No. 11-50948

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

MELVIN DAVID TOWNS, JR.
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
[5:10-CR-00614-XR]

REPLY BRIEF FOR APPELLANT

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Issue One: The Court denied Towns, his constitutional right to confront witnesses against him when admitting testimonial pseudoephedrine transaction logs in evidence without the testimony of the persons who prepared the records.

1. The pseudoephedrine logs are not business records under the definition set forth by the Supreme Court in *Palmer*.

The Supreme Court defines a document "made in the regular course of business" as one that is "made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." *Palmer v. Hoffman*, 318 U.S. 109, 113 (1943). Further, it states such documents do not include records that have "little or nothing to do with the management or operation of the business as such" regardless of whether or not the business has established procedures to record the events. *See id.* at 113-114. They must be "routine reflections of the day-to-day operations of a business" to be trustworthy as a business record. *Id*. Based on this definition, records of isolated or unusual events are excluded from 803(6) because they are not "made in the regular course of business."

Pseudoephedrine logs are kept pursuant to procedures that vary in each store and are not "made in the regular course of business." They record isolated events since a store could go days or weeks without selling any products containing pseudoephedrine. Or, the store may not stock or sell the product at all. More importantly, they are prohibited by law from keeping these records for any

business purpose.[1] The logs are, thus, not "routine reflections of the day-to-day operations" because they only record isolated, non-business information. As such, they do not possess the necessary indicia of trustworthiness required by the Supreme Court for business records.

The government argues that *Palmer*, *supra,* is distinguishable because it dealt with accident reports prepared by a railroad employee for use in litigation. See Appellee's Brief at p. 24. While the facts may be distinguishable, they are comparable. The Court held the accident reports are a type of regularly made record that went beyond the "regular course of business" into "regular course of conduct." The Court held that activity in the company's "regular course of conduct" is not a business record. *Id*. at 115. Just as it was not the railroad's business to litigate accident claims, it is not a store's business to track and prosecute the manufacture of methamphetamine nor to show compliance with administrative recordkeeping regulation.

2. The pseudoephedrine logs are not business records because they were created for the sole purpose of providing evidence against a defendant.

In *Melendez-Diaz*, the Supreme Court explained that documents whose sole purpose is the production of evidence for use at trial may not be admitted into

[1] As discussed in Appellant's opening brief, the Texas Attorney General has explicitly stated that the information being collected is being collected for law enforcement or governmental purposes *and not for business purposes*. *See* Texas Atty. Gen. Op. GA-0564, *available at* 2006 WL 2773877.

evidence as business records. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2538 (2009). Here, the only purpose of the pseudoephedrine logs is to produce evidence for use at trial. See footnote one, *supra.*

The government the Bill Analysis ("Bill Analysis") that accompanied the pseudoephedrine log requirement shows another purpose. See Appellee's Brief at p. 20. However, it supports the fact that the pseudoephedrine logs' sole purpose is to assist law enforcement. According to the Bill Analysis and the government's brief, the statute was passed to "combat a 'growing epidemic' of methamphetamine use, manufacture, and distribution." See Appellee' Brief at p. 20; See also Bill Analysis, Tex. H.B. 164, 79th Leg., R.S. (2005). Nowhere in the Bill Analysis is it claimed that there is any business purpose for these logs.

The government also argues that *United States v. Veytia-Bravo* defeats Appellant's arguments regarding the logs' untrustworthiness. See Appellee's Brief at pp. 23-24. The records in *Veytia-Bravo* were of ammunition sales and Form 4473's, of firearms sales. *United States v. Veytia-Bravo*, 603 F.2d 1187, 1188 (5th Cir. 1979). This Court "seemed to be persuaded by the voluminous and *standardized* nature of these documents." *See Id.* (emphasis added). While the Form 4473's are standardized forms filled out in the same manner at all firearm dealers in the United States, pseudoephedrine logs vary widely. According to the government's witness, DPS investigator Pieprzica, each store had its own way of

keeping the records. See USCA5 289. Without the same standardization present in *Veytia-Bravo*, the logs here are significantly distinguishable.

