EFiled: Nov 12 2019 09:51AM EST
Filing ID 64416750
Case Number 520,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAKAI CHAVIS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 520, 2018
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

NICOLE M. WALKER [#4012]
JOHN F. KIRK IV [#5916]
LISA M. SCHWIND [#2821]
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801
(302) 577-5121

Attorneys for Appellant

DATED: November 12, 2019

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I. THE TRIAL COURT DENIED CHAVIS HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN IT ALLOWED THE STATE TO INTRODUCE DNA TEST RESULTS, THE ONLY EVIDENCE LINKING HIM TO THE CRIME OF WHICH HE WAS CONVICTED, WITHOUT THE TESTIMONY OF ALL THE ANALYSTS WHO PARTICIPATED IN THE TESTING.

1. *Crawford v. Washington*[1] And Its Progeny Require This Court To Hold That The Confrontation Clause Entitled Chavis To Be Confronted With All The Testing Analysts Whose Implicit And Explicit Out-Of-Court Testimonial Statements Were Relied Upon And Relayed To The Jury By Sarah Siddons.

The State concedes that Siddons' "statements in the report about the match and probabilities were accusatory."[2] However, it erroneously claims that because she "relied on machine-generated data to draft her report" she was "the only person from Bode who made testimonial statements."[3] This faulty argument ignores the reality of science that, quite frankly, this Court understands.

This Court revealed its understanding in *Martin v. State*. As previously discussed, the testing at issue in that case was gas chromatograph mass spectography. There, Smith, the testifying analyst, explained that:

> if Wert [the non-testifying analyst] properly follows the established protocol, she first notes the samples that are flagged in the laboratory's spreadsheet for confirmatory testing for phencyclidine (PCP). Wert then generates a chain of custody worksheet, retrieves the batch of samples, performs the extractions, places the final products into the machine, allows the machine to run, and processes the

[1] 541 U.S. 36, 51 (2004).
[2] Supp.Resp.Br. at 19.
[3] Supp.Resp.Br. at 5.

> data. Finally, Wert prints out the data for all of the samples into a batch report.[4]

The *Martin* Court then explained that Smith

> received the batch packets including the results from both tests for final certification and review. Smith testified that she did not observe Wert perform the analysis, but instead customarily relied on Wert to follow the standard operating procedure Smith develops and approves as laboratory manager.[5]

Then, Smith, "after reviewing the results in the batch packet, prepared a written report certifying that Martin's blood tested positive for phencyclidine (PCP)."[6]

While the batch reports were not entered into evidence, Smith relied on them in order to certify that Martin's blood contained PCP. As a result, this Court concluded, that the "State introduced the substance of Wert's statements during Smith's testimony. [It] further conclude[d] that Wert's representations and test results comprise[d] the underlying conclusions supporting Smith's report, which also was admitted into evidence."[7] This is precisely our case.

Similarly, following *Williams*,[8] the District of Columbia Court of Appeals, in *Young v. United States*, renewed its previous holdings that "'conclusions of FBI laboratory scientists' who conduct DNA profiling tests are testimonial in nature, as

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[4] 60 A.3d 1100, 1101 n.1 (Del. 2013).
[5] *Id.* at 1101.
[6] *Id.*
[7] *Id.* at 1107.
[8] *Williams v. Illinois*, 567 U.S. 50 (2012).

are the data 'produced by operation of a DNA-typing instrument.'"[9] It explained that "it would 'require an impossible feat of mental gymnastics' to 'disaggregate' [the testifying analyst]'s own non-hearsay conclusions from the interwoven hearsay on which she relied, relaying the results of the DNA testing and analysis performed by other […] lab employees."[10]

Accordingly, in our case, the "machine-generated data" upon which Siddons relied depended on "inputs" of the other analysts in the process.[11] So, those "inputs may well be appropriately characterized as testimonial" hearsay.[12] "[T]he DNA profiles […] do not stand on their own but, instead, have meaning because they amount to a communication by the scientists who produced them—the assertion, essentially, that the scientists generated these specific results by properly performing certain tests and procedures on particular, uncorrupted evidence and correctly recording the outcomes."[13]

The question would be different if Siddons had observed the analysts conducting the tests and then testified or reported about the results. But, that did not

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[9] *Young v. United States*, 63 A.3d 1033, 1047 (D.C. Cir.2013) (*quoting Veney v. United States*, 936 A.2d 811, 831 (D.C.2007) and *Roberts v. United States*, 916 A.2d 922, 938 (D.C.2007) (internal quotation marks omitted)). *See Gardner v. United States*, 999 A.2d 55, 58-59 (D.C. Cir. 2010)).

