

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE MITCHELL,
Petitioner,

-v-

UNITED STATES OF AMERICA,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Mr. Seth Kretzer
440 Louisiana Street, Suite 1440
Houston TX 77002

Phone: 713-775-3050 (direct)
Fax: 713-929-2019 (fax)
seth@kretzerfirm.com

Appointed CJA Counsel of
Record for Petitioner

QUESTION PRESENTED

- 1) Whether law enforcement (lay) testimonies about the narcotics character of certain substances may be shined with the expert testimonial gloss of unproduced lab reports in violation of (and indeed an end run around) *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011)?

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Petitioner Mitchell asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The September 11, 2018, opinion of the U.S. Court of Appeals for the First Circuit appears in Appendix A. *United States v. Ocean* 904 (1st Cir. 2018).

JURISDICTION

The First Circuit Court of Appeals rendered its decision September 11, 2018. This petition is timely filed. The Supreme Court has certiorari jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals possessed jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3771(d)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; ***to be confronted with the witnesses against him;...***

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

STATEMENT OF THE CASE

An Indictment filed February 12, 2015 charged Jermaine Mitchell (and co-defendant Ocean) with narcotics conspiracy, more specifically alleging that he participated in a conspiracy to distribute 280 grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1).

Ocean and Mitchell began trial on June 20, 2016. The jury convicted.

STATEMENT OF FACTS

A. Trooper Brian Gacek

Trooper Brian Gacek that on December 28, 2011, he stopped a car for a lane change violation being driven by one Adam Brooks in which Mitchell was sitting in the front passenger seat. Vol.3.578. After getting a search warrant, the impounded car was found to contain in its back-seat sandwich bags with yellowish white substances. Over Mitchell's objection, Vol.3.580-83, Gacek volunteered that

“based on my training and experience, I believe it was crack cocaine.” A picture of this was introduced as Exhibit 36.

On cross-examination, Gacek conceded that this contraband was sent to a lab, “all evidence that we seize for drug cases that require analysis get sent to the state lab”, Vol.3.587, but that he “did not have a copy of that lab report.” *Id.* At 588.

B. Officer Scott Quintero

Maine State Police Officer Scott Quintero testified that on August 29, 2013, he was working at a Portland bus terminal on the lookout for suspicious activity he engaged Mitchell in conversation and Mitchell volunteered that he had some marijuana. Vol.4.149. After being *Mirandized*, Mitchell also took from his pocket a small rock that Quintero believed to be crack cocaine.

Similar to the objection to Officer Gacek, the defense objected that no lab report had ever been done to corroborate Quintero’s assumption as to what the substance was. Vol.4.855-856.

A bag of crack was found by Mitchell’s feet. Vol.4.858; Gov’t Ex.24.

ARGUMENT

A. First Circuit's *Ratio Decidendi* Was Not Well Reasoned

The First Circuit resolved Mitchell's evidential/Confrontation Clause arguments as follows:

Mitchell argues that because the officers testified that they had seen lab reports, the implication was that the lab reports confirmed the presence of cocaine base. This inference "bronzed" the testimony of the lay law enforcement witnesses with an impermissible expert-witness gloss, according to Mitchell.

904 F.3d, at 38.

[A]s Mitchell concedes, the identification of a substance as a drug may be based upon the opinion of a knowledgeable lay person. *United States v. Walters*, 904 F.2d 765, 770 (1st Cir. 1990) ("Proof based on scientific analysis or expert testimony is not required to prove the illicit nature of a substance, and identification of a substance as a drug may be based on the opinion of a knowledgeable lay person."); *United States v. Paiva*, 892 F.2d 148, 155-57 (1st Cir. 1989) (finding a drug user competent to give a lay witness opinion that a particular substance perceived by her was a particular drug, based on her own experience or knowledge). Mitchell is not contending on appeal that allowing the officers to testify based on their experience and training that they believed the substance was crack cocaine was error, but rather that the references to lab reports -- invited, we note, by the defense -- inappropriately bolstered the testimony. There was ample evidence that the substance seized by each law enforcement witness was crack cocaine. A witness testified that they were carrying crack cocaine when they were stopped by Trooper Gacek in New Hampshire. And Detective Quintero testified that Mitchell himself admitted that the substance seized from him was crack cocaine. In light of the significant evidence already in the record, the incremental effect of the references to laboratory reports (without even stating the results contained in the reports) did not affect Mitchell's substantial rights or seriously impair the fairness of the proceeding. Mitchell fails to demonstrate error, let alone plain error.

Id. at 39.

B. Baseline Legal Principles

Mitchell's argument begins with a simple tautology: the government cannot introduce a report created to serve as evidence for a criminal proceeding without making the author of the report available for cross examination. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009) (finding a forensic lab report testimonial and so requiring testimony from a witness competent to testify to the truth of the report's statement to admit the report); *see also Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011) (under the Confrontation Clause, a lab report stating defendant's blood alcohol concentration could be admitted only with testimony from analyst who performed, observed, or certified report, unless that person was unavailable and the defendant had the opportunity to cross-examine her before the trial).

C. Application to Mitchell's Trial

One drug addict after another testified that Mitchell gave them drugs. But all of these witnesses were highly susceptible to cross-examination because their inveterate drug use impeded their memories. When it came to police officers, however, this avenue of cross-examination attack was not available. Because the

officers had seen lab tests about the very substances there were testifying about, their lay testimonies were bronzed with an impermissible expert-witness gloss.

D. Mitchell Presents A Cutting-edge Issue in Legal Scholarship

Mitchell humbly submits that his case presents the ideal vehicle to address a cutting-edge issue in legal scholarship. *See Charles Alan Wright et al., A Harbinger—Of What?: Bullcoming v. New Mexico*, 30A FED. PRAC. & PROC. EVID. § 6371.6 (1st ed.); Jesse Jordan, *Who Can Testify About Lab Results after Melendez-Diaz and Bullcoming?: Surrogate Testimony and the Confrontation Clause*, 38 AM. J. CRIM. L. 375 (2011).

CONCLUSION

Mitchell respectfully asks the Court to grant a writ of certiorari.

Respectfully submitted this 10th day of December, 2018.

By: 
Seth Kretzer
Member, Supreme Court Bar

LAW OFFICE OF SETH KRETZER
440 Louisiana Street, Suite 1440
Houston TX 77002
Phone: 713-775-3050
Fax: 713-929-2019
seth@kretzerfirm.com

Appointed CJA Counsel of Record for
Petitioner Mitchell

CERTIFICATE OF MAILING

I hereby certify that, on the 10th day of December 2018, this pleading was served on the Court via mail courier.



Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that, on the 10th day of December 2018, a true and correct copy of this petition and appendices was mailed by first-class U.S. mail to:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave., N.W.; Room 5616
Washington, DC 20530-0001

Further, I certify that I one copy of the foregoing petition was delivered to Jermaine Mitchell; , via U.S. Mail:

FCI FORT DIX
P.O. BOX 2000
JOINT BASE MDL, NJ 08640



Seth Kretzer