Furthermore, the government argues that as long as a company has an incentive to comply with the regulations, it makes the records trustworthy. See Appellee's Brief at p. 28. That is not what this Court held in *Veytia-Bravo*. This Court found an independent business interest for the records in *Veytia-Bravo*: to show that Globe had not violated federal law by knowingly selling firearms or ammunition to persons who could not lawfully purchase them. *Veytia-Bravo*, 603 F.2d at 1191. Mere compliance with regulations for the sole purpose of compliance with the regulation was insufficient to guarantee trustworthiness, especially where, as here, the stores are prohibited from relying on them as business records and are exempt from civil suit for any omissions.

There is no corresponding need for stores to show via these logs that they are not violating the law as there was for the company in *Veytia-Bravo*. So long as they maintain the logs, they are in compliance with the law.[2] The sole incentive the stores have regarding the logs is in *completing* the logs, not necessarily in completing them *accurately*. The logs are not verified by law enforcement once

[2] Although stores may not sell more than 3.6 grams of pseudophedrine within 24 hour period or 9 grams within 30 days to the same person, there is no criminal penalty for doing so. Section 486.014, Tex. Health and Safety Code.

they are submitted and they may not rely upon them for any business purpose. Thus, there is no incentive for accuracy in their creation.

The government cites three different possibilities for an incentive for the store to keep accurate logs: to demonstrate that the store is not aiding and abetting an illegal purchase by a person of more than nine grams of a product with pseudoephedrine during a 30-day period. See Appellee's Brief at p. 29. This is unpersuasive, because if a store was "aiding and abetting" such a crime, it would not log that activity. Thus, the logs would not be determinative of such a charge.

Next the government argues that the Attorney General may revoke a non-compliant store's exemptions. See Appellee's Brief at p. 29. But this creates the incentive to *complete* the logs, not to complete them *accurately*. Since, the Attorney General has no way of verifying that the company collected accurate information, this is no guarantee of trustworthiness.

The government also argues that an additional business incentive is the prevention of civil liability if the store complies. See Appellee's Brief at p. 20; Tex. Health & Safety Code Ann. § 486.0145 (West 2012). But the regulation states that the store is not civilly liable for any *omission* complying with the regulations. *See id.* (Emphasis added). Moreover, it shows that the logs are not business records at all, but are like the accident reports in *Palmer, supra.*

Records kept for no business reason and which are completed solely for use by law enforcement as evidence at trial, are inadmissible as business records under *Melendez-Diaz* and *Palmer* and this Court's holding in *Vetia-Bravo*.

3. There are not sufficient guarantees of trustworthiness to admit the pseudoephedrine logs as business records.

In addition to the four requirements of Rule 803(6), the source of the information or the method or circumstances of preparation for business records must not indicate a lack of trustworthiness. Fed. R. Evid. 803(6). The evidence about the source of information and method of preparation of these pseudoephedrine logs, however, do indicate they lack trustworthiness.

As noted in Appellant's opening brief, the Texas statute does not require government issued identification to be presented in order to verify age and identity. Tex. Health & Safety Code Ann. § 486.014(1)(A) (West 2012). Under federal law, either the seller or the purchaser may enter the information into the log, as long as the other party verifies the information. *See* 21 U.S.C. § 830(e)(1)(A)(iv)(III). The manner of verification is not prescribed. An untrained clerk may enter the information and merely ask the customer if it is correct.

Additionally, investigator Pieprzica testified that each store had its own way of keeping the records, but he did not say what manner each store used. See USCA5 289. The fact that the stores are instructed to collect accurate information does not mean that they complied. As stated above, they are immune from suit for

omissions and each store is left with a substantial amount of discretion in determining how to prepare the logs. Some methods are reliable and others are not. But, the record is silent regarding the methods used by any stores.

