Order

Michigan Supreme Court
Lansing, Michigan

July 8, 2022

Bridget M. McCormack,
Chief Justice

162211 & (55)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 162211
COA: 350391
Oakland CC: 2019-175232-AR

ALTON FONTENOT, JR.,
Defendant-Appellant.

_____/

On March 3, 2022, the Court heard oral argument on the application for leave to appeal the September 10, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we VACATE Part II(C) of the Court of Appeals opinion and REMAND this case to the 45th District Court for further proceedings not inconsistent with this order.

MRE 803(6) states that otherwise admissible business records may be excluded if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." "[T]he presumed trustworthiness of both the source of information reported and the accuracy with which the information is recorded lies at the heart of the business records hearsay exception . . . ." *Solomon v Shuell*, 435 Mich 104, 116-117 (1990). The Court of Appeals' suggestion that a trial court may not consider whether there are reasons to doubt the trustworthiness of a particular purported business record is without support. Indeed, MRE 803(6) gives the trial court discretion to consider whether any particular circumstances undercut the indicia of trustworthiness that is generally presumed to apply to business records. Though Michigan caselaw construing MRE 803(6)'s trustworthiness component tends to highlight circumstances where the documents' trustworthiness is undermined because the documents are prepared in anticipation of litigation, see *Shuell*, 435 Mich at 126-128; *People v Jambor (On Remand)*, 273 Mich App 477, 482 (2007), we agree with the dissenting judge that "nowhere in MRE 803(6) is there any limitation on the meaning of 'trustworthiness' or specification of how or why a record might lack trustworthiness," *People v Fontenot*, 333 Mich App 528, 540 (2020) (RONAYNE KRAUSE, J., dissenting).

We also disagree with the panel majority's assertion that the trustworthiness of the log is merely "a question of the weight that the fact-finder should give this evidence" and not a question of "whether they are admissible as business records." *Fontenot*, 333 Mich App at 538 (opinion of the Court). Indeed, we already considered and rejected that argument in *Shuell*: "We disagree, however, that, under MRE 803(6), trustworthiness is not also a question of admissibility. As the rule and its theoretical underpinnings indicate, trustworthiness is, under MRE 803(6) . . . an express condition of admissibility." *Shuell*, 435 Mich at 128.

The trial court nevertheless erred by determining that the MRE 803(6) exception did not apply because the DataMaster technician was employed by a contractor rather than directly by the state of Michigan. The lack of a direct employer–employee relationship, without more, does not indicate a lack of trustworthiness. "[I]f the employee preparing the report is under a duty to do so or is aware of his employer's general reliance on the accuracy of the records, a powerful motivation to be accurate is supplied." *Shuell*, 435 Mich at 120. That "powerful motivation" applies to direct and contract employees alike—unless there is evidence that it is lacking in a particular case. We take no position on whether the contractor or contract employee at issue in this case are sufficiently trustworthy to support the admission of the records under MRE 803(6). On remand, the trial court may consider further arguments on the issue of trustworthiness. In all other respects, the application for leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

MCCORMACK, C.J. (*concurring*).

In this drunk-driving case, the prosecution seeks to introduce administrative logs documenting routine testing and inspection of the DataMaster breath-testing machine used to clock the defendant's blood alcohol levels on the afternoon of his arrest. The question is whether the logs are admissible as evidence or whether the prosecution must also offer the technician as a witness at trial.

I concur in the order vacating the Court of Appeals' analysis of the application of MRE 803(6). While the trial court's basis for finding that the business-records exception did not apply was erroneous, I agree that the defendant should be provided another opportunity to argue that this hearsay exception is nonetheless inapplicable in light of unique concerns about the trustworthiness of this particular declarant. Our Court's order denies leave on the separate question of whether a technician's inspection logs of a DataMaster breath-testing machine are testimonial statements that trigger constitutional protections under the Confrontation Clauses, US Const, Am VI; Const 1963, art 1, § 20. By sidestepping that issue, the published Court of Appeals opinion holding that such administrative logs are nontestimonial remains binding on lower courts. The Court of Appeals majority embraced the near-unanimous view of other state and federal courts

