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Supreme Court No. 84045-8

BY RONALD R. CARPENTER

CLERK  
IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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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

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LUI'S SECOND SUPPLEMENTAL BRIEF ADDRESSING  
*WILLIAMS V. ILLINOIS*

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ORIGINAL

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**I.**  
**INTRODUCTION**

The parties previously briefed whether this case should be stayed pending the U.S. Supreme Court's decision in *Williams v. Illinois*, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012). Now that the decision has issued, the Court has authorized further briefing regarding *Williams*, as well as an analysis of Lui's case under the Washington constitution.

**II.**  
**STATEMENT OF THE CASE**

A. BACKGROUND

Lui has set out the facts in detail in his opening brief at p. 2-7, and Reply Brief at 1-2. In short, on February 9, 2001, Elaina Boussiacos was found dead in the trunk of her car, which was parked in the lot of the Woodinville Athletic Club (WAC). Her fiance at the time was Sione Lui. The case was considered unsolved until 2007. *See* Brief of Respondent at 13. The primary new evidence at that point was an additional interview of Lui, in which he maintained his innocence, and new DNA testing, which is discussed below.

Lui was convicted based on entirely circumstantial evidence. There was no eyewitness to the crime, no confession, and no history of domestic violence between Lui and Boussiacos.

B. TESTIMONY OF DR. HARRUFF

The State presented the testimony of medical examiner Dr. Richard Harruff although Dr. Kathy Raven performed the autopsy in this case. X RP 1337. By the time of trial, Dr. Raven had relocated to Reno, Nevada, (X RP 1337, 1343) but the State did not claim that it would be impossible for her to appear at Lui's trial.

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 heavily on his discussions with Dr. Raven and his reading of her notes and report. X RP 1335-36, 1341, 1352-53, 1369-70.

The trial court agreed with the defense that Dr. Raven's report was largely "testimonial" for purposes of the Confrontation Clause. X RP 1347. Nevertheless, "since he signed off on the report at the time the confrontation requirement is satisfied by him being in court." The Court therefore overruled the defense objection. *Id.*

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 was not at the scene when the temperature was taken but merely relied on the “investigator’s notes.” X RP 1352-53. Dr. Harruff ultimately testified that the death could have taken place on February 2 or 3, 2001. X RP 1356.

The time of death was fundamental to the State’s theory that Lui killed Boussiacos sometime after she was last seen on the evening of February 2 and before her plane was scheduled to leave on the morning of February 3. In closing argument, the prosecutor discussed at length how various bits of circumstantial evidence fit that scenario. XIV RP 1809-42. Among other things, she ridiculed the testimony of a defense witness who maintained that Boussiacos’s car did not appear in the parking lot of the WAC until several days after February 3. XIV RP 1840-42. In rebuttal argument, the second prosecutor likewise maintained that Boussiacos was killed no later than the early morning of February 3. XIV RP 1887.

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, which showed no drugs or alcohol in Boussiacos. X RP 1398. In particular, Dr. Harruff noted the absence of nicotine. This point was significant because it refuted Lui’s suggestion to the police that

Boussiacos might have been killed after sneaking out of the house to smoke. X RP 1430; XVI RP 1845.

Dr. Harruff testified that the victim had various injuries, and that she was killed by strangulation, possibly with a ligature. X RP 1375-98. This testimony was based not only on the autopsy report but also on photographs taken by others. *See, e.g.*, X RP 1375-77 (discussing photographs). These photos were not authenticated by anyone with first-hand knowledge but rather admitted through the testimony of Dr. Harruff himself. *See, e.g.*, X RP 1358-59. 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." X 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.*

The prosecutor relied on Dr. Harruff's testimony in arguing that that Lui intended to kill Boussiacos, a necessary element of murder in the second degree. XVI RP 1850. She focused on his description of various bruising, which the prosecutor argued was consistent with the victim

trying to defend herself. *Id.* She then repeated Dr. Harruff's opinion regarding the level of force and the amount of time it would have to be applied to strangle Boussiacos to death.

It could have taken up to four minutes to die. I am not going to count that out. But we know that it was long enough, whatever it was, to burst those tiny blood vessels in her eyes and in her mouth and on her skin. To kill her with nothing other than an intent of, "I am going to kill you."

XVI RP 1850-51. She also relied on Dr. Harruff's testimony to argue that "there wasn't a lot of blood because it is that purging post death, sort of pinky colored." XVI RP 1850. That helped her explain why no bloodstains were found on the carpet of the Lui/Boussiacos home. *See X* RP 1009-10.

#### C. TESTIMONY OF GINA PINEDA

Lui also objected on Confrontation grounds to testimony from Gina Pineda. XII RP 1419-20. At the time of trial, Ms. Pineda was the associate director of Orchid Cellmark, a private DNA company in Dallas, Texas. XII RP 1483. She previously worked for Reliagene Technologies, a DNA company located in New Orleans, Louisiana before it was acquired by Orchid Cellmark. *Id.* She did not view or participate in any of the testing done in this case. XII RP 1489, 1494-95.

