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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31921-1-III

STATE OF WASHINGTON, Respondent,

v.

JAIME HERNANDEZ, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Jaime Hernandez was convicted of child molestation in the third degree for molesting his 15-year-old daughter. A few weeks before trial, the State sought testing for the DNA evidence that they had in their possession almost two years before the trial date. The DNA testing results were not available to defense counsel until the trial date, forcing Hernandez to choose between a right to speedy trial or a right to effective assistance of counsel. At trial, the court admitted the expert testimony of a DNA technical peer reviewer to testify about the DNA results even though she was not the analyst who originally tested the evidence, over the defendant's objection to violation of his confrontation rights. After he was convicted, Hernandez was sentenced to 12 months in jail, with credit for good time.

Several errors during the trial phase significantly prejudiced Hernandez and deprived him of a fair trial. The trial court erred by denying Hernandez's motion to dismiss under CrR8.3(b) for prosecutorial misconduct and denying Hernandez's motion to exclude DNA evidence under CrR 4.7 for prosecutorial mismanagement. Hernandez's Sixth Amendment right to confront the witnesses against him was violated because the DNA technical peer reviewer who testified at trial was not the analyst who originally tested the evidence.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in denying Hernandez's motion to dismiss under CrR8.3(b) for prosecutorial misconduct.

ASSIGNMENT OF ERROR 2: The trial court erred in denying Hernandez's motion to exclude DNA evidence under CrR 4.7 for prosecutorial mismanagement.

ASSIGNMENT OF ERROR 3: Hernandez's Sixth Amendment right to confront the witnesses against him was violated because the DNA technical peer reviewer who testified at trial was not the analyst who originally tested the evidence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did the trial court manifestly abuse its discretion in denying Hernandez's motion to dismiss?

1. Was there government misconduct?
2. Was there actual prejudice to the rights of the accused which materially affected his right to a fair trial?

ISSUE 2: Did the trial court manifestly abuse its discretion when it denied Hernandez's motion to exclude the DNA evidence?

1. Was the discovery violation under CrR 4.7 caused by prosecutorial mismanagement?
2. Was the DNA evidence disclosed in a timely manner?
3. Was Hernandez prejudiced when the State placed him in an untenable position of forcing to choose between his right to a speedy trial or his right to effective assistance of counsel?
4. Is exclusion of the evidence the appropriate remedy?

ISSUE 3: Was Hernandez's right to confrontation was violated when the DNA technical peer reviewer who testified at trial was not the analyst who originally tested the evidence?

1. Are the results of DNA testing "testimonial"?
2. Is a supervisor a "witness" to a test she did not personally conduct or observe?
3. Does introducing a testimonial report prepared by a non-testifying witness violate the Confrontation Clause?

IV. STATEMENT OF THE CASE

On March 27, 2011, K.H., age 15, was staying at home with her father, Jaime Hernandez, and her younger brother and sister. Her mother had been staying in Seattle for the past two weeks caring for her ill grandmother in the hospital. CP 4. That night, K.H. took a shower, got ready for bed, brushed her teeth with her younger sister and brother, and fell asleep in a bedroom she shares with her younger sister. RP 218. Sometime during the middle of the night, she woke up to something rubbing on her buttocks area and felt a hand on her hip. CP 4, RP 219, 333. She found that her pajamas and underwear were pulled down from behind just below her buttocks. She turned around and found her father lying beside her under the covers. CP 4, RP 220, 329. She could not tell if he had his pants down, but she felt something wet and slimy on her buttocks. CP 4, RP 329, 333. K.H. did not believe her father penetrated her and said he did not touch her breast or any other private areas to include her anus or vagina. RP 326. K.H. pulled her underpants up and later wiped herself with a tissue and threw it in the bathroom trashcan. RP 329.

K.H. told her father to get out and that she was going to tell her mother what he had done. CP 4. According to K.H., her father told her that she was a woman now and she would have to do it someday anyway

and he knew she liked it. CP 4, RP 334. He told her that it was normal that every woman did it. CP 4, RP 334. K.H. told him no and he got out of the bed and took her cell phone. CP 4, RP 221. When Hernandez left the room, K.H. got up and locked her bedroom door. RP 221.

The next morning, her father gave her back her cell phone and told her to get ready for school. RP 223. She left for school and called her mother, Maria Hernandez, to report what her father had done. CP 4, RP 146, 223-24. K.H. was crying on the phone, and her mother told her to go to school. CP 4, RP 146, 224. At that time, Maria left the hospital in Seattle and traveled with her brother, Jose, and sister, Alicia, back to Kennewick. RP 146-47.

