

**FILED**

FEB 18, 2014

Court of Appeals  
Division III  
State of Washington

No. 31639-4-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DENISE L. JONES,

Defendant/Appellant.

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Appellant's Brief

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A. ASSIGNMENT OF ERROR

The trial court erred in allowing an expert drug analyst to testify about the results of drug tests identifying the controlled substance that were conducted by other people who did not testify.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was the Sixth Amendment Confrontation Clause violated when an expert witness's testimony was based on the work of others who did not testify and that work was done for the purpose of criminal prosecution?

C. STATEMENT OF THE CASE

Ms. Jones was convicted by a jury of possession of a controlled substance—methamphetamine. CP 28. The State established the identity of the substance through the testimony of Trevor Allen from the Washington State Patrol Crime Lab. Ms. Jones objected that allowing Allen's testimony violated the Sixth Amendment confrontation clause. RP 26-33, 84, 91. Mr. Allen reviewed the data from the testing done in the lab report but he did not perform the tests and was not present when they were done. He formed an independent opinion based on the lab data and was a peer reviewer of the final report. RP 88-92.

This appeal followed. CP 45-64.

D. ARGUMENT

The Sixth Amendment Confrontation Clause was violated when an expert witness's testimony was based on the work of others who did not testify, and that work was done for the purpose of criminal prosecution.<sup>1</sup>

The Sixth Amendment Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right is made binding on the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Article I, section 22 of the Washington Constitution similarly provides, "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." An alleged violation of the Confrontation Clause is subject to de novo review. *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

Until the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), hearsay statements made by unavailable declarants were admissible if an adequate indicia of

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<sup>1</sup> On January 2, 2014, the Washington Supreme Court reached the opposite result in *State v. Lui*, No. 84045-8. A motion for reconsideration was filed in that case on January 17, 2014. Appellant raises this issue for preservation in case the Court reverses itself on

reliability existed, i.e., they fell within a firmly rooted hearsay exception or bore a 'particularized guarantee of trustworthiness.' *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled by *Crawford*, 124 S. Ct. 1371 (2004).

Under *Crawford*, “[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” *Crawford*, 124 S. Ct. at 1374. But if testimonial hearsay evidence is at issue, the Confrontation Clause requires witness unavailability and a prior opportunity for cross-examination. *Crawford*, 124 S. Ct. at 1374. After *Crawford*, a state's evidence rules no longer govern confrontation clause questions. See *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir.2004).

The U.S. Supreme Court applied the *Crawford* analysis to statements prepared by expert, forensic witnesses in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). It found that the certificate of a laboratory analyst asserting that the tested substance was cocaine was a testimonial statement. *Id.*, 129 S. Ct. 2527, 2540. It rejected various arguments that the statements of scientific experts

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reconsideration or in the event a Writ of Certiorari is filed and the U.S. Supreme Court accepts review.

should be treated differently from the statements of other witnesses. *Id.* at 2532-42. Consequently, the analysts were "witnesses" for confrontation clause purposes and Melendez-Diaz had the right to confront them. *Id.* at 2532. Because he was not given this opportunity, the evidence should not have been admitted. *Id.* at 2542. The Court concluded, "The Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." *Id.*

A similar case is *Bullcoming v. New Mexico*, — U.S. —, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). In *Bullcoming*, Donald Bullcoming was charged with driving while intoxicated. 131 S.Ct. at 2709. A forensic laboratory report certifying that his blood alcohol concentration was above the threshold for aggravated DWI was the principal evidence against him. *Id.* At trial, the State failed to call as a witness Curtis Caylor, the analyst who performed the blood alcohol test and who signed the certification of results. *Id.* Caylor was on " 'unpaid leave' for a reason not revealed." *Id.* at 2712. Instead, the State called Gerasimos Razatos, "another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." *Id.* at 2709. A jury convicted him of aggravated driving while intoxicated, and

the state court of appeals affirmed. *Id.* at 2712. The New Mexico Supreme Court then concluded that live testimony of another analyst was sufficient under the Confrontation Clause. *Id.* at 2712-13.

The U.S. Supreme Court granted certiorari and stated the issue presented in that case 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.” *Id.* at 2710. The Court held that the surrogate testimony in that case did not meet the requirements of the Constitution. *Id.*

The issue in this case is whether the reasoning of *Melendez-Diaz* and *Bullcoming* applies when, as here, a live expert witness testifies at trial but it is not the same one who performed the forensic analysis. The U.S. Supreme Court’s resolution of the petition for a writ of certiorari in *Ohio v. Crager*, 116 Ohio St.3d 369, 879 N.E.2d 745 (2007), most notably demonstrates the result that should occur in this case. In *Crager*, the State introduced DNA evidence through an expert witness. *Crager*, 116 Ohio St.3d at 371. The analyst who actually performed the testing was not produced because she was on maternity leave. *Id.* The testifying analyst

performed a “technical review” of the other’s work, which “involved reviewing her notes, the DNA profiles she generated, her conclusions, and the final report.” *Id.* at 373. He came to an independent opinion regarding the conclusions. *Id.* The Ohio Supreme Court found that, because the testifying analyst had reached his own conclusions, he conveyed any “testimonial” aspects of the DNA examination. *Id.* at 384. There was no confrontation violation in the Court’s view because the testifying analyst could be questioned about “the procedures that were performed, the test results, and his expert opinion about the conclusions to be drawn from the DNA reports.” *Id.* (citations and internal quotations omitted).

On June 29, 2009, four days after the opinion issued in *Melendez-Diaz*, the Supreme Court issued the following order in *Crager*:

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Ohio for further consideration in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

*Crager v. Ohio*, 557 U.S. 930, 129 S.Ct. 2856, 174 L.Ed.2d 598 (2009).

The Supreme Court will issue such an order only when an intervening decision “reveal[s] a reasonable probability that the decision below rests upon a premise that the lower 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).

On remand from the U.S. Supreme Court, the Ohio Supreme Court reversed Crager’s conviction and ordered “a new trial consistent with *Melendez-Diaz v. Massachusetts*.” *Ohio v. Crager*, 123 Ohio St.3d 1210, 914 N.E.2d 1055 (2009).

The facts in this case are indistinguishable from *Crager*. Therefore, under prevailing federal authority this Court should grant Ms. Jones the same relief that Crager received.

**E. CONCLUSION**

For the reasons stated, the conviction should be reversed and the case dismissed.

Respectfully submitted February 18, 2014,

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s/David N. Gasch  
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 18, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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