No._____

In The
Supreme Court of The United States

October Term 2018

UNITED STATES OF AMERICA
Respondent,

V.

ROSSAHN BLACK
Petitioner,

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ROSSAHN BLACK
Petitioner
Reg. No. 44054-039
USP-Florence High
P.O. BOX 7000
Florence, Colorado 81226

QUESTIONS PRESENTED

I. Whether this Court's decision in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009) and Bullcoming v. New Mexico, 564 U.S. 647, 131 S.Ct. 2705 (2011), created a bright line rule excluding the testimony of an individual regarding the results or subject of a test or analysis, other than the person who administered the test and authored the report or opinion on the subject.

II. Whether the Ninth Circuit's use of an individual's testimony involving the the results of or subject of an analysis or report andministered and authored by another person.

LIST OF PARTIES

All parties in the caption of the case, on the cover page, are the parties involved in this matter.

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OPINION BELOW

The Opinion and Judgement of the United States District Court for the Eastern District of Michigan, and the Sixth Circuit Court of Appeals' affirmance of the District Court Opinion and Judgement, in its Order denying Petitioner's Motion for Rehearing En Banc.

BASIS OF JURISDICTION IN THIS COURT

The Opinion and Judgement of the U.S. District Court was filed on January 31, 2017, and the Sixth Cicuit's order affirming the District Court's Opinion, via its denial of Petitioner's Motion for Rehearing En banc, was filed on April 18, 2018. This instant petition is being filed within ninety (90) days of this latter date as required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The indictment upon which the Petitioner was tried stated offenses against the United States, as defined in Title 21, United states Code. The trial court had subject matter jurisdiction over the proceedings under 18 U.S.C. § 3231. A timely noctice of Appeal from the Judgement of Conviction and Sentence entered by the trial court was filed, and the Court of appeals was thereby vested with appellate jurisdiction under the provisions of 28 U.S.C. § 1291.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The right of the people to confront his or her accuser, in an adversarial proceeding, is fundamental and guaranteed under the Sixth Amendment (VI).

No person should suffer adversely as a result of the application of a law or proceeding, without first enjoying notice thereof and the proper application

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1 The Opinions Below can be found in the Appendix attached hereto, at Exhibits 1 and 2 respectively. Petitioner's Petition for Rehearing En Banc can be found at Exhibit 3, hereto.

and process of the law and proceeding, pursuant to the right, guarantee and protection of the Fifth Amendment (V).

STATEMENT OF THE CASE

The Petitioner, Rossahn Black, was found guilty by a jury, following an eight-day trial in May and June of 2012, of three counts of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g), and the district court sentenced petitioner to 252 months imprisonment.

At trial, the Petitioner presented an insanity defense and the district court ordered forensic evaluations of the Petitioner, not only to determine Petitioner's sanity at the time of his crimes, but his competency to stand trial for the crimes at subject. The district court's order specified that the examination/analysis be conducted by a licensed psychiatrist and/or psychologist.

Thus, Petitioner's (the defense's) examiner was Dr. Wendt (Ph.D), a licensed, forensic mental health expert. Dr. Wendt examined and evaluated the Petitioner himself, and at the conclusion, submitted his report/analysis that Petitioner was incompetent to stand trial, as well, was not responsible for his conduct for the crime/offense the subject of the mental examination. The Government's examiner, was its own Doctor employed with the Federal Bureau of Prisons, Dr. Nieberding, who was also licensed. However, Dr. Nieberding did not himself examine or evaluate the Petitioner for competency or insanity, but delegated the the duty to Lisa Forrester, an unlicensed mental health student under Dr. Nieberding's tutelage, but who was not supervised during her examination of Petitioner, and who presented a resulting report/analysis opining that Petitioner was competent to stand trial and, as well, was not insane at the time of the crime; that is, unable to appreciate right from wrong.