[10] *Young*, 63A.3d at 1048.

[11] *Id.* at 1046.

[12] *Id.*

[13] *Id.*

happen and Siddons' "independent evaluation" of the data produced by the other analysts is "not enough to satisfy the Confrontation Clause because [it] do[es] not alter the fact that she relayed testimonial hearsay."[14]

The State also makes a misguided argument that Siddons' testimony was properly admitted without the presence of the other analysts because "she could disclose any hearsay statements from the non-testifying technicians to the extent Chavis elicited these statements on cross-examination."[15] However, Siddons' testimony was offered for the truth of the matter. During closing argument, the prosecutor told the jury:

> You heard that analyst testify to that DNA profile, that singular DNA profile, one that she got. So it was the defendant's DNA. The defendant's DNA on her window. [16]

Again, in *Martin*, this Court concluded that, despite the expert nature of the testifying analyst, the non-testifying analyst's representations were admitted for their truth and, thus, fell within the protection of the Confrontation Clause.[17] Further, if counsel elicited any out-of-court statements from Siddons on cross examination, he did so after the Court ruled that the State was not obligated to bring in the other

[14] *Young*, 63A.3d at 1048.
[15] Supp.Resp.Br. at 27.
[16] D-1.
[17] *Martin*, 60 A.3d at 1105.

analysts. In other words, he was working within the confines of the court's order. Finally, to the extent there has been any waiver, it is the State that has waived this "defense" by raising it for the first time in supplemental briefing.

2. No Practical Or Policy Concern Overcomes Chavis' Right To Confront The Testing Analyst Upon Whose Implicit And Explicit Out-Of-Court Testimonial Statements Were Relied Upon And Relayed To The Jury By Sarah Siddons.

The State provides no meaningful challenge to the fact that upholding a defendant's right to confront all testing analysts in a multi-analyst process "promotes accurate forensic analysis." Nor does it provide any meaningful challenge to the fact that upholding a defendant's right to confront all testing analysts in a multi-analyst process prevents the State from unfairly and unreasonably shifting the burden to secure the presence of any adverse witness at trial. Instead, the State baldly asserts Chavis' arguments are "unavailing." The State then sings the refrain of the prosecution often made in response to confrontation claims involving forensic evidence – "requiring analysts to come to court places an undue burden on the prosecution."[18]

[18] Supp.Resp.Br. at 32-36.

In *Bullcoming*[19] and *Melendez-Diaz*,[20] the Court rejected the "undue burden" argument by first noting only a "small fraction of ... cases" actually proceed to trial[21] then quoting *Amici Curiae* as follows:

> [W]hen cases in which forensic analysis has been conducted [do] go to trial, defendants regularly ... [stipulate] to the admission of [the] analysis. [A]s a result, analysts testify in only a very small percentage of cases, for [i]t is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis.[22]

The State also argues that the DNA evidence alone in Chavis' case "provides additional security" for his confrontation right because "the knowledge that defects in a DNA profile may often be detected from the profile itself provides a further safeguard."[23] In other words, DNA testing is so trustworthy, there is no need for confrontation. Yet, one's confrontation rights should not be shoved aside even if a witness, for example, "always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa."[24]

The dissent in *Williams* set forth an example that reveals a flaw in the State's argument. Justice Kagan cited to a case in California where an

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[19] *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).
[20] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).
[21] *Bullcoming*, 564 U.S. at 667 (quotation marks and citation omitted); *Melendez-Diaz*, 557 U.S. at 328) (same)).
[22] *Id.*
[23] Supp.Resp.Br. at 35 (*quoting Williams*, 567 U.S. at 85).
[24] *Melendez-Diaz*, 557 U.S. at 319 n.6.