In 2006 and 2007<sup>1</sup>, Reliagene tested the shoelaces from the victim, the vaginal swab DNA extract, and three known samples from various individuals. In 2008<sup>2</sup>, Orchid tested the vaginal wash from the victim. XII RP 1491. In regard to the testing at Reliagene, Pineda reviewed the documentation prepared by the analysts and signed off on the report. XII RP 1505-06. Ms. Pineda did not sign off on the tests at Orchid because there was a different supervisor and analyst at the Dallas facility. XII RP 1562. For purposes of the trial she reviewed the documentation and results generated by the Orchid analysts and then testified based on them. XII RP 1561-62.

The testing performed by Reliagene and Orchid was restricted to the Y chromosome, which is unique to males. XII RP 1496-97. This type of testing cannot distinguish between the members of the same paternal lineage (such as a father and his son). XII RP 1502. Neither Sione Lui nor his son, Enoch Lui, could be excluded as the “major” donors of DNA found on the victim’s shoe laces. XII RP 1518. The profile detected occurs in about 0.2% to 0.3% of the male population. XII RP 1545. Anthony Negron, the ex-husband of Elaina Boussiacos, could not be excluded as a “minor” donor of DNA on the shoelaces. XII RP 1519. In

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<sup>1</sup> XII RP 1512, 1551, 1559.

<sup>2</sup> XII RP 1561

addition, an unidentified man was a minor donor. XII RP 1552-53.

Evidence tying Lui to the shoe laces was significant because it appeared that the murderer had dressed Boussiacos after killing her. IV RP 344-45.

No result could be obtained from the vaginal swab extract because the quantity of male DNA was too low. XII RP 1534, 1559-60. Orchid's testing of the vaginal wash extract yielded a profile consistent with Lui's. XII RP 1535-37, 1566. 0.2% of the male population could have the same profile. XII RP 1546. Ms. Pineda was neither the analyst nor the supervisor for this test. XII RP 1564-65. She did not sign off on it. X RP 1562.

The report prepared by Orchid actually stated that Sione Lui could not be excluded as the "predominant" contributor of male DNA in the vaginal wash. XII RP 1566. Ms. Pineda acknowledged that other "peaks" were detected on some of the genetic markers that were inconsistent with Lui's profile. *Id.* Over additional objection, she was permitted to testify that she discussed that matter with analysts at the Dallas lab and they concluded that these other peaks were "below threshold" and likely artifacts from the testing process rather than truly DNA from a second individual. XII RP 1567-68. She maintained that the word "predominant" went into the report "in order to be conservative." XII RP 1568.

In her closing argument, the prosecutor emphasized that Pineda's testimony was inconsistent with Lui's claim that he did not have sex with Boussiacos close to the time she disappeared.

That is the second thing that he will never admit and has never admitted to any one, probably himself included, that is the intercourse that night. He has adamantly denied throughout that they had sex.

He loved the idea of religious righteousness, but he can't even admit to himself, even in the face of semen in her vagina, because whatever happened in that regard that night was very bad.

XVI RP 1828. The prosecutor then suggested that Lui might have sexually assaulted Boussiacos. XVI RP 1829. "Maybe it happened at the same time she was being strangled, maybe not." XVI RP 1830. *See also*, XVI RP 1853. The prosecutor explained the small amount of semen detected as follows: "It is entirely possible that there was no completed sex act and that would have been the final humiliation for him." XVI RP 1830.

The prosecutor urged the jury to accept Pineda's claim that "predominant contributor" of male DNA really meant "sole contributor." "We know that there is no other person's semen in her." XVI RP 1848.<sup>3</sup>

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<sup>3</sup> It is true that the Washington State Patrol Crime Laboratory previously found a very small amount of Lui's DNA on Boussiacos's underpants (RP 1220-21), but that could have been there for "a really long time" and could remain even if the underwear had been washed. RP 1270-71. The State Patrol also found some male DNA on a vaginal swab, but the results were too weak for a full profile (although Mr. Lui could not be excluded). RP 1235-38.

**III.**  
***WILLIAMS V. ILLINOIS***

A. THE REASONING OF EIGHT SUPREME COURT JUSTICES SUPPORTS LUI'S POSITION

Aside from the fact that Mr. Williams lost his case, the ruling in *Williams v. Illinois, supra*, takes some effort to decipher. It is, in the words of Justice Kagan, a “fractured” decision. *Id.*, 132 S.Ct. at 2265. Four Justices wrote to express differing views.