that have taken up this question. See, e.g., *State v Hawley*, 149 So 3d 1211 (La 10/15/14); *Commonwealth v Dyarman*, 621 Pa 88, 102 (2013); *People v Pealer*, 20 NY3d 447, 455 (2013); *State v Benson*, 295 Kan 1061, 1067-1068 (2012); *Commonwealth v Zeininger*, 459 Mass 775, 786-787 (2011); *United States v Foster*, 829 F Supp 2d 354, 361-363 (WD Va, 2011); *United States v Forstell*, 656 F Supp 2d 578, 580-581 (ED Va, 2009). And while I concur in our denial on that issue in the absence of further guidance from the United States Supreme Court, I write separately to express some reservations about the consensus that has seemingly emerged that these statements are nontestimonial.

I. THE PRIMARY-PURPOSE TEST

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" Likewise, "[s]ince its birth as a state, Michigan has also afforded a criminal defendant the right to 'be confronted with the witnesses against him,' adopting this language of the federal Confrontation Clause verbatim in every one of our state constitutions." *People v Fackelman*, 489 Mich 515, 525 (2011) (citation omitted).

The modern era of Confrontation Clause jurisprudence begins with *Crawford v Washington*, 541 US 36 (2004). There, the Supreme Court created a dividing line between so-called "testimonial" and "nontestimonial" statements. The Court did not provide a definition for testimonial statements, but it offered some illustrative examples:

> Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. [*Crawford*, 541 US at 51-52 (cleaned up).]

Testimonial statements are protected by the confrontation right and therefore require in-court testimony from the declarant (unless she is unavailable and the defendant had a prior opportunity to question her). Not so for nontestimonial statements. *Crawford* opted to "leave for another day any effort to spell out a comprehensive definition of 'testimonial,' " *id*. at 68, but the nearly two decades of Supreme Court precedent since *Crawford* help flesh out the contours of what makes a statement "testimonial."

Davis v Washington, 547 US 813 (2006), a consolidated case involving statements made by domestic-violence survivors in two separate prosecutions, was the first Supreme Court case to apply *Crawford*'s new framework. In *Davis*, the statements were made in a frantic 911 call in the immediate aftermath of an episode of domestic violence. In the companion case, *Hammon v Indiana*, the statement was elicited during an in-person police interrogation in the declarant's living room, where she discussed the abuse she suffered at the hands of her husband and then completed an affidavit about it. *Id*. at 819. The Supreme Court found the statements in *Davis* to be nontestimonial, while the statements in *Hammon* were.

To differentiate the two, the Court introduced the primary-purpose test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. at 822. Because the 911 caller in *Davis* was alone, without police protection, and "apparently in immediate danger," the Court concluded that she "was seeking aid, not telling a story about the past." *Id*. at 831. The emergency was ongoing. In contrast, the living-room interrogation in *Hammon* was "delivered at some remove in time from the danger she described." *Id*. at 832. The statements were "neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation . . . ." *Id*. In other words, while the *Davis* declarant's primary purpose was to secure police assistance in response to an ongoing emergency, for the *Hammon* declarant, "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime[.]" *Id*. at 830.

The primary-purpose test therefore emerged from two fact patterns involving interrogations of the declarant by law enforcement—one involving police officers and one involving 911 operators acting as agents of law enforcement. See also *Michigan v Bryant*, 562 US 344 (2011) (finding that a gunshot victim's identification of his shooter in response to police questioning was nontestimonial because it was made to help police respond to an ongoing emergency). In a footnote, the *Davis* Court explained that it was unnecessary, at that time, to consider "whether and when statements made to someone other than law enforcement personnel are 'testimonial.' " *Davis*, 547 US at 823 n 2.

Ohio v Clark, 576 US 237 (2015), presented the question that *Davis* saved for another day. There, the interrogation came not from law enforcement but from preschool teachers asking a 3-year-old child about the source of injuries on his body. *Id*. at 241. The child responded that his mother's boyfriend had caused his injuries. *Id*. A child-abuse prosecution followed, and the question for the Court was whether the child's statements to his teachers were testimonial. The Court said no: the child's statements "clearly were not made with the primary purpose of creating evidence for [the

defendant's] prosecution." *Id*. at 246. Rather, the teacher's questions and the child's answers were "primarily aimed at identifying and ending the threat" of an ongoing child-abuse emergency. *Id*. at 247. The objective, in other words, was simply to protect the child. The Court expressly declined to adopt a rule that "statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment" but emphasized that the questioner's identity is still highly relevant to the analysis, because "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id*. at 249.

