --

4 JUSTICE SCALIA: Is it often contested? My
5 impression is it's not very often contested.

6 MR. KING: I'm not aware of it being
7 contested often, Your Honor, I -- and this form I think
8 is one of the things in New Mexico that really helps
9 with that. The reason that the court submitted the form
10 is that you have everything relating to the chain of
11 evidence on -- on one document, and -- and so indeed a
12 lot of those statements really help --

13 JUSTICE BREYER: Yes, but the reason I asked
14 the question is because I don't think it is normally
15 contested. It's normally a business record of some
16 kind.

17 However, what I was looking for is a
18 distinction, because in the future I don't see why it
19 wouldn't be contested, unless there's a distinction.

20 MR. KING: Yes, Your Honor, and I think that
21 the distinction is that in this case the -- the analyst
22 is not essentially a party to the action. The analyst
23 works arm's-length transaction from -- from the -- from
24 the police and from the prosecutors, and so he's not
25 part of the prosecution team, is -- is how I've been

1 thinking about it.

2 JUSTICE SCALIA: General, I know your State
3 takes a different view of it or you wouldn't be here,
4 but aren't there are a number of States that -- that do
5 provide the testimony of the technician, who do require
6 the technician to come in and -- and testify?

7 MR. KING: Your Honor, I believe that there
8 are other States that have statutes that -- that have
9 different ways of presenting evidence.

10 JUSTICE SCALIA: And have they had, to your
11 knowledge, serious problems about defendants contesting
12 chain of custody simply because this other thing is
13 required? Again, I'm -- I'm not aware that that's been
14 a problem. I think it's a boogeyman.

15 MR. KING: Your Honor, we -- we understand
16 that -- that the -- that the burden on the State is --
17 is not an issue that comes directly into the analysis
18 relating to the Confrontation Clause. I -- in New
19 Mexico, for instance, one of the problems that we have
20 is that -- is that the lab's centrally located in
21 Albuquerque and the -- and in this case the trial was in
22 San Juan County, so -- so the witness has to drive for
23 about 3 hours to get to where the courthouse is. So
24 that's sort of different in New Mexico than, say, in
25 Massachusetts or something like that. And -- and even

1 for 10 minutes worth of testimony, they might have to
2 drive 6 hours and take a whole day out of the lab.

3 So it -- it is a problem that -- that is
4 there, but I don't think that it is the seminal issue
5 that --

6 JUSTICE BREYER: Are there States -- are
7 there States that do require a -- a -- a prosecutor to
8 produce everyone who has handled something in a chain of
9 custody at a -- at a laboratory, a criminal -- you know,
10 normal business? Are there States that do require that?
11 If so, could you tell me a couple, because I --

12 MR. KING: Your Honor, I'm not aware of any
13 State that requires that everyone in the chain of
14 custody appear in -- in trial. It is indeed normally up
15 to the prosecutor with regard to chain of custody to
16 determine who --who is going to be appearing.

17 JUSTICE BREYER: What about medical reports
18 that are aimed at a particular known victim of a crime
19 and thus will end up in trial? For example, a graph, a
20 graph which the nurse keeps, which is a statement by the
21 nurse that the patient's temperature on such and such a
22 day was 98.6 or whatever, and normally that graph would
23 be introduced; but are there any States that wouldn't
24 require -- would say, oh, no, you have to produce the
25 nurse? You have to produce the doctor for all medical

1 records? Which of course, are known by the keeper that
2 they will be used at the criminal trial.

3 Are there any States that require that?

4 MR. KING: There are none that I'm aware of,
5 Your Honor. I -- I don't -- I haven't --

6 JUSTICE BREYER: Are there any States that
7 require ordinary business records perhaps of the most
8 ordinary kind, which always are statements that somebody
9 did something on a particular day? When those business
10 records happen to be kept before with the knowledge that
11 they'll probably be introduced at the trial, are there
12 States that require the man or woman who made the
13 business record to come into court?