> analyst had extracted DNA from a bloody sweatshirt found at the crime scene and then compared it to two control samples—one from [the defendant] and one from the victim. The analyst's report identified a single match: As she explained on direct examination, the DNA found on the sweatshirt belonged to [the defendant]. But after undergoing cross-examination, the analyst realized she had made a mortifying error. She took the stand again, but this time to admit that the report listed the victim's control sample as coming from [the defendant], and [the defendant]'s as coming from the victim. So the DNA on the sweatshirt matched not [the defendant], but the victim herself.[25]

The dissent explained that the error would probably not have come to light if the prosecutor had merely "asked a third party to present its findings. Hence the genius of an 18th-century device as applied to 21st-century evidence: Cross-examination of the analyst is especially likely to reveal whether vials have been switched, samples contaminated, tests incompetently run, or results inaccurately recorded."[26]

3. That The Relevant Samples Were Transferred To Rachel Aponte And Feng Chen, Respectively For "Analysis" Confirms That These Two Analysts Were Active Participants In The Testing Of The DNA Sample In Chavis' Case.

The State does not dispute that the definition of the term "analysis," as provided by Chavis, includes a "process of identification and evaluation of

[25] *Williams*, 567 U.S. at 118–19.
[26] *Id.*

biological evidence in criminal matters using DNA technologies;"[27] and "a detailed examination of anything complex in order to understand its nature or to determine its essential features."[28] Instead, it appears to ask this Court to assume that Aponte and Chen "didn't mean it" when they said they signed out the evidence on the chain-of-custody log to conduct "analysis."[29] This, despite Siddons' affidavit indicating that they performed procedures falling within the definition of analysis.[30]

Further, early in its brief, the State noted the following:

> Although 'analyst' and 'technician' may have been used interchangeably in this proceeding, the terms have distinct meanings in the relevant scientific field. For example, the Federal Bureau of Investigation ('FBI') defines ***an 'analyst' as someone who 'conducts and/or directs the analysis of forensic samples, interprets data and reaches conclusions,' while a technician does not.***
>
> […]
>
> Moreover, an analyst must have a degree in certain scientific fields, while a technician must have '[d]ocumented training specific to their job function(s).' [31]

[27]https://www.fbi.gov/file-repository/quality-assurance-standards-for-forensic-dna-testing-laboratories.pdf/view (last visited 9/19/19).
[28]https://www.merriam-webster.com/dictionary/analysis (last visited 9/19/19).
[29] Supp.Resp.Br. at 37.
[30] A41-43.
[31] Supp.Resp.Br. at 3 n.7 (*quoting* FBI, Quality Assurance Standards for Forensic DNA Testing Laboratories, §§ 2, 5.4.1, 5.6.1 https://www.fbi.gov/file-repository/quality-assurance-standards-for-forensic-dnatesting-laboratories.pdf/view, last accessed October 26, 2019) (emphasis added).

Yet, Siddons is the one who referred to the others who participated in the process as analysts.[32] Also, Bode laboratories requires those applying for an entry level position for both a lab technician and a lab analyst to have advanced education, preferably a Master of Science degree in biology, forensics or other natural sciences.[33] Interestingly, at least at the time of the trial, Siddons possessed a Bachelor of Science degree.[34] And, of course, they are all required to "maintain external proficiency and testify in court when needed." Thus, from the record at least, nothing distinguishes the individuals as far as training and/or ability.[35] This begs the question: If, for example, an analyst or technician such as Aponte or Chen, is required to have a Bachelor's degree, and preferably a Master's degree, in science and Siddons has a Bachelor's degree, how is it that one can conclude that Aponte and Chen performed only ministerial functions in this case particularly when all of the analysts have described the functions that they performed in this case as analysis?

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[32] A40

[33]https://www.indeedjobs.com/bodetechnology/jobs/b32150744bbe1cd0e747. (last visited 11/10/19).

[34] A40.

[35] In other words, the DNA technologist position is no less important in the process than a radiologist and lab technician's position is to the diagnosis of cancer. The physician (oncologist) may diagnose cancer, but they are relying on the findings from the radiologist (another physician).

4. While The State Did Provide Chavis With Portions Of The Requested Discovery Related To DNA Testing, The Production Was Incomplete.

Chavis does not dispute the State's factual representation regarding the State's production of DNA discovery and the resolution of his Motion to Compel.

5. The State's Proposed Framework Of "Producing Data" Versus "Preparing Samples" Does Not Adequately Encapsulate Modern DNA Testing, And Even If It Did, That Distinction Does Not Apply To This Case.