Citing *Melendez-Diaz,* the government argues that Appellant would have it bear the onerous burden of calling every person entering log data to testify. Appellee's Brief at pp. 19-20. *Melendez-Diaz* states that "The Confrontation Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience." *United States v. Melendez-Diaz*, 557 U.S. 305, 129 S.Ct. 2527, 2540 (2009). Further, a person with knowledge about the manner in which the store's logs were created and their limitations would facilitate confrontation of this testimonial evidence. Especially where, as here, the information was offered for the truth of the matter asserted, *Williams v. Illinois*, 2012 WL 2202981 (U.S. June 18, 2012), requires that such a witness testify in order to satisfy the Confrontation Clause. The government having produced no witness at all, also does not meet the burden of 803(6) regarding trustworthiness.

Issue Two: The Court abused its discretion when it admitted pseudoephedrine logs and summaries of them as business records.

1. The Government's argument that the pseudoephedrine logs were not prepared for use at trial is contrary to the stated purpose of the enacting legislation.

The government argues, quoting *Melendez-Diaz,* that business records are *typically* not testimonial. See Appellee's Brief at p. 32 (emphasis added). But, a

finding that a record is a business record is not dispositive. Some business records *are* testimonial. The question is whether the logs were created for use at trial.

The Bill Analysis for the Texas statute shows that its purpose is purely law enforcement related: "designed to combat a 'growing epidemic' of methamphetamine use, manufacture, and distribution." See Appellee's Brief at p. 20. The only way one combats drug use, manufacture, and distribution is to prosecute offenders by using the proscribed records at trial. Thus, the government's argument is unpersuasive. These logs are prepared for use at trial and are not business records.

2. The pseudoephedrine logs are testimonial statements that necessarily fall subject to the Confrontation Clause.

The Supreme Court has held that a document created solely for an evidentiary purpose and made in the aid of a police investigation is testimonial. *Bullcoming v. New Mexico,* 131 S.Ct. 2705, 2717 (2011). The government construes this to mean that the "sole purpose must be evidentiary *with an eye toward trial*." See Appellee's Brief at p. 33 (emphasis added). But, the Court in *Bullcoming* did not construe testimonial statements so narrowly. Anything created solely for evidentiary purposes and *made to aid a police investigation* "ranks as testimonial" according to the Court. *Bullcoming*, 131 S.Ct. at 2717. The pseudoephedrine logs meet this two-part test.

These logs are kept "solely for an evidentiary purpose." Stores only keep the logs because they are required to by regulations, which also prohibit their use for any business purpose. As explained above, there is no separate business purpose for them, and stores are *required* to produce them to law enforcement upon request. Applying *Bullcoming* to these facts reveals the pseudoephedrine logs are testimonial.

In *Melendez-Diaz* the Court analyzed lab report affidavits and held that one characteristic that made the affidavits testimonial was the fact that they 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." *Melendez-Diaz*, 129 S.Ct. at 2532. The government argues that "a store clerk at a local Walgreens, [would] believe that their entries of pseudoephedrine purchases would be used at a later trial." See Appellee's Brief at p. 35.

However, a store clerk trained to keep the logs would know that they do not record other purchases and that pseudoephedrine is regulated, as evidenced by the very need to record its purchase and produce the record to law enforcement upon request. It defies logic to think that such a clerk, possessing that knowledge, would not believe that these records would not be used to prosecute someone's excess purchases. The pseudoephedrine logs *are* testimonial because any objective witness making the record would undoubtedly know that law enforcement would

use them later at trial. They are recording the information for law enforcement and may not use it for any business purpose.

Here, they were used as the functional equivalent of live witness testimony. Under *Melendez-Diaz* 129 S.Ct. at 2532, by admitting the reports and not requiring live testimony, the Appellant was deprived of his right to confrontation. *Id.*

The government argues that the logs are simply "routinely recorded business records containing an objective catalog of unambiguous factual matters." See Appellee's Brief at p. 35. But like the lab reports in *Bullcoming* and *Melendez-Diaz*, the information here was gathered by persons using different protocols and methodologies. The record is silent about what methods or protocols. Thus, like the lab reports in *Bullcoming* or the affidavits in *Melendez-Diaz*, these logs cannot be presumed to be fully accurate and correct. It is the defendant's right, according to the Court in *Crawford*, to test the sufficiency and methodology of that testimonial evidence through the crucible of cross-examination. *Crawford v. Washington*, 541 U.S. 36, 60 (2004). As argued above, compliance with this Constitutional requirement is not over-burdensome.