14 MR. KING: No, Your Honor, and I think
15 that's the point of all of those. State law has their
16 -- their hearsay law that -- that analyzed whether those
17 statements are admissible.

18 JUSTICE SCALIA: Well, I -- I don't think
19 that's an accurate response, at least if you include the
20 qualification that Justice Breyer put in the question,
21 which is that the records were kept with the knowledge
22 that they would be introduced in -- in criminal trials.

23 I mean, you can say that all the records of
24 labs -- let's assume there's a -- there's a police lab
25 which -- which only does police testing of blood. Those

1 would be business records of the lab, but they certainly
2 would not be introducible just because they're business
3 records. If the record is made for the use in
4 prosecution, surely it's -- it doesn't come under the
5 business records exception, or else we wouldn't be here
6 today.

7 MR. KING: Your Honor, I think the
8 hypothetical that -- that you say really shows where the
9 line is. If -- if the lab is a police lab and only
10 doing the analysis for the police, then they -- they
11 look a lot more like a party to the -- to the lawsuit,
12 and certainly the hearsay exceptions have made it clear
13 that even though observations are -- are generally --
14 that are public records are generally allowed, that
15 observations by police officers are not.

16 And -- and so --

17 JUSTICE SCALIA: It's an independent lab and
18 police always send it to this independent lab, but in
19 fact it's an independent business, it makes a profit;
20 but all the stuff it does it knows is going to be used
21 at trial. That wouldn't be admissible, would it? Even
22 though it's a perfectly normal business record.

23 MR. KING: Your Honor, I think that that
24 depends on -- on how you look at the purpose and whose
25 purpose it is that -- that you're analyzing. Now first

1 off that, would assume that the purpose test applies in
2 this case, and it seems to me since Michigan v. Bryant
3 that the purpose test may not apply to these kinds of
4 cases where -- where there's not a police interrogation.

5 But if -- if that is the case and the
6 purpose test applies, then it -- it also appears to me
7 that the -- that the test now requires that -- that you
8 look not just at the purpose of the policeman who --
9 who's asking the question, but that you look at the
10 purpose of the declarant, and in this case the purpose
11 of the labs clearly is -- is a purpose just to -- to get
12 the sample, do a good analysis, and -- and report that
13 analysis to, in New Mexico's case, both parties.

14 JUSTICE SOTOMAYOR: Counsel --

15 MR. KING: The analysis that comes from our
16 State lab goes not only to the prosecution but also to
17 the defendant.

18 JUSTICE SOTOMAYOR: General --

19 JUSTICE GINSBURG: General, we seem to be
20 describing -- this case seemed rather particular, that
21 is, there was no objection by New Mexico to having an
22 analyst show up, Razatos; so -- so he had to travel
23 however long he said. It's just a question of one
24 employee's time rather than the other.

25 But -- and then you described how simple

1 this thing was, you just put it in a machine, you would
2 get out a piece of paper. Why didn't New Mexico have
3 this -- there was an additional sample that could have
4 been -- it would have been si simple to just retest it.
5 Having the witness come to the court, why don't you arm
6 him with the additional test, and then there would be no
7 controversy?

8 MR. KING: Your Honor, one of the problems
9 in New Mexico would be since -- since the court believed
10 that -- that that report was -- was admissible, if they
11 did a second sample and --- and tried to submit that it
12 would be cumulative evidence, and probably would be kept
13 out by -- by the rule in New Mexico in that case.

14 So Mr. Razatos did have an important purpose
15 at this trial. In New Mexico you still I believe have
16 to have a witness who -- who can authenticate the
17 document to bring the document in. It might not have
18 had to have been Mr. Razatos in this case.

19 JUSTICE KENNEDY: Well, let's say that this
20 Court holds that the Confrontation Clause requires the
21 presence of the actual analyst to testify about the
22 sample. Is there anything in the law that says that
23 that testimony is suddenly excused, and you do not need
24 the analyst if there's another sample available for the
25 defendant to test? That's not the rule, is it?

