



by
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On a bright, clear, overcast, rainy Thursday morning, deep in the cold, black heart of the Nineteenth Judicial Circuit, Sober Joe Worktruck-driver hustled his company-issued truck down King's Highway, just west of Port Fierce, noticing the Flying J truck stop to his left. As he passed the Flying J at 50 miles an hour, in line with the posted speed limit, a car pulled out of the truck stop directly into his path. Sober Joe swerved to his left, temporarily leaving his lane, neatly avoiding an unscheduled meeting with the driver of the now-lucky car that some later called The Phantom.

Hapless Mary Victimwrittenall-overher was having a bad day already. Her EverReady bunny of a child, sitting in the back seat of her victimmobile, would just not shut up. Yack, yack, yack. Blah, blah, blah. Yada, yada, yada.

Hapless Mary's day was about to get worse. As she approached King's Highway from the east, she needed to turn left toward Florida's Turnpike. Perhaps distracted by Satan's Spawn

whining behind her, Hapless Mary turned right instead.

Unfortunately for Hapless Mary, Sober Joe had borrowed her lane. The chemistry between them was immediate. Well, sparks flew, anyway. Debris flew, too.

The Phantom never slowed, much less stopped. Perhaps he did not even notice.

Deputy Fairchild (not his real name) did notice, at least, he did after he was dispatched to the scene. He noticed, particularly, what was not there. He noticed no skid marks, and no witnesses, except for Sober Joe and Hapless Mary. He also noticed no odor of alcohol on Sober Joe's breath.

Although Sober Joe had no apparent injuries, Deputy Fairchild, whose first name was "Completely," chose not to ask Sober Joe to participate in the field sobriety ballet. He thought that would not be fair, because Sober Joe may have had a concussion. Certain that he lacked probable cause to arrest Sober Joe, Deputy Completely Fairchild instead asked him to voluntarily go to the hospital and submit to a blood test. He even let Sober Joe drive himself there.

Deputy Fairchild sent the blood samples to Worstoff Laboratories. Eventually, the lab confirmed that Sober Joe had absolutely no alcohol at all in his

blood. (Frank Sinatra once said, "I feel sorry for people who don't drink. When they wake up in the morning, that's as good as they are going to feel all day.")

The lab did report that Sober Joe's blood tested positive for methadone and morphine, in amounts "greater than therapeutic levels for non-tolerant users."

In a shocking turn of events, Deputy Completely Fairchild obtained a warrant charging Sober Joe with DUI. On his behalf, I denied the allegation, and sought to defy the alligator.

Eventually, a jury trial began.

True to his name, the deputy testified in a manner fair to both sides. He faulted Sober Joe for the accident, but conceded that Sober Joe may have been in the wrong lane for less than one second. He called Sober Joe polite and cooperative. He did not use the word phantom to describe the car that no one but Sober Joe saw.

Exit Deputy Fairchild. Enter Lana Labdirector, supervisor of lab monkeys at Worstoff Labs. With only modest guidance from the prosecuting attorney, and in a manner only dreamed of by most over-the-counter sedatives, Lana thoroughly explained her vast educational background and what seemed like decades of on-the-job experience.

When Lana was tendered as an expert witness, I prevailed upon the judge to allow a brief voir dire. With refreshing candor, Lana confirmed that she was an incredibly gifted supervisor, capable of approving the results of her underling lab monkeys' work without actually participating in any testing, watching any testing, or even being in the Worstoff Labs' building when testing was being done.

At this point, I stipulated to her expertise.

In a bold move that surprised absolutely no one in the courthouse, the prosecuting attorney approached Lana with the slanderous lab test reports. I objected.

"She did not do the testing. She did not watch the testing being done. She was not even there when the testing was done. The United States Supreme Court says I get to confront and cross-examine the lab monkey herself, not just some

supervisor or surrogate. Really. They did. You could look it up.”

I handed the judge and the prosecutor each a nice, fresh copy of *Bullcoming v. New Mexico*, 564 U.S. 1058, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). This is a favorite case of mine, partly because the majority opinion contains a lengthy footnote that is lifted verbatim from the amicus brief submitted by NACDL, which was written by three of my good friends, Ron Moore of California, Lenny Stamm of Maryland, and Justin McShane of Harrisburg, Pennsylvania.

Poor Mr. Bullcoming was in a car crash, and his blood alcohol level was reported by some lab monkey to be .18. On the date of his trial, the prosecution tried to substitute an alternative lab monkey for the one who actually tested Mr. Bullcoming’s blood. His lawyer objected. Good move.

In line with its Confrontation Clause holding in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and consistent with the more recent *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the Supremes said no.

Back at Sober Joe’s trial, the judge read every word of the *Bullcoming* opinion. We watched him. Then he read it all again. Then he brought Lana Labdirector back in for more questioning, outside the presence of the jury. At his invitation, I repeated the same cross-examination I had done in my voir dire. Lana courageously gave us the same answers.

The judge found that the Supreme Court of the United States had made it very clear that surrogate witnesses are not acceptable. “I am not suppressing this lab report,” he ruled, “but you cannot admit it through this witness.”

The standard “but, judge” reply by the prosecutor failed to persuade the judge to reconsider.

“Well, then,” she announced, “I will have to ask the Court to recess for the day early, and I will bring in the actual tech to testify in the morning.”

“No, you won’t,” I replied. “You did

not list any lab tech in discovery.”

“Yes, I did,” she insisted.

“No, you did not,” said I. I waited with great eagerness for her next move.

“Why don’t you all go out in the hall and figure this out,” suggested the wise and bored jurist.

The prosecutor stormed out into the hallway, followed by four of her colleagues who had shown up to watch me lose a DUI trial. I chose not to join them. Having carefully reviewed not only my case file but also the clerk’s case file the day before trial, I knew the answer.

Eventually, the prosecution team came back. “Judge,” she began, “I need you to make your ruling on the record.”

“I think I already did,” said the judge,

“but I will again. I am not suppressing this lab report, but you cannot admit it through this witness.”

“In that case, Your Honor,” the prosecutor said (her words, not mine), “I have no choice. The State announces a nolle prosequere.”

In what I hope you will agree was a courageous display of my ability to take things in stride and soldier on, I soldiered on down the street to the Yellowtail, my favorite local watering hole, for a purely medicinal glass of single malt scotch.

“How do you like that?” I rhetorically asked Amy Ritchey, my then-associate who had done much of the pre-trial prep and second-chaired the trial.

“I guess they never saw the bull coming,” she replied. 🐃

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