It appears the State concedes that there is no distinction between testing analysts who "prepare samples" and those who "produce data" for purposes of determining Chavis' right to confrontation.[36]

6. The Violation Of Chavis' Right To Confront All Of The Testing Analysts In His Case Was Not Harmless Beyond Reasonable Doubt.

The State erroneously claims that any error created by the absence of Aponte, Chen or the other testing analysts was harmless beyond a reasonable doubt because "[t]he Confrontation Clause does not require every individual who handled the evidence to provide live testimony to establish the chain of custody[.]"[37] Instead, the State claims, any gaps go to the weight of the evidence and not its admissibility.[38] This argument is misplaced as it does not address the harm created by the violation of Chavis' right to confrontation, but simply rehashes the State's erroneous argument as to why there was no violation at all.

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[36] Supp.Resp.Br. at 40-41.
[37] *Id.* at 42.
[38] *Id.*

Here, the State concedes that its case relied on DNA evidence and that it would have had insufficient evidence to prosecute Chavis for the burglary without it.[39] Thus, once this Court finds a Confrontation violation based on the preceding arguments, it must find harm as the Court will have necessarily found that the testimony of all of the testing analysts was crucial to the introduction of the State's key evidence.

The State's additional claim is the oft raised challenge to the confrontation clause that a substitute is just as good as the original. However, the testimony of another witness, such as Siddons, regarding the actions or qualifications of the other analysts cannot satisfy a defendant's right to confront and cross-examine the testing analysts.

The absent forensic analysts had knowledge of evidentiary facts from their active participation in the testing process that Siddons did not have. Further, Siddons was unable to provide anything to the jury about the qualifications, credentials, or any certifications the other analysts may have had, and whether those certifications were up-to-date. And, the concurrent exodus of Aponte and Chen from Bode remained a mystery. [40] Thus, in addition to the quality of the technical work

[39] *Id.*
[40] A110.

performed by each of the analysts in this case, the jury was left to speculate as to the professional competence of those performing that work.[41]

The United States Supreme Court has noted that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials." [42] The U.S. Supreme Court has noted time and again that questioning the testing—certifying analyst under oath enables "counsel to raise before a jury questions concerning [the analyst's] proficiency, the care he took in performing his work, and his veracity."[43] Therefore, Chavis was entitled to cross examine the testing analysts in this case.

The *only* evidence that linked Chavis to the crime for which he was convicted was the DNA evidence at issue. He was convicted of only one out of eleven charges, six being alleged burglaries or attempted burglaries. The burglary for which Chavis was convicted was the only one that alleged the presence of DNA evidence. Several other forms of evidence were produced by the State in an attempt to link Chavis to

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[41] As the dissent in *Williams* noted, "[s]cientific testing is "technical," to be sure, […] but it is only as reliable as the people who perform it. That is why a defendant may wish to ask the analyst a variety of questions: How much experience do you have? Have you ever made mistakes in the past? Did you test the right sample? Use the right procedures? Contaminate the sample in any way? Indeed, as scientific evidence plays a larger and larger role in criminal prosecutions, those inquiries will often be the most important in the case." *Williams*, 567 U.S. at 137 (Kagan, J. dissenting).

[42] *Melendez-Diaz*, 557 U.S. at 319.

[43] *Martin*, 60 A.3d at 1103 (*quoting Bullcoming* 564 U.S. at 661-662 n.7).

other burglaries. That evidence, all of which the jury discredited, included surveillance footage, photographs, and cell phone data.[44] Chavis' sole conviction makes clear that the jury was convinced by only one piece of evidence: the DNA. Therefore, it cannot be concluded that any errors in the admission of this evidence was harmless beyond a reasonable doubt.

Because the trial court denied him that right, his conviction must be reversed.

[44] A84–91.

CONCLUSION

For the reasons and upon the authorities cited herein, Chavis' conviction must be reversed.

Respectfully submitted,

/s/ Nicole M. Walker
Nicole M. Walker [#4012]
Carvel State Building
820 North French Street
Wilmington, DE 19801

/s/ John F. Kirk IV
John Kirk [#5916]
Carvel State Building
820 North French Street
Wilmington, DE 19801

/s/ Lisa M. Schwind
Lisa M. Schwind [#2821]
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: November 12, 2019