The district court, relying on Ms. Forrester's report/analysis, concluded

at a pretrial hearing that Petitioner was competent to stand trial. And subsequently, during trial, Dr. Nieberding was alllowed to testify, in place of Ms. Forrester, concerning the subject of Petitioner's mental state (sanity) at the time of the offense for which he was being tried, although the court expressed hesitation at allowing Dr. Nieberding's testimony in view of Ms. Forrester having been Petitioner's actual examiner, the author of the resulting report/analysis, and who was not licensed. When asked by the court if it was proper and/or ethical for Lisa Forrester, an unlicensed student, to have examined the Petitioner and not then be available for testimony, Dr. Nieberding responded that he did not know, but that it was "a common practice." Dr. Nieberding's adverse testimony, all the same, was allowed.

REASONS FOR GRANTING THE WRIT

I. The District Court and Court of Appeals failed to apply Melendez-Diaz v. Massachsetts, 557 U.S. 305 (2009) and Bullcoming v. New Mexico, 564 U.S. 647 (2011), exclusion rule as a result of Lisa Forrester's Examination and Report, but Dr. Wendt's substituted appearance and testimony relating to the the subject of the Examination and report of Forrester.

In his post conviction motion, pursuant to Title 28 U.S.C. § 2255, the Petitioner alleged that his due process rights, related to Melendez-Diaz v. Massachussets, 557 U.S. 355 (2009); Bullcoming v. New Mexico, 564 U.S. 647 (2011); and earlier progenies, including Pate v. Robinson, 383 U.S. 375 (1975); Drope v. Missouri, 420 U.S. 162 (1975), were violated--and defense counsel ineffective for failing to object and preserve the issue--when Lisa Forrester was allowed to examine the Petitioner and present a report/analysis, although she was not a licensed Doctor, per the court's order, and did not appear at trial for testimony and confrontation/cross-examination by Petitioner, but was instead replaced at trial (and at the pretrial competency hearing) by Dr. Nieberding, who gave

adverse testimony on the subject of Petitioner's competency to stand trial and his sanity at the time of the crime/offense, as a result of Ms. Forrester's examination and report/analysis.

In denying Petitioner's claim, the district court acknowledged that it did question Dr. Nieberding on this point at trial, whereby eliciting his acknowledgement that the accuracy of the test results depends to some extent on the skill of the individual administering the test. (See Appendix Exhibit 1, at page 7). The district court also acknowledged Petitioner's Melendez-Diaz v. Massachusetts and Bullcoming v. New Mexico challenge to Lisa Forrester's examination and report and Dr. Nieberding's substitution for her, and adverse testimony at trial. (Id. at 7-8). However, the district court reasoned that 1) "to the extent that Petitioner complains of the admission of Dr. Nieberding's testimony at a a pretrial competency hearing and the court's reliance on this testimony to determine that Petitioner was competent to stand trial, it is debatable whether the Sixth Amendment applies in pretrial competency hearings, and 2) "the Supreme Court's recent Confrontation Clause rulings do not resolve the question whether a supervisor may testify at trial regarding the results of a test performed by another employee under his supervision."

First, this Court made it unequivocally clear, in both Melendez-Diaz and Bullcoming, that the right to confrontation, the right to confront ones accuser(s) at trial, is absolute, where the testimony is material (that is, testimonial in nature), and that right is or should be clear to all, after Melendez-Diaz and Bullcoming, that the right to confront ones accuser "under circumstances which would lead an objective witness reasonably to believe that they were made for use in a criminal trial (Mendez-Diaz, 174 L.Ed.2d 314-15) or "to prove a fact at [defendant]'s criminal trial." Bullcoming, 180 L.Ed.2d 610-11. And such circumstances include any judicial proceedings and/or forums, and certainly a

pretrial hearing to determine a defendant's competency to stand trial on the crime(s), or whether he was sane (responsible for his acts) at the time of the crime(s). Thus, although this Court did not specifically spell-out what particular circumstances or proceeding in which the accused's right to confront his accuser or witness against him is guaranteed, the due process clause of the Constitution makes such an answer axiomatic, and not openly debatable as the district court here contended. (Appx.; Exh. 1, Id. at page 8). And its [district court's] citation to several decisions, including this Court's decision in Kentucky v. Stincer, 482 U.S. 730 (1987), is misplaced.

