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Court of Appeals No. 61804-1-I

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IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

SIONE P. LUI,
Defendant-Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Michael J. Trickey, Judge

LUI'S SUPPLEMENTAL BRIEF ADDRESSING *BULLCOMING V.
NEW MEXICO*

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I. INTRODUCTION

The State has filed a supplemental brief addressing the effect of the United States Supreme Court's opinion in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), on the Confrontation Clause issue raised by Lui on appeal. Lui has not objected to the Court considering supplemental briefing from both sides. He files this brief in anticipation of a ruling granting supplemental briefing.

II. RELEVANT FACTS

The State argues that medical examiner Dr. Richard Harruff and DNA expert Gina Pineda testified to some extent based on their personal knowledge. In fact, both relied extensively on the work of other, non-testifying, witnesses.

It is true that in this case Dr. Harruff relied to some extent on photographs taken during the autopsy. But the photographs were not authenticated and admitted through witnesses with first-hand knowledge of how they were taken, but rather through the testimony of Dr. Harruff himself. *See, e.g.*, X RP 1358-59. In any event, Dr. Harruff also relied on various observations of Dr. Raven, and even on a toxicology report prepared by the crime laboratory. *See* Appellant's Opening Brief (AOB) at 9.

Although Dr. Harruff “cosigned” Dr. Raven’s report, X RP 1335-36, he was not in the building when the autopsy was conducted. X RP 1339. He did not see how any evidence was collected. *Id.* His memory of his own observations of the body was “quite dim.” X RP 1338. “I am not saying, you know, to what degree I looked at it.” *Id.* Certainly the body would have been sewn up by the time he could have seen it. X RP 1340. Dr. Harruff relied in part on his discussions with Dr. Raven and his reading of her notes and report. X RP 1335-36, 1341, 1352-53, 1369-70. The State insisted that it was proper for Dr. Harruff to rely on notes taken by Dr. Raven about her investigation of the body at the scene because “they are part of what he reviews to reach his opinion” and “he talked to her about what the scene site was.” X RP 1369-70.

For example, Dr. Harruff maintained that the temperature of the victim’s body at the time it was found was “significant in terms of setting the time of death.” X RP 1354. He admitted that he was not at the scene when the temperature was taken but merely relied on the notes of Dr. Raven. X RP 1352-53. In discussing the victim’s injuries, Dr. Harruff relied at times on internal injuries to the head and neck. X RP 1391-92. Any information he had about those injuries could only have come from Dr. Raven’s reported observations. Further, he acknowledged that certain

injuries looked like scratches in the photos, but “they are described as contusions, meaning bruising.” RP 1380. Based on that description by Dr. Raven, he agreed with the State’s theory that the injuries could have been caused by the perpetrator using his knees to pin down the victim. *Id.*

Dr. Harruff also explained why the toxicology report was important in identifying the cause of injuries. X RP 1397-98. He then recited the results from the Washington State Toxicology Laboratory. X RP 1398.

Gina Pineda did not view or participate in any of the DNA testing done in this case. *See* AOB at 10-11. Regarding the test of the vaginal wash, Pineda was neither the analyst nor supervisor, and she did not sign the report. AOB at 13. The actual report from Cellmark said that Lui was the “predominant” contributor of DNA and other male DNA markers were also detected. But Pineda said she had discussed the matter with the analysts and their opinion was that these low level readings were likely artifacts from the testing process rather than truly DNA from a second individual. *Id.*

III. ARGUMENT

In *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), as here, a surrogate analyst testified in place of the one who actually performed the test at issue. *Bullcoming* involved a gas chromatograph test for blood alcohol level. *Id.* at 2710-11. The state court found no confrontation violation because the testifying expert was available for cross-examination regarding gas chromatography and the procedures used by the laboratory. *Id.* at 2712-13. Further, the state court believed that the report of the analyst was not testimonial because the “true accuser” was a machine and the analyst merely transcribed data produced by it.

The U.S. Supreme Court, however, found that this testimony violated the simple rule set out by its “controlling precedent”:

As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront the witness.

Id. at 2713. The Court expressly rejected the notion that reliance on machine-generated data rendered the analyst a “mere scrivener.” *Id.* at 2714-15. The Court noted that an analyst could make various errors in his use of the machine. *Id.* at 2710-11, 2715. “In any event, the comparative reliability of an analyst’s testimonial report drawn from machine-produced

data does not overcome the Sixth Amendment bar.” *Id.* at 2715.

“Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.” *Id.* at 2716.

The Court likewise rejected the State’s argument that the report of the analyst was not testimonial because it was not sworn or notarized. *Id.* at 2716. Relying on such technicalities “would make the right to confrontation easily erasable.” *Id.* at 2717, citing *Davis v. Washington*, 547 U.S. 813, 830-31, n. 5, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) and *id.* at 838 (Thomas, J. concurring in judgment in part and dissenting in part).¹

That *Bullcoming* applies to Lui’s case is clear from two cases recently summarily overturned and remanded in view of *Bullcoming*: *Barba v. California*, 2011 WL 2535076, and *Dilboy v. New Hampshire*, 2011 WL 2535078. The Supreme Court will issue a “grant, vacate and remand” order only when an intervening decision “reveal[s] a reasonable probability that the decision below rests upon a premise that the lower

¹ It is notable that the majority cited Justice Thomas for this point (with his approval) because the State maintains that Justice Thomas would find the analyst’s work in Lui’s case to be insufficiently formal to merit the protection of the Confrontation Clause.

court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.” *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996).

In *Barba*, the director of Cellmark Lab testified to DNA results of another analyst who did not testify. *See People v. Barba*, 2010 WL 571950 (Cal. App. 2 Dist.) (unpublished). An earlier state-court ruling upholding this testimony was remanded by the U.S. Supreme Court for reconsideration in view of *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). On remand, the state court interpreted *Melendez-Diaz* as a narrow ruling prohibiting only the actual admission into evidence of reports from a non-testifying expert. The state court found that the confrontation clause was satisfied by presenting a live expert subject to cross-examination, even if that expert relied on the report of another. By once again vacating and remanding, the U.S. Supreme Court indicated that the California court’s reasoning was faulty.

Similarly, in *Dilboy*, a State crime laboratory technician tested the defendant’s blood and urine for drugs under the direction of a supervisor. The supervisor reviewed the results, and testified to his independent opinion. *State v. Dilboy*, 160 N.H. 135, 999 A.2d 1092 (2010). The New

Hampshire Supreme Court held that “an expert may rely upon testimonial statements when the expert renders ‘an independent judgment’ and applies his or her ‘training and experience to the sources before [the expert]’ because the opinion is ‘an original product that can be tested through cross-examination.’” *Dilboy*, 160 N.H. at 149 (citations omitted). As in *Barba*, the state court interpreted *Melendez-Diaz* narrowly. There would have been no need for the U.S. Supreme Court to vacate and remand if it believed that *Bullcoming* did not apply in this situation.

The State correctly notes that the Supreme Court has recently taken review in *Williams v. Illinois*, 2011 WL 2535081 (Jun 28, 2011). That case differs from *Bullcoming* in that the analyst’s report was not actually admitted into evidence; rather, the testifying expert relied upon the report in coming to her opinion. The state court found no confrontation violation because the analyst’s report was not offered for the truth of the matter asserted. *People v. Williams*, 238 Ill.2d 125, 939 N.E.2d 268 (2010). The State suggests that this distinction will also apply to Lui’s case because no written reports from non-testifying experts were admitted into evidence.

There are several problems with this reasoning. First, unlike in *Williams*, the jury was never instructed in this case that testimony

concerning the work of non-testifying experts was admitted for anything other than the truth of the matter.

Second, it is unlikely that the U.S. Supreme Court would reach a different result from that in *Bullcoming* simply because an analyst's report is not admitted into evidence. If an expert must rely on the results obtained by another, then obviously the truth of those results are at issue. If the results are false, so are the opinions drawn from them. Many courts have rejected this approach. See AOB at 27-29.² In a related setting, this Court agreed that "courts ought to guard against any 'backdoor' admission of inadmissible hearsay statements." *State v. Mason*, 160 Wn.2d 910, 921, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008). "[W]e are not convinced a trial court's ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis." *Id.* at 922.

² It does not matter that evidence rules may authorize an expert to give an opinion based on inadmissible evidence. Since *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), state rules regarding the admission of hearsay are simply irrelevant to the confrontation analysis.

IV.
CONCLUSION

Since Lui filed his opening brief in this case, the U.S. Supreme Court has twice rejected attempts by state courts to admit forensic evidence without presenting the witness who actually performed the test or analysis. If it was not clear before that Lui's confrontation rights were

violated, it is clear now. This Court should reverse and remand for a new trial.

DATED this 16^r day of August, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on the following:

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