Issue Three: The Court's belief that it could not even consider a safety valve reduction for Towns was erroneous.

1. The Government argues that the District Court did not err in denying Appellant a safety valve reduction.

The government argues that because Mr. Towns maintains his innocence,

and because he states that he did not manufacture drugs as the government believes, that the District Court did not err in denying Appellant a safety valve reduction.

At sentencing on October 5, 2011, Appellant provided information regarding his methamphetamine use at times prior to the period charged in the indictment. This provides evidence that Appellant is being truthful in providing all information that he is aware of as required by the safety valve provision. It is not impossible to believe that the government's impression of Appellant may not be accurate. Specifically, it is possible that Appellant is being truthful in stating that he did not purchase pills to manufacture methamphetamine. The government argues that this claim is contradicted by the pseudoephedrine logs which show Appellant and Mr. Sanders purchasing pseudoephedrine together, but Appellant argues that such logs show just the opposite. If Mr. Sanders was purchasing pseudoephedrine himself in excess of the legal limit, it is possible, if not likely, that there would be no reason for him to need additional pills from Appellant. The only evidence the government introduced to the contrary was the testimony of Mr. Sanders that Appellant gave him pseudoephedrine pills from time to time, without specifying a time frame. Thus, Mr. Sanders' testimony is not evidence that Appellant did not debrief truthfully.

More importantly, it appears from the record that the District Court judge

did not exercise his discretion in considering this possibility. From the transcript it appears as if he believed the decision was entirely up to the Government, as if it were the sentencing authority or only it could authorize the reduction in sentence. He said at the sentencing hearing, in part, "I am stuck with a statutory requirement that I sentence you to no less than 10 years…the safety valve is inapplicable here." USCA5 463-64. The judge went on to add, "[T]he only way out of this ten years is if you debrief with the government to a point that they're satisfied *and would make a recommendation of safety valve*." USCA5 21. In other words, the judge believed that the decision was not his to make. But the judge's hands are not tied absent the government's assent. The safety valve is not applied similarly to downward departure for substantial assistance.

Since Appellant did truthfully provide all information that he possessed regarding the offense for which he was found guilty. He provided information regarding his prior drug use, his prior relationship with Michael Sanders, and what he knew about the transactions that were a part of the indictment. Appellant did take a successful polygraph, as additional evidence to be considered in proving that he debriefed truthfully. Appellant never denied having purchased pseudoephedrine – he only disputed the amounts that the logs reflected. Clerk's Record USCA5 354-60.

Appellant does not claim, as the government suggests, that Appellant should

be granted a safety valve reduction just because Appellant passed a polygraph. See Appellee's Brief at p. 38. But, the District Court had the discretion to consider this, as well as the rest of the evidence, in determining whether to grant a safety valve reduction. This Court should remand this case for the sentencing court to exercise its discretion.

CONCLUSION AND PRAYER

This Honorable Court should reverse and remand Towns' conviction without the admission of records, which were not business records and violates his right to confront witnesses against him. It should further reverse and remand his case for a resentencing in which the District Court decides whether, in its discretion, it desires to assess the safety valve reduction.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of June, 2012 a true and correct copy of the above Reply Brief for Appellant has been served to:

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as a registered participant to the CM/ECF filing system and *via* U.S. Mail, first class, in a postage paid and preaddressed envelope, upon notice from this Court for Appellant to file the paper copies.

By: ___/s/ *Cynthia E. Orr*_____
Cynthia E. Orr

CERTIFICATE OF COMPLIANCE

This brief contains 3,390 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

By: ___/s/ *Cynthia E. Orr*_____
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