Second, whether the substituted testifying party was a coworker, underling, student, or supervisor of the actual individual who performed the test/examination and signed the certificate, and regardless of how close or related the substitute is to the nontestifying individual who performed the test and signed the certficate, this Court made no exceptions to an accused's right to confront the individual actually performed the test and signed the certificate/affidavat. Indeed, this Court, in Bullcoming, made clear that the testimony of the substitute drug analyst, who did not perform or observe the reported drug test did not satisfy the right to confrontation, although an employee and coworker in the laboratory. Id. at 611. Thus here, the district court's reliance on Dr. Nieberding being a supervisor and coworker in the laboratory with the unlicensed student, Lisa Forrester, was error and contrary to this Court's holding and the settled law, especially where Dr. Nieberding did not represent that he even observed Ms. Forrester perform the test. (Appx.; Exh. 1, at page 8). To be sure, Dr. Nieberdment never represented that Dr. Nieberding observed Ms. Forrester during her examination of the Petitioner nor that he knew what Ms. Forrester knew or observed herself in reaching her conclusions concerning Petitioner's mental health, one of the concerns of this Court, in Bullcoming. Id. at 611.

II. The District Court and the Court of Appeals failed to observe Petitioner's Due process Right to Confront Lisa Forrester, the Unlicensed Student, who conducted Petitioner's "Competency to Stand Trial" and "Sanity at the Time of the Crime" tests/examination, and who authored and signed the resulting Report, Certification, and/or Affidavit.

Here, it is a simple and straight forward infringement of a constitutional right as it gets. Under Bullcoming and Melendez-Diaz, this Court cleared up any ambiguity or guesswork as to when and where and under what circumstances a defendant shall enjoy the right to confront/cross-examine his accuser or adversarial witness, and in any judicial proceeding or forum where jeopardy has attached and the accusatory witness(es) testimony and/or authored report, certificate, or affidavit is material to proving or disproving a fact adversely to the defendant, the Court's holdings made clear that the defendant shall have that right of process. Here, however, the district court and the Court of Appeals failed to observe this most fundamental right in denying Petitioner the opportunity to confront and cross-examine Ms. Forrester, to challenge her knowledge (of the testing and examination process and applications), her experience with mental health testing and examinations, the specific testing technique and process she employed, the reasoning and scientific support in her conclusions (certificate, report, affidavit), and her credibility, all of which contradicted and adversely affected Petitioner's mental health defense.

CONCLUSION

Because the district court, and the Sixth Circuit's affirmance, clearly failed to recognized and interpret, and thus apply this Court's holdings and the law in Bullcoming and Melendez-Diaz, certiorari should be granted to clarify for the Sixth Circuit and others similarily denying an accused his due process right to confront his accuser or adverse witness simply because the circumstances or proceedings may be some other criminal (pretrial) judicial

proceeding, in which adversarial testimony is taken, other than trial and/or where the adverse witness or testifying individual is closely related to the nontestifying party who performed the test and signed the certificate.

Respectfully submitted,

Rossahn Black

Rossahn Black
Petitioner
Reg. No. 44054-039
USP-Florence High
Florence, CO 81226

PROOF OF SERVICE

Petitioner, Rossahn Black, affirm and state:

That on June 3rd, 2018, a copy of this foregoing petition for Writ of Certiorari was served upon the Office of the Solicitor general of the United States, via first-class mail, postage prepaid, at the Department of Justice, Washington, D.C. 20530.

I CERTIFY, under penalty of perjury of the United States Criminal Code, that the stated mailing and service represented herein, is true and correct.

Dated: June 3, 2018.

Rossahn Black

Rossahn Black
Reg. No. 44054-039