1 MR. KING: It's not the rule, Your Honor,
2 although one of the things that we pointed out is that
3 -- is that the State always keeps two samples, that the
4 defendant has the right statutorily in New Mexico to --
5 to have a sample retested at a lab --

6 JUSTICE KENNEDY: But I'm saying that
7 analytically that does not bear on the question whether
8 or not the sample that's introduced by the State
9 requires the -- the analyst to be present. They're just
10 unrelated.

11 MR. KING: Correct, Your Honor.

12 JUSTICE KENNEDY: That may -- that may show
13 that the confrontation rule is a silly rule. But it
14 doesn't -- but it -- there's -- assuming confrontation
15 is required, it's not excused --

16 MR. KING: Yes.

17 JUSTICE KENNEDY: -- by the presence of
18 another sample.

19 JUSTICE GINSBURG: I -- I don't follow that
20 because we have a substitute now. Caylor is out of the
21 picture; we know that it is the defendant's blood
22 because everything else is the same, and there's this
23 vial that has a certain amount of blood and there's a
24 certain amount left over, so it's not cumulative,
25 because Caylor's out of the picture. It is the

1 defendant's blood that has been lab tested by another
2 analyst.

3 MR. KING: I'm sorry, Your Honor, in -- in
4 your hypothetical, if -- if the State knew far enough
5 ahead of time that they -- they would not be able to
6 submit the -- the -- that analyst's results, they could
7 always -- because the blood sample continues to exist,
8 they could always retest that and -- and have another
9 witness who could do that. Depending on how the Court
10 rules in this case, it might be that States will be
11 required to do that.

12 But at this point in time under -- under the
13 current jurisprudence, it -- it didn't appear to the
14 State that they needed to retest the sample, and I think
15 you have to worry a little bit about -- about how many
16 people you might indeed have to have come into court and
17 testify if -- if the State -- if the burden on the State
18 is that you have to -- you have to sample twice just in
19 case you're going to lose one of your analysts, I -- I
20 think that that does indeed put a great burden on the
21 State to do that. And so --

22 JUSTICE SCALIA: General, I -- I don't want
23 to eat up your -- your little remaining time, I think
24 you can answer yes or no. Does New Mexico assert the
25 same rule as applicable to ballistics testing?

1 MR. KING: No, Your Honor.

2 JUSTICE SCALIA: Why?

3 MR. KING: I think that you have to do the
4 analysis in each kind of statement that you're looking
5 at, Your Honor, to determine whether or not the
6 statement that's -- that's being made and that's being
7 proposed for trial is a substitute for live in-court
8 testimony. And so, with regard to ballistics, you know,
9 you would be looking at a little bit different set of
10 facts.

11 But in this case the facts are that -- that
12 the gas chromatograph gave us a printout that said that
13 the -- that the level of alcohol in the blood is .21
14 grams per 100 milliliters, Mr. Caylor transferred that
15 to a form, and that's what we are putting in.

16 I -- I think that -- that it proves the
17 point that I'm talking about, in a ballistics analysis,
18 you would have to have some analysis and someone to
19 reach a conclusion. And it's that that sets
20 Melendez-Diaz apart from this case, is -- is that there
21 was -- that there was some analysis by -- by -- by
22 the -- the declarant in that case. And in the
23 ballistics cases I think, most often, you would find
24 that.

25 Now, if the -- if in the ballistics case you

1 just took a photograph of the bullet and wanted to bring
2 that into the court and say here's what the bullet looks
3 like, the jury then could make a determination whether
4 they think that that bullet appears to be the same as
5 the other. That wouldn't be covered by the
6 Confrontation Clause.