Maria picked up her daughter, K.H., at school and went directly to the Kennewick Police Department to make their statements. RP 147, 225. Officer Tony Valdez retrieved the underwear that K.H. was wearing and placed it into evidence. RP 225, 325. Maria told Officer Valdez that Hernandez had a gun at their apartment and she was afraid he may use the gun against them or himself if he found out they were reporting the crime. Maria went back to the apartment with the police and turned in the gun. RP 148. The gun returned stolen out of Whitman County. CP 4. Maria

made plans with Hernandez to meet at Burger King that night, so the police could arrest him, but Hernandez did not show up. RP 153.

The next day, on March 29, 2011, Maria took K.H. to Kadlec Hospital in Richland, Washington. She was examined by a sexual assault nurse examiner (SANE), Traci Swett, RN, who performed a rape kit sexual exam on K.H. RP 154, 341-370.

On August 22, 2011, the Benton County prosecuting attorney filed an Information charging Hernandez with the crimes of child molestation in the third degree and possessing a stolen firearm. CP 1-2. At the time the information was filed, Hernandez's whereabouts were unknown. CP 5.

On November 19, 2012, Hernandez was arrested on the outstanding warrant in this case. CP 15. He was arraigned on the charges on November 20, 2012. CP 15. Hernandez had a trial date set for January 14, 2013 and his time for trial expired on January 19, 2013. CP 7, 15. On December 13, 2012, law enforcement obtained a search warrant for Hernandez's DNA and obtained four buccal swab samples for DNA comparison purposes. CP 7, 15. The rape kit and underwear were collected from evidence and submitted to the Washington State Patrol Crime Lab, along with Hernandez's DNA sample on December 14, 2012. CP 8, RP King 8-9.

On January 7, 2013, the State filed a motion for continuance of the trial for purposes of obtaining the DNA lab results. CP 6-11. Anna Wilson, the forensic scientist assigned to perform the DNA analysis, advised that the forensic report should be available by January 14, 2013, the date of trial. CP 8. On January 9, 2013, Hernandez filed a motion to dismiss the charges or alternatively, to exclude the DNA evidence, alleging government mismanagement. CP 14-19.

At the motion hearing on January 9, 2013, the court granted the State's motion for continuance and reset the trial date on January 22, 2013, over Hernandez's objection. RP King 3-15. The court denied Hernandez's motion to dismiss the case or alternatively, exclude the DNA evidence. *Id.* The court found that it was reasonable for the State to start the DNA process once Hernandez was in custody (and not two years before when the evidence had been collected), and that a reasonable time was necessary for the State to complete the process. RP King 12. The court also stated that it would not have been reasonable to test the evidence earlier and "have different testers and all sorts of problems." RP King 14. The court found that the continuance was not outside of Hernandez's speedy trial time, but "that to the extent it is, I think this is a good cause continuance." RP King 13.

On January 18, 2013, Hernandez filed a motion to exclude the DNA evidence because it was provided in an untimely manner and the time for trial had expired, forcing the defendant to choose between his right to speedy trial and his right to confront evidence by an attorney who will provide effective assistance of counsel. CP 22-30. At a hearing on the motion on January 18, 2013, the court heard from the parties and ruled that the State would be able to use the DNA evidence and that the case would proceed to trial on January 22, 2013, unless the defendant wished to waive his right to speedy trial. CP 60. The court further informed Hernandez that should he waive his right to a speedy trial to be able to review and confront the DNA evidence that the court would appoint an expert to assist counsel in investigating and reviewing the collection of DNA from the victim and from himself, and the court would make any other orders necessary for his counsel to be able to effectively prepare for DNA evidence on his behalf. CP 60. After consulting with defense counsel, Hernandez agreed to waive a speedy trial at that time. CP 58. Hernandez was tried before a jury in June 2013.

During its case-in-chief, the State presented the expert testimony of forensic scientist Erica Graham of the Washington State Patrol Crime Lab, in lieu of the testimony of Anna Wilson, the scientist who originally tested the DNA evidence in this case. RP 388-430. Graham was the technical

peer reviewer of the DNA evidence in this case. RP 393. Wilson was not available for trial because she was on maternity leave. RP 393.

Hernandez objected to the admissibility of Graham's testimony because his right to confrontation would be violated since the DNA testing was not performed by this witness. RP 429. The court overruled Hernandez's objection and ruled that Graham's testimony was admissible. RP 429.

After the end of State's case-in-chief, the State moved to dismiss count 2, possession of a stolen firearm, and the State rested. RP 470.