The Court used the primary-purpose test to evaluate the nature of statements made in response to questioning—regardless of whether the interrogator was a police officer, a 911 operator, or a concerned preschool teacher. That makes sense because in these circumstances, mixed motives abound. The lines can blur easily between statements that "enable police assistance to meet an ongoing emergency" (*Davis*, *Bryant*, *Clark*) and statements that take on a prosecutorial purpose (*Hammon*). The primary-purpose test, which objectively "evaluate[s] the circumstances in which the encounter occurs and the statements and actions of the parties," provides a framework to parse the meaning and purpose of the declarant's statements. *Bryant*, 562 US at 359.

Indeed, our Court has remarked upon the context-dependent use of the primary-purpose test. In *Fackelman*, the majority opinion emphasized how the test makes sense when applied to emergency situations where "there is often ambiguity concerning the objectives or purposes of the declarant's utterances." *Fackelman*, 489 Mich at 559. But we also described the test as "largely irrelevant" in more mundane circumstances, where it is difficult to imagine a statement taking on alternative purposes. *Id*.

The *Fackelman* Court's observation is salient because, of course, not every Confrontation Clause fact pattern comes from the heated context of time-sensitive emergencies like police questioning or dying declarations of gunshot victims. Sometimes, the statement comes from the cold remove of a scientific forensic report or, as in this case, the banal entries of a technician's log.

II. THE PRIMARY-PURPOSE TEST AND FORENSIC REPORTS

The *Fackelman* Court's reluctance to apply the primary-purpose test outside the context of emergency situations was consistent with United States Supreme Court precedent at the time. In *Melendez-Diaz v Massachusetts*, 557 US 305 (2009), the challenged statements were notarized certificates, signed by forensic analysts, that the material seized by police was cocaine. There was no emergency, and the Court never applied the primary-purpose test. The *Melendez-Diaz* Court instead looked to *Crawford*'s articulation of the " 'core class of testimonial statements' " and its two references to "affidavits." *Id*. at 310, quoting *Crawford*, 541 US at 51. The Court saw a

parallel: though described as "certificates," the documents were functionally equivalent to affidavits: " 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.' " *Melendez-Diaz*, 557 US at 310, quoting *Black's Law Dictionary* (8th ed). The certificates stated that the substance was cocaine. Had the analyst testified at trial, they would have told the jury the exact same thing. The certificates were functionally identical to live, in-court testimony. And it's not as if the analysts would be surprised to learn that their reports were being used for an evidentiary purpose; indeed, "that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves." *Melendez-Diaz*, 557 US at 311.

In *Bullcoming v New Mexico*, 564 US 647 (2011), the Court considered a forensic laboratory report certifying that the defendant's blood alcohol levels were well above the legal threshold. The Court again found the report to be testimonial; *Melendez-Diaz* left no room for a contrary finding. *Id*. at 663-665. It was a document created solely for an "evidentiary purpose" and produced to aid a police investigation. *Id*. at 664. The primary-purpose test was only referenced in a footnote and a partial concurring opinion from Justice Sotomayor emphasizing that the state never suggested that the laboratory report certification had an alternative purpose; it was instead clearly meant to create an out-of-court substitute for trial testimony. *Id*. at 659 n 6; *id*. at 668 (Sotomayor, J., concurring in part).

III. *WILLIAMS*, *NUNLEY*, AND THE "TARGETED INDIVIDUAL TEST"

And then to *Williams v Illinois*, 567 US 50 (2012). Like *Melendez-Diaz* and *Bullcoming*, the contested statement was a forensic report. In this rape prosecution, a private DNA-testing company analyzed a vaginal swab to create a DNA profile, which prosecutors were then able to match to the defendant using a state database. None of the analysts from the private lab testified at trial, nor was the report entered into evidence. The prosecution instead offered a DNA expert, who testified that the DNA analysis confirmed a match between the defendant and the sample. On cross-examination, the analyst acknowledged that she had not conducted or observed any of the testing in this case but that she trusted the private lab's reliability.