The case stems from a rape in 2000. The Illinois State Police (ISP) obtained a vaginal swab from the victim and sent it to Cellmark Diagnostics Laboratory, which produced a DNA profile and report. At this time Williams was not under suspicion for the crime. Later, Sandra Lambatos, a forensic specialist at the ISP lab, conducted a computer search and determined that the Cellmark profile matched one obtained by ISP from Williams after he was arrested on unrelated charges. *Williams*, 132 S.Ct. at 2229.

At a bench trial, an ISP analyst testified about her work in obtaining a known profile from Williams. The State declined, however, to call any witness from Cellmark. Instead, Lambatos testified over objection that the known profile matched the suspect profile. *Id.* at 2229-30. The Illinois Supreme Court affirmed on the basis that the Cellmark

report was not used for the truth of the matter asserted but only as a basis for Lambatos's expert opinion. *Id.* at 2231-32.

On review by the U.S. Supreme Court, five Justices rejected the state court's reasoning. Justice Kagan, writing for four Justices, explained that when a witness repeats an out-of-court statement as the basis for a conclusion "the statement's utility is then dependent on its truth." *Id.* at 2268. "If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies." *Id.* at 2268-69. Justice Thomas, writing only for himself, agreed on this point: "There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth." *Id.* at 2257.

Only four Justices accepted the state court's reasoning. *See* opinion of Justice Alito, *id.* at 2233-41. Thus, a majority of the Court unequivocally rejected the notion that out-of-court statements relied on by an expert witness satisfy the Confrontation Clause as long as they are not offered for the truth of the matter asserted. Justice Alito's rationale would not apply in any event to Lui's case because his jury was never told that it should not consider the out-of-court statements for their truth.

Justice Alito offered a second rationale supporting the admission of the Cellmark results: they were not “testimonial” because their “primary purpose” was not to accuse a “targeted individual of engaging in criminal conduct.” *Id.* at 2242. Rather, “[w]hen the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time.” *Id.* at 2243. Justice Alito relied on *Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and *Michigan v. Bryant*, 131 S.Ct. 1143, 1155, 179 L.Ed.2d 93 (2011), which held that a statement is not testimonial when it is made to “resolve an ongoing emergency.” *See Williams*, 132 S.Ct. at 2243.

This rationale cannot apply to the DNA testing in Lui’s case. He was considered the primary suspect since 2001. When Detective Bartlett took on the “cold case” in 2006, she set out to gather additional evidence against him. X RP 1313. Certainly there was no “ongoing emergency” by

the time Reliagene and Orchid became involved. Similarly, even at the time of the autopsy , Lui was an identified suspect.<sup>4</sup>

Justice Kagan, also writing for four Justices, stressed the need for cross-examination of forensic analysts because it is “especially likely to reveal whether vials have been switched, samples contaminated, tests incompetently run, or results inaccurately recorded.” *Id.* at 2264-65. In her view, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), and *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), compelled the conclusion that the Cellmark analyst was required to testify. *Id.* at 2266.

Justice Kagan also criticized Justice Alito’s decision for limiting testimonial statements to those aimed at a targeted individual, and for stretching the notion of an “ongoing emergency” test beyond its logical limit. *Id.* at 2273. Justice Thomas likewise criticized Justice Alito’s

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<sup>4</sup> On February 8, 2001, Detective Doyon conducted a lengthy taped interrogation of Lui. VI RP 771 and Ex. 43. This included questioning about whether Lui’s relationship with Boussiacos was going well, whether Lui had a prior criminal record, and whether he had committed domestic violence against Boussiacos. On the same day, Doyon and his partner Detective Gulla went to the Lui/Boussiacos home and noted that several things seemed suspicious. VIII RP 940-47. They took some swab samples of stains on the door and the hallway. VIII RP 948. In his report of February 8, Gulla described Lui as a “suspect.” VIII RP 996. Boussiacos’s body was found the next day. VIII RP 948-49. Officers promptly detained Lui in handcuffs and Doyon and Gulla took him to the courthouse for another interview. VII RP 951- 56. Gulla found Lui’s statements and manner suspicious. *Id.*

“primary purpose” test. *Id.* at 2261-64. This controversy is irrelevant to Lui’s case, however, since he passes even Alito’s test on those points.

As Justice Kagan noted, it is misleading to refer to Justice Alito’s opinion as a “plurality.” “In all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication.” *Id.* at 2254<sup>5</sup>.

Why then did Williams lose? Only because Justice Thomas adopted a uniquely narrow definition of testimonial statements: They must have the same level of “solemnity” as “depositions, affidavits, and prior testimony.” *Id.* at 2260. It appears that forensic reports can achieve that level of solemnity only if they are “certified” or “sworn.” *Id.* Otherwise, the reports cannot implicate the Confrontation Clause no matter how they are used at trial. *Id.* at 2260-61. The Cellmark report in Williams’s case was not sworn or certified. The same is true of the autopsy and DNA reports in Lui’s case. No other Justice agreed with Thomas’s test, however. As Justice Kagan noted, prosecutors should not be permitted to circumvent the Confrontation Clause by having their witnesses write out sufficiently informal statements. *Id.* at 2276.