7 JUSTICE SCALIA: Certainly not.

8 MR. KING: And -- and --

9 JUSTICE SCALIA: But you -- you -- you think
10 the result would be a -- the same if we could develop a
11 machine that you put the bullet in and -- and -- and --
12 that's been fired from this gun, and the murder bullet,
13 and the machine goes, blah, blah, blah, and it spits
14 out, you know, 99 percent, 99.9 percent match, that
15 would be okay?

16 MR. KING: May I answer the question, Your
17 Honor?

18 CHIEF JUSTICE ROBERTS: Sure.

19 MR. KING: In -- in that case, if -- if the
20 machine were able to do all of that, the machine
21 essentially is giving you the best evidence, yes, I
22 believe that that would be the case.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Fisher, you have 2 minutes remaining.

25 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

1 ON BEHALF OF THE PETITIONER

2 MR. FISHER: Thank you. Let me try to make
3 four quick points.

4 First, Justice Alito, I said the first
5 objection was at JA 40, it's actually 44-45 in the Joint
6 Appendix.

7 With regard to the State's argument about
8 whether this document is testimonial, I would simply
9 urge the Court to take a very close look at the lab
10 report itself. It's at JA 62. At the top it says,
11 Mr. Chief Justice, in response to your question,
12 arresting officer identification, and the officer
13 writes, check for blood alcohol concentration. That's
14 the order to the lab.

15 If you look at the bottom in the
16 certification of analyst, he certifies that the
17 following is true and correct, signs his name, and
18 perhaps the most critical thing is at the very bottom,
19 the actual rules of the New Mexico evidence law and
20 criminal procedure law are referenced. So, it's exactly
21 like Melendez-Diaz. This is a document that is
22 expressly prepared for substitute live testimony.

23 JUSTICE SCALIA: Not under oath, though,
24 that's the only difference?

25 MR. FISHER: Not under oath if a

1 certification is actually different than an oath, that
2 just makes this worse, as in Crawford this Court said
3 that it would be implausible that trial by affidavit
4 would be prohibited but trial by unsworn affidavit would
5 be okay.

6 JUSTICE KENNEDY: Do the rules of
7 criminal -- do the rules of criminal procedure in New
8 Mexico say it should be prima facie evidence?

9 MR. FISHER: They say much the same thing.
10 There are -- there are several rules referenced at the
11 bottom that all make this automatically admissible,
12 notwithstanding the hearsay rule to prove the truth of
13 the matter asserted.

14 With respect to Justice Ginsburg's question
15 about retesting, you are exactly right. The State had
16 many choices in the case -- in this case about how to
17 proceed. But if it wanted Mr. Razatos to be its
18 witness, all it had to do was have him do a -- retest it
19 and write a new report and have him be the witness.
20 There is no reason it would have to introduce
21 Mr. Caylor's report then and come up against any State
22 law issue. Mr. Razatos could have been the live
23 witness.

24 CHIEF JUSTICE ROBERTS: Well, it depends on
25 when they do it, of course. I mean, you have the right

1 to look at their evidence presumably so -- so far in
2 advance of trial, whatever, and if they had to get a
3 new -- new technician, that would have to put off the
4 trial --

5 MR. FISHER: And I think that -- I'm sorry.
6 I think that goes to my last point, which is, Justice
7 Breyer, you're talking about States that do this -- I'll
8 combine my answer to these two things. A continuance
9 would have been perfectly -- perfectly appropriate if
10 that scenario had arisen, Mr. Chief Justice, and that's
11 what -- one thing the public -- Public Defender Service
12 brief it talks about 23 -- 26 jurisdictions encompassing
13 23 different States that follow the rule that we're
14 advocating today. And it -- we're not asking for more
15 witnesses. It's important that we're -- this isn't a
16 multiple witness problem, we're just asking for a
17 different witness.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. FISHER: In other words, the State just
20 brought the wrong witness. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 The case is submitted.

23 (Whereupon, at 11:16 a.m., the case in the
24 above-entitled matter was submitted.)

25

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