What resulted was a fractured opinion that lower courts have struggled to interpret for a decade. See *Stuart v Alabama*, 586 US ___, ___; 139 S Ct 36, 36 (2018) (Gorsuch, J., dissenting from the denial of certiorari) ("This Court's most recent foray in this field, *Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), yielded no majority and its various opinions have sown confusion in courts across the country."). Writing for a four-justice plurality, Justice Alito explained that the primary purpose of the DNA analysis "was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time." *Williams*, 567 US at 84. The opinion applied a new formulation of the primary-purpose test to ask whether the report was "prepared for the primary purpose of

accusing a targeted individual." *Id*. at 84 (emphasis added). The plurality's reformulation of the test was not lost on the four-justice dissent, which puzzled over the new requirements that the statement must be accusatory and directed at a previously identified person to be testimonial. Noting that such a test had no basis in precedent, the dissenting justices explained that while the Court's cases had "previously asked whether a statement was made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution'—in other words, for the purpose of providing evidence," there had never before been a suggestion of a "targeted individual" requirement. *Id*. at 135 (Kagan, J., dissenting) (citation omitted). In the context of highly technical laboratory work, the fear is not that a researcher might carry a personal vendetta against a particular defendant, but rather that "careless or incompetent work" may go unchallenged. *Id*. Given that, "it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect." *Id*. at 136.

In an opinion concurring only in the judgment, Justice Thomas shared the dissenters' distaste for the plurality's new test, finding that it "lacks any grounding in constitutional text, in history, or in logic." *Id*. at 114 (Thomas, J., concurring in the judgment). All in all, five Supreme Court justices rejected the formulation of the primary-purpose test proposed by four justices.

In the aftermath of *Williams*, the proper formulation of the primary-purpose test is unclear.[1] Is it necessary for a suspect to have already been "targeted" for a declarant's statement to be sufficiently prosecutorial to trigger Confrontation Clause concerns? If so, the defendant in this case is out of luck; the technician's logs were completed months before the alleged drunk-driving incident and necessarily months before the defendant was ever a "targeted individual." But given that a majority of Supreme Court justices rejected Justice Alito's formulation in *Williams*, I don't think it should be applied here.

The Court of Appeals' panel saw things differently. It said that in *People v Nunley*, 491 Mich 686 (2012), this Court had already adopted the *Williams* plurality's primary-purpose test. See *People v Fontenot*, 333 Mich App 528, 534-535 (2020). I disagree. In *Nunley*, which was issued about three weeks after *Williams*, this Court considered whether a certificate of mailing asserting that the Michigan Department of State had mailed a notice to the defendant that his driver's license had been suspended was testimonial. *Nunley*, 491 Mich at 689. We held that it was not testimonial "because the circumstances under which it is generated would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*.

[1] And given the limited or nonexistent application of any variation of the primary-purpose test in *Melendez-Diaz* and *Bullcoming*, a threshold ambiguity arguably remains about whether the primary-purpose test (in any form) should be applied to statements in forensic reports.

While the opinion summarized the plurality, concurring, and dissenting opinions from *Williams*, it did not adopt any of them. *Id*. at 702-704. Instead, in a footnote, we explained that "our analysis is consistent with the reasoning of both the lead opinion and the dissenting opinion from the United States Supreme Court's recent plurality decision in *Williams*." *Id*. at 710 n 77.

The Court of Appeals' conclusion, then, that the DataMaster logs were nontestimonial, in part, because "they were not created for the purpose of prosecuting defendant specifically," *Fontenot*, 333 Mich App at 535, relies on reasoning rejected by a majority of the United States Supreme Court and never formally adopted by this Court.

IV. DATAMASTER LOGS AS TESTIMONIAL EVIDENCE

While I am not persuaded by Justice Alito's formulation of the "primary purpose" test in *Williams* and the Court of Appeals' embrace of it below, the defendant faces strong headwinds. First, while the *Nunley* Court may not have formally adopted the *Williams* plurality's primary-purpose-test formulation, it did rely heavily on the fact that the certificate of mailing was generated *before* the charged crime could be committed. *Nunley*, 491 Mich at 707. "At the time the certificate was created, there was no expectation that defendant would violate the law by driving with a revoked driver's license and therefore no indication that a later trial would even occur." *Id*. at 709. Unlike *Crawford* and its progeny, the evidence at issue was not prepared as a result of a criminal investigation or created after the commission of the crime. That distinction, we wrote, "makes 'all the difference in the world' . . . ." *Id*. at 709-710, quoting *Melendez-Diaz*, 557 US at 322. The prosecution urges us to apply that reasoning here, where the inspection logs were necessarily completed before the defendant was accused of driving while intoxicated.