Hernandez moved for dismissal of the charges based on government mismanagement. CP 151-153. Hernandez claimed that his right to a fair trial was violated because he was tried for possession of a firearm which was highly prejudicial, without the state intending to prove the allegation. CP 151, RP 482. The court denied the motion and defense counsel then moved for a mistrial, which the court denied. RP 485. Next, defense counsel moved for a curative instruction, which the court granted. CP 163, RP 485-489.

Hernandez chose not to testify in his own behalf or offer any additional witnesses to testify in his behalf. RP 473-74. The jury found Hernandez guilty of child molestation in the third degree as charged in

Count 1. RP 532. The trial court ultimately sentenced Hernandez to 12 months in jail, with good time. RP 543. Hernandez timely appeals.

V. ARGUMENT

1. The trial court erred in denying Hernandez's motion to dismiss under CrR8.3(b) for prosecutorial misconduct.

Hernandez contends that the trial court abused its discretion in denying his motion to dismiss for prosecutorial mismanagement. He argues that the State's DNA evidence was not provided in a timely manner under discovery rule CrR 4.7, because if left in sufficient time to allow the defense to rebut the evidence by calling a rebuttal witness of the defense choosing.

Criminal Rule 8.3(b) states:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b). Before a trial court may dismiss charges under CrR 8.3(b), the defendant must show by a preponderance of the evidence (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The governmental misconduct need not be evil or

dishonest; simple mismanagement is sufficient. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). And the defendant must show actual prejudice, not merely speculative prejudice affecting his right to a fair trial. *Rorich*, 149 Wn.2d at 657. Dismissing charges under CrR 8.3(b) is an extraordinary remedy. *Rohrich*, 149 Wn.2d at 658. It is limited to those “truly egregious cases of mismanagement or misconduct.” *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). The trial court should resort to dismissal under CrR 8.3(b) “only as a last resort.” *Wilson*, 149 Wn.2d at 12. The appellate court reviews the trial court’s decision denying a motion to dismiss under CrR 8.3 for an abuse of discretion, which it is when the decision was manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997); *Blackwell*, 120 Wn.2d at 830.

Dismissal under CrR 8.3 or CrR 4.7 is “generally available only when the defendant has been prejudiced by the prosecutor’s actions.” *State v. Cannon*, 130 Wash.2d 313, 328, 922 P.2d 1293 (1996). To justify dismissal, the defendant must show actual prejudice; the mere possibility of prejudice is insufficient. *State v. Stein*, 140 Wn.App. 43, 56, 165 P.3d 16 (2007), *review denied*, 163 Wn.2d 1045, 187 P.3d 271 (2008). Such prejudice includes the right to a speedy trial and the right to be represented

by counsel who has had sufficient opportunity to adequately prepare a material part of his defense. *Michielli*, 132 Wn.2d at 240.

Here, the trial court's ruling was manifestly unreasonably because the State committed actual misconduct when it failed to test DNA evidence in a timely manner. The record reflects that the investigation into this incident took place in late March 2011. Law enforcement had K.H.'s underwear and the Rape Kit in evidence by March 29, 2011. In addition, law enforcement had access to Hernandez's apartment when Maria handed Officer Valdez the gun. At that time, law enforcement could have collected DNA samples of Hernandez because they were in his apartment and had permission from Maria and access to his property, but they did not do so at that time. Law enforcement's investigation appears to have concluded in late March 2011. Hernandez was arrested on November 19, 2012, and arraigned on November 20, 2012. Although Hernandez was in custody, law enforcement did not seek a warrant or ask Hernandez to provide a DNA sample until December 13, 2012. On December 14, the State finally sent the K.H.'s underwear, the Rape Kit, and Hernandez's DNA samples to the Washington State Crime Lab for DNA testing. Even then, no attempts were made to analyze any samples whatsoever until January 2013. Defense counsel was unaware of the

additional evidence or DNA testing until he was provided discovery on January 7, 2013, a week before trial.

In addition, the trial court's ruling was manifestly unreasonable because Hernandez was actually prejudiced in a manner that materially affected his right to a fair trial. The record reflects that the DNA report would not be submitted until the day of trial on January 14, 2013, which was untimely. At that point, there was no opportunity for defense counsel to adequately review the records, to obtain an expert witness on the defendant's behalf or to provide effective assistance of counsel.

A defendant being forced to waive his speedy trial right is not a trivial event. *Michielli*, 132 Wn.2d at 245. The Washington Supreme Court has as matter of public policy, chosen to establish speedy trial time limits by court rule and to provide that failure to comply therewith requires dismissal of the charge with prejudice. *Id.*

In *Michielli*, the State expressly admitted that it had all the information and evidence necessary to file all of the charges months before the trial date. *Id.* at 246. Despite this, the State delayed bringing the most serious of these charges for months, and did so only three business days before trial. *Id.* The court found that the State's delay in amending charges, coupled with the fact that the delay forced the

defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice sufficient to satisfy CrR 8.3(b). *Id.* at 245.

