

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

NO. 84045-82011 JUL 20 P 2: 36

BY RONALD R. CARPENTER

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SIONE LUI,

Petitioner.

CLERK

BY RONALD R. CARPENTER

2011 AUG 17 A 10:18

FILED  
SUPREME COURT  
STATE OF WASHINGTON

STATE'S SUPPLEMENTAL BRIEF ADDRESSING  
BULLCOMING V. NEW MEXICO  
564 U.S. \_\_\_\_ (2011 WL 2472799) JUNE 23, 2011)

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DEBORAH A. DWYER  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u> .....	1
B. <u>RELEVANT FACTS</u> .....	1
C. <u>ARGUMENT</u> .....	2
D. <u>CONCLUSION</u> .....	6

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bullcoming v. New Mexico, 564 U.S. \_\_\_\_  
(2011 WL 2472799) (June 23, 2011)..... 1, 2, 3, 5, 6, 7

Melendez-Diaz v. Massachusetts, \_\_\_\_ U.S. \_\_\_\_,  
129 S. Ct. 2527, 174 L. Ed.2d 314 (2009)..... 5

Other Jurisdictions:

People v. Williams, 238 Ill.2d 125,  
939 N.E.2d 268 (2010) ..... 5, 6, 7

A. INTRODUCTION

The State submits this supplemental brief solely to address the effect of the United States Supreme Court's opinion in Bullcoming v. New Mexico, 564 U.S. \_\_\_\_ (2011 WL 2472799) (June 23, 2011), on the Confrontation Clause issue raised by Lui in this appeal.

B. RELEVANT FACTS

The relevant facts are set forth in the State's Supplemental Brief filed in this Court on June 10, 2010. These facts are summarized here for the Court's convenience.

Dr. Harruff testified at trial as to the cause and manner of death of the victim, Elaina Boussiacos. While Harruff did not personally conduct the autopsy, he contemporaneously reviewed the work of the pathologist who did, and he co-signed the report. Harruff's testimony was based in large part on photographs, and on his own expertise in strangulation injuries. The autopsy report itself was not admitted into evidence.

Gina Pineda testified at trial about DNA results relevant to this case. Pineda is the associate director and technical leader of Orchid Cellmark, a private DNA laboratory in Dallas, Texas. She

supervises the daily duties of the forensic scientists there, and she is responsible for maintaining standard operating procedures and quality control. While Pineda did not personally conduct the DNA testing for this case, she supervised a portion of the testing directly, and she reviewed the supporting documentation as well as the results for the remainder of the tests. Based on her independent review of the testing results and her considerable expertise in DNA analysis, Pineda testified to her own conclusions concerning the meaning of the DNA evidence. Pineda showed charts with raw data and explained them to the jury, but the reports prepared by the DNA analysts were not themselves admitted into evidence.

C. ARGUMENT

In Bullcoming v. New Mexico, the United States Supreme Court continued to develop its Confrontation Clause jurisprudence in the context of scientific testimony. The Court framed the question as "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification -- made for the purpose of proving a particular fact -- through the in-court testimony of a scientist who

did not sign the certification or perform or observe the test reported in the certification." Bullcoming, 2011 WL 2472799 at \*4.

The scientific result at issue in Bullcoming was a blood-alcohol concentration. Id. This result was obtained by forensic analyst Caylor. Id. at \*5. Rather than calling Caylor at trial to testify about the results of the gas chromatography test that he had performed, the State called forensic analyst Razatos, who had neither observed nor reviewed Caylor's analysis. Id. at \*5. The trial court allowed the State to admit the "certificate of analyst," completed and signed by Caylor and containing the results of Caylor's testing, as a business record during the testimony of Razatos. Id. at \*4, \*5. By a bare five-justice majority, the Supreme Court held that the certificate was testimonial, and that Bullcoming accordingly had a right to confront Caylor, the forensic analyst who had prepared it. Id. at \*10, \*11.

Of particular significance to the Lui case is the concurrence written by Justice Sotomayor, who provided the majority with its fifth vote and who wrote to "emphasize the limited reach of the Court's opinion" and to "highlight some of the factual circumstances that this case does *not* present." Id. at \*13, \*15 (Sotomayor, J., concurring) (*italics in original*).