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<sup>5</sup> Justice Breyer wrote separately because he believed the case required re-argument. *Id.* at 2244-52.

The bottom line is that the testimony in Lui's case satisfied only Justice Thomas's interpretation of the Confrontation Clause. Under Justice Kagan's reasoning, Dr. Harruff's and Gina Pineda's testimony obviously violated the confrontation clause because their opinions were based on the work of others. Justice Alito's notion that the analyst's work could be offered for something other than the truth of the matter asserted is irrelevant to Lui's case because the information was admitted for its truth. (And in any event five Justices expressly disavowed the use of such a pretense.) Finally, even under Justice Alito's relatively restrictive "primary purpose" test, the forensic reports regarding Lui were clearly testimonial since they targeted a known suspect.

B. REMAND ORDERS OF THE U.S. SUPREME COURT  
FOLLOWING *WILLIAMS* CONFIRM LUI'S  
INTERPRETATION

That a majority of the U.S. Supreme Court would find a confrontation violation in Lui's case is confirmed by a number of rulings granting certiorari, vacating convictions, and remanding for further consideration in view of *Williams*. The Supreme Court will issue such summary "grant, vacate and remand" orders 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).

In each of the following cases, the lower court found no confrontation violation: *People v. Mercado*, 2011 WL 2936791 (Cal. Ct. App. July 21, 2011)<sup>6</sup>, *review denied* (Oct. 19, 2011), *cert. granted*, *judgment vacated sub nom. Mercado v. California*, 11-7972, 2012 WL 2470082 (U.S. June 29, 2012) (medical examiner gave opinion on manner of death based in part on witness statements obtained by coroner’s office); *People v. Suen*, 2010 WL 4401796 (Cal. Ct. App. Nov. 8, 2010), *reh’g denied* (Nov. 23, 2010) , *review denied* (Feb. 16, 2011), *cert. granted*, *judgment vacated sub nom. Suen v. California*, 10-10936, 2012 WL 2470059 (U.S. June 29, 2012) (DNA analyst testified about analysis conducted by others at her company); *United States v. Turner*, 591 F.3d 928, 930-35 (7th Cir. 2010) *cert. granted*, *judgment vacated*, 09-10231, 2012 WL 2470054 (U.S. June 29, 2012) (supervisor testified in place of chemist who tested drugs); *People v. Kwon*, 2011 WL 1143026 (Cal. Ct. App. Mar. 30, 2011), *review denied* (June 8, 2011), *as modified on denial*

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<sup>6</sup> The state court ruling in *Mercado*, as with some of the other cases cited in this section, was unpublished and may not be cited for precedential value. Lui is not relying on these cases as persuasive precedent, however. In fact, he disagrees with the rulings in all of them. The cases are discussed merely to give a context for the U.S. Supreme Court’s published rulings vacating the lower courts’s decisions.

*of reh'g* (Apr. 19, 2011), *cert. granted, judgment vacated sub nom. Kwon v. California*, 11-5832, 2012 WL 2470063 (U.S. June 29, 2012) (testifying witness actually performed the DNA analysis at issue, but the State did not call the other analysts who performed some of the preliminary steps in the testing); *Com v. Greineder*, 458 Mass. 207, 235-39, 936 N.E.2d 372, 394-97 (2010) *cert. granted, judgment vacated sub nom. Greineder v. Massachusetts*, 10-8835, 2012 WL 2470055 (U.S. June 29, 2012) (laboratory director of Cellmark testified regarding DNA results obtained by staff analyst); *U.S. v. Pablo*, 625 F.3d 1285, 1290-95 (10th Cir. 2010) *cert. granted, judgment vacated*, 10-9789, 2012 WL 2470057 (U.S. June 29, 2012) (analyst testified as expert witness regarding DNA and serology analysis performed by others at the same state crime lab); *People v. Johnson*, 2011 WL 135826 (Cal. Ct. App. Jan. 18, 2011), *review denied* (Mar. 23, 2011), *cert. granted, judgment vacated sub nom. Johnson v. California*, 10-10923, 2012 WL 2470058 (U.S. June 29, 2012) (supervisor testified in place of DNA analyst from same crime lab).

The Supreme Court's treatment of these cases shows that it would almost certainly vacate any ruling affirming the conviction in Lui's case.

**IV.**  
**WASHINGTON CONSTITUTIONAL ANALYSIS**

In the alternative, if this Court concludes that the fractured *Williams* decision does not resolve Lui's case, it should decide the matter under article 1, section 22 of the Washington Constitution. Of course, other Washington