Second, *Melendez-Diaz* includes a footnote clarifying that "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the . . . accuracy of the testing device, must appear in person as part of the prosecution's case. . . . Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." *Melendez-Diaz*, 557 US at 311 n 1. That footnote responded to the dissenting opinion, which expressed the concern that the majority's reasoning would be applied broadly to precisely the type of testing-device-accuracy logs at issue in this case.

Third, Mich Admin Code, R 325.2654(2) requires routine inspections of the DataMaster machines and imposes a duty to maintain administrative records of those calibration checks like the one at issue here. As the Court of Appeals explained, "Although the DataMaster logs are occasionally presented at trials, they are not prepared for the purpose of litigation, but rather, because the administrative regulations require the keeping of such logs." *Fontenot*, 333 Mich App at 537.

In my view, none of these arguments is dispositive. *Nunley* is distinguishable as a certificate of mailing—mechanically generated to establish that a letter had been sent—is fundamentally different than a technician's calibration-log entry indicating that a complex piece of machinery produces reliable data. I agree with the *Nunley* Court that the certificate of mailing was not generated under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. But the same can't be said for a technician's entry into an inspection log that is designed, at least in part, for ensuring the reliability of the tests for the purpose of future prosecutions. A certificate of mailing might not find its way into a prosecution, but breath-test-machine-inspection logs routinely do. Like the certificates in *Melendez-Diaz*, the logs here were "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Melendez-Diaz*, 557 US at 310 (quotation marks and citation omitted). I suspect that the *Nunley* Court did not anticipate this particular factual pattern, in which a statement could be made before the commission of a crime but still be made with a prosecutorial purpose in mind.

And the *Melendez-Diaz* footnote doesn't add much. It supports the prosecution's view in a general way, but it provides only persuasive authority. As for Mich Admin Code, R 325.2654(2), I agree with the dissenting judge in the Court of Appeals, who noted that the underlying purpose of the administrative rule should matter: it "is for the purpose of using the tests in prosecutions. It cannot be overemphasized that the 120-day test logs do not simply show that a test was administered, but rather that a test was properly administered, which in turn is of direct relevance to the reliability and thus admissibility of the test." *Fontenot*, 333 Mich App at 541 (RONAYNE KRAUSE, J., dissenting) (emphasis omitted).

Rather than applying the *Williams* plurality's formulation of the primary-purpose test, I would instead—like the *Melendez-Diaz* Court—look to *Crawford*'s articulation of the core class of testimonial statements and consider how the technician's logs in this case line up with "material such as affidavits . . . or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . ." *Crawford*, 541 US at 51 (quotation marks and citation omitted). In other words, were the technician's log entries "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"? *Id.* at 52 (quotation marks and citation omitted). It certainly seems like it. The logs were kept for the purpose of litigation—to directly establish key facts relevant and necessary to prosecute defendants for driving while intoxicated.

And like the report in *Melendez-Diaz*, which had the relevant state-law provision reprinted on the certificate itself, the logs here expressly stated how failure to comply with the relevant Michigan Administrative Rule "may result in breath alcohol analysis results being inadmissible in court or other proceedings." It's difficult for me to imagine

how an objective witness could view entries into the log without believing that those entries would be available for use at a later trial.

Despite my reservations about the Court of Appeals' constitutional analysis, I concur with this Court's denial of leave on that question. Future Confrontation Clause challenges to testimonial logs or reports serving similar functions may well bring additional clarity to this set of questions. But this area of Confrontation Clause jurisprudence remains unsettled, and absent further guidance from the United States Supreme Court, I cannot conclude that the panel majority's analysis was clearly erroneous. Though I would caution lower courts against automatic application of the *Williams* plurality's "targeted individual" test, I nonetheless concur.

BERNSTEIN, J., joins the statement of MCCORMACK, C.J.