Drawing a distinction highly relevant to the issue on appeal in Lui, Justice Sotomayor cautioned that "this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." Id. at \*15. By contrast, Dr. Harruff, who testified at Lui's trial, had reviewed the work of the pathologist who did the autopsy on the victim, and had co-signed the report. Similarly, Gina Pineda had directly supervised a portion of the DNA testing, and had reviewed the supporting documentation as well as the results for the remainder of the tests.

Justice Sotomayor drew another distinction relevant to Lui's appeal, observing that "this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." Id. at \*16. At Lui's trial, both Harruff and Pineda were asked for their independent opinions about, respectively, cause of death and DNA results, and neither the autopsy report nor the DNA report was admitted into evidence. As Justice Sotomayor observed, the Court "would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others'

testimonial statements if the testimonial statements were not themselves admitted as evidence." Id.<sup>1</sup>

The Supreme Court recently granted certiorari in a case that will likely provide an answer to this "different question." In People v. Williams, 238 Ill.2d 125, 939 N.E.2d 268 (2010), the Illinois Supreme Court upheld the admission of expert testimony in a case that bears significant similarities to Lui's. In Williams, a forensic biologist with the Illinois State Police ("ISP") testified that a DNA profile developed at Cellmark Diagnostic Laboratory matched the defendant's DNA profile, which was on file in the ISP database. Williams, 939 N.E.2d at 270-71. The testifying analyst, Lambatos, conducted an independent evaluation of the underlying data obtained by others, using her own expertise and professional judgment to compare the resulting DNA profiles. Id. at 276, 280. Lambatos used the underlying tests only to explain how she formed

---

<sup>1</sup> Justice Thomas, also a member of the five-justice majority in Bullcoming, has repeatedly made it clear that his view of the scope of the Confrontation Clause is a narrow one. He believes that the Clause is implicated by extrajudicial statements "only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Melendez-Diaz v. Massachusetts, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2527, 2543, 174 L. Ed.2d 314 (2009) (Thomas, J., concurring). Because the underlying reports were not admitted in Lui's case, it is likely that Justice Thomas would find no Confrontation Clause violation.

her own opinion. Id. at 278. Cellmark's report was not itself introduced into evidence. Id. at 272.

The Illinois Supreme Court held that Lambatos's testimony concerning the Cellmark report was not offered for the truth of the matter asserted, and thus was not hearsay. Id. at 282.

Accordingly, the testimony did not violate the Confrontation Clause. Id.

The United States Supreme Court accepted certiorari in Williams on June 28, 2011. Appendix A. The Court framed the question presented by the case: "Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause." Id. The answer to this question will likely answer the question presented in Lui's appeal.

#### D. CONCLUSION

The United States Supreme Court, in its opinion in Bullcoming, held that the introduction of a forensic laboratory report containing both the results of the relevant testing and a testimonial certification, through the testimony of a scientist who neither signed

the certification nor performed or observed the tests, violated the defendant's rights under the Confrontation Clause. Bullcoming neither addressed nor resolved the Confrontation Clause issue before this Court. Justice Sotomayor's concurrence, in combination with Justice Thomas's narrowly-constricted view of the scope of the Confrontation Clause, indicates that a majority of the Supreme Court would likely find no Confrontation Clause violation under the circumstances presented by Lui's case.

For the reasons already set forth in prior briefing, the State respectfully asks this Court to affirm the Court of Appeals' opinion finding no Confrontation Clause violation in this case. In the alternative, the Court may wish to stay its decision until the United States Supreme Court issues its opinion in Williams, sometime during the Court's upcoming term.

DATED this 18<sup>th</sup> day of July, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DEBORAH A. DWYER, WSBA #18887  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

# **APPENDIX A**

**10-8505 WILLIAMS V. ILLINOIS**

DECISION BELOW: 238 Ill. 2d 125

LOWER COURT CASE NUMBER: 107550

**QUESTION PRESENTED:**

Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.

CERT. GRANTED 6/28/2011

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **David B. Zuckerman**, the attorney for the petitioner, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104, containing a copy of the **State's Supplemental Brief Addressing Bullcoming v. New Mexico in STATE V. SIONE P. LUI**, Cause No. **84045-8**, in the Supreme Court of the State of Washington .

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name



Date

07-18-2011

Done in Seattle, Washington