With Cert Denials, Hope Fades for Clarification on Use of Substitute Analysts

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Categories : Evidence, Procedure, Uncategorized

Tagged as : confrontation clause, crawford, substitute analyst, supreme court

Date : June 4, 2014

Mumford & Sons has a song called Hopeless Wanderer. When it comes to substitute analysts and the confrontation clause, that song title sums me up, and maybe you as well.

Anyone who practices criminal law knows that Confrontation Clause issues have been a big deal ever since the United States Supreme Court handed down its regime changing *Crawford* decision in 2004. Crawford v. Washington, 541 U.S. 36 (2004). For prosecutors, another hammer came down in 2009 when the Court said, in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009), that forensic reports were testimonial and covered by the new *Crawford* rule. Since then prosecutors have tried a variety of techniques for introducing forensic reports when the preparing analyst isn't available for trial, with the most common being use of a substitute analyst. While we hoped for a definitive ruling on the constitutionality of that practice when the Supreme Court took up the *Williams* case, the Court stuck a big fat pin in our hope balloon when it finally issued its decision. As I discuss in detail here, while the decision affirmed a conviction involving use of a substitute analyst at trial, *Williams* was a fractured opinion in which no rationale garnered five votes. Williams v. Illinois, __ U.S. __, 132 S.Ct. 2221 (2012). It thus left judges and litigants largely in the dark about the constitutionality of substitute analyst testimony. As I explain here, in July of 2013, the North Carolina Supreme Court issued several post-*Williams* decisions. Those decisions gave the OK to substitute analyst testimony, provided the expert testifies to an independent opinion based on information reasonably relied upon by experts in the field. Cert petitions were filed in two of those cases, and in ten others from around the country dealing with similar issues. Sadly for us, the United States Supreme Court recently denied cert in all but one of those cases. They include:

- Arauz v. California (No. 13-9118)
- Brewington v. North Carolina (No. 13-504)
- Edwards v. California (No. 13-8618)
- Galloway v. Mississippi (No. 13-761)
- Marshall v. Colorado (No. 13-7768)
- Maxwell v. United States (No. 13-7394)
- Ortiz-Zape v. North Carolina (No. 13-633)
- Turner v. United States (No. 13-127)
- Walker v. Wisconsin (No. 13-8743)
- Williams v. Massachusetts (No. 13-9330)
- Yohe v. Pennsylvania (No. 13-885)

A conference on the one remaining case--Derr v. Maryland (No. 13-637)--is set for June 5th. The question presented in that case is:

Whether the Sixth Amendment permits the State's expert witness to present to a jury the results of forensic tests that she neither performed nor witnessed as substantive evidence to support her conclusion that Petitioner was the source of DNA evidence, when the State does not call the analysts who performed the tests as witnesses or show that they are unavailable and previously subject to cross-examination?

Maybe we'll get lucky and the Court will grant cert in *Derr.* But hope seems to be fading that we'll get clarification soon. Meanwhile, prosecutors, courts and legislatures continue to struggle with pressures created by *Melendez-Diaz.* Just one example of how they're struggling to deal with this is the recent bill introduced in North Carolina that would enact a notice and demand statute for remote testimony by forensic analysts. If you're interested, the bill is here. And my paper on the constitutionality of remote testimony generally is here.

Stay tuned. I'll keep you updated as things develop.