Similarly, in this case, the State delayed in testing the DNA evidence it had in its possession almost two years before the trial date. For defense counsel not to be able to receive the DNA evidence until the day trial was scheduled forced Hernandez to waive his right to speedy trial in order to prepare an adequate defense. Actual prejudice exists because Hernandez could not both have a speedy trial and effective assistance of counsel.

Because there was government misconduct and actual prejudice to Hernandez, the trial court manifestly abused its discretion by denying Hernandez's motion to dismiss. As a result, the conviction should be reversed and the cause dismissed with prejudice.

2. The trial court erred in denying Hernandez's motion to exclude DNA evidence under CrR 4.7 for prosecutorial mismanagement.

Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court. *Id.* The reviewing court will not

disturb trial court's discovery decision absent manifest abuse of its discretion. *State v. Blackwell*, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993).

The factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. *State v. Hutchinson*, 135 Wn.2d 863, 882-83, 959 P.2d 1061(1998).

While CrR 4.7(h)(7)(i) does not enumerate exclusion as a remedy, it does allow a trial court to "enter such other order as it deems just under the circumstances." This language allows the trial court to impose sanctions not specifically listed in the rule. *Id.* Cases interpreting CrR 4.7(h)(7)(i) have typically involved the failure to produce evidence or identify witnesses in a timely manner. *See, e.g., State v. Linden*, 89 Wn.App. 184, 947 P.2d 1284 (1997) (holding trial court acted within its discretion when granting continuance to defense for prosecution's late disclosure of information). Violations of that nature are appropriately remedied by continuing trial to give the non-violating party time to

interview a new witness or prepare to address new evidence. Where the State's violation of the rule is serious, mistrial or dismissal may be appropriate. *See, e.g., State v. Jones*, 33 Wn.App. 865, 868–69, 658 P.2d 1262 (1983)(holding State's numerous failures to adhere to trial judge's discovery orders justified mistrial).

The principles underlying CrR 4.7 require meaningful access to discovery based on fairness and the right to adequate representation. *State v. Boyd*, 160 Wn.2d 424, 433, 158 P.3d 54, 59 (2007). The discovery rules are designed to enhance the search for truth and their application by the trial court should ensure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage. *Id.*

Courts have long recognized that effective assistance of counsel, access to evidence, and in some circumstances, expert witnesses, are crucial elements of due process and the right to a fair trial. *Id.* at 434. The Fifth Amendment to the United States requires that prosecutors make available evidence “favorable to an accused ... where the evidence is material either to guilt or to punishment.” *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Sixth Amendment right to effective assistance of counsel advances the Fifth Amendment's

right to a fair trial. That right to effective assistance includes a “reasonable investigation” by defense counsel. *See Strickland v. Washington*, 466 U.S. 668, 684, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re Pers. Restraint of Brett*, 142 Wash.2d 868, 873, 16 P.3d 601 (2001). It also guarantees expert assistance if necessary to an adequate defense. *State v. Punsalan*, 156 Wn.2d 875, 878, 133 P.3d 934 (2006). Supporting the right to effective representation, CrR 4.7(h)(4) provides that the evidence must be disclosed “in time to permit ... beneficial use.” *Boyd*, 160 Wn.2d at 434-35.

Here, the trial court’s admission of the DNA evidence was manifestly unreasonable. The State was untimely in disclosing the DNA evidence. Defense counsel was unaware of the additional evidence or DNA testing until he was provided discovery on January 7, 2013 and received an email with the DNA results on January 10, 2013. CP 30. With a trial date set on January 14, 2013, and then again on January 22, 2013 after the court granted the State’s continuance, there would not be enough time for defense counsel to adequately prepare for trial. In his affidavit, defense counsel explained that before he could be effective, he would need the following: 1) the DNA report evaluated by a DNA expert before trial; 2) an independent analysis of the result of the DNA testing; 3) an investigator who was experienced in DNA collection to review the

collection procedure; 4) a DNA collection investigator to interview witnesses who reported to collect the DNA to determine whether contamination took place. CP 30. In addition, defense counsel stated there was insufficient time for counsel to seek funds from Office of Public Defense, interview experts, and have the evidence transferred to an expert for evaluation before trial. CP 30. Furthermore, Hernandez was demanding his right to a speedy trial. CP 30. Hernandez was put in the untenable position of either having effective assistance of counsel for his defense or waiving his right to speedy trial.

To allow the State to use evidence which cannot be challenged because of the delay in discovery created by the prosecuting attorney would be grossly unfair and prejudicial to Hernandez. If the court orders a continuance, the court would be violating the defendant's right to a speedy trial under the Washington and U.S. Constitutions and under CrR3.3. The State should not be allowed to profit from its mismanagement and failure to obtain discovery in a timely manner. It is immaterial whether the error or mismanagement was caused by the Washington State Patrol Crime Lab, the local law enforcement, or the prosecuting attorney. Here, Hernandez was prejudiced because he was forced to give up his right to a speedy trial and agree to a continuance in order to have effective assistance of counsel.

As a result, the court manifestly abused its discretion by denying Hernandez's motion to exclude the DNA evidence.

3. Hernandez's Sixth Amendment right to confront the witnesses against him was violated because the DNA technical peer reviewer who testified at trial was not the analyst who originally tested the evidence.

Hernandez contends that the DNA reports in this case are testimonial and he was denied his Sixth Amendment right to confront the witnesses against him. 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 1, 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." In *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006), our Supreme Court concluded that article 1, section 22 can offer higher protection than the Sixth Amendment with regard to a defendant's right of confrontation. *Id.* at 391-92. 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 in *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 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*, 541 U.S. 36 (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*, 541 U.S. at 68. But if testimonial hearsay evidence is at issue, the Confrontation Clause requires witness unavailability and a prior opportunity for cross-examination. *Id.* 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.* The Court rejected various arguments that the statements of scientific experts 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.*

The U.S. Supreme Court had the opportunity to revisit its *Melendez–Diaz* decision in the context of a driving under the influence of intoxicants prosecution. In *Bullcoming v. New Mexico*, — U.S. —, 131 S.Ct. 2705, 2709, 180 L.Ed.2d 610 (2011), the Supreme Court held that the introduction into evidence of a “forensic laboratory report certifying that Bullcoming’s blood-alcohol concentration was well above the threshold for aggravated DWI” violated Bullcoming’s confrontation right because the laboratory report was accompanied by the testimony of a

laboratory analyst who had neither written the report nor conducted the testing. *Id.* at 2711–12.

Recently, however, in *State v. Liu*, 315 P.3d 493 (2014), the Washington Supreme Court rejected the precedents set in *Melendez-Diaz* and *Bullcoming*, and created a newfound interpretation of the Sixth Amendment. In *Liu*, the court held that Liu’s right to confrontation was not violated when the State introduced DNA evidence through a supervisor, rather than the analysts who physically conducted the DNA testing. *Id.* at 510. Furthermore, in *State v. Manion*, 172 Wn.App. 610, 295 P.3d 270 (2013), Division One of the Court of Appeals also rejected the precedents set in *Melendez-Diaz* and *Bullcoming*. The court in *Manion* held that testimony of a DNA expert regarding the results of DNA analysis conducted by a non-testifying analyst, based on independent peer review of that analysis, does not violation a defendant’s right of confrontation. *Id.*

In this case, Hernandez claims the court should reject the analysis of the majority in *Liu* and *Manion*, and adopt the analysis of the Dissenting Opinion in *Liu*. The dissent agrees with the precedents set in *Melendez-Diaz* and *Bullcoming*, and would hold that the results of genetic testing are testimonial, that a supervisor is not a “witness” to a test he or

she did not personally conduct or observe, and that introducing testimonial reports prepared by a non-testifying witness violates the Confrontation Clause. *Liu*, 315 P.3d at 513-29.

Here, Hernandez's Sixth Amendment right to confrontation was violated because the DNA technical peer reviewer who testified at trial was not the analyst who originally tested the evidence. This conflicts with the U.S. Supreme Court's Sixth Amendment jurisprudence in *Melendez-Diaz* and *Bullcoming*. Accordingly, the judgment should be reversed and this matter remanded for a new trial.

VI. CONCLUSION

Hernandez respectfully requests that the court find that prejudicial errors were committed below such that his conviction ought to be reversed and his case remanded for further proceedings. These errors significantly prejudiced Hernandez's defense, depriving him of a fair trial.

Hernandez's judgment and sentence should be vacated, the convictions reversed, and the case dismissed with prejudice, or alternatively, remanded for new trial.

RESPECTFULLY SUBMITTED this 30th day of January, 2014.



ELIZABETH HALLS, WSBA #32291
Attorney for Appellant



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Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Andrew Kelvin Miller
Benton County Prosecutor's Office
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Jaime Hernandez
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 30th day of January, 2014 in Walla Walla, Washington.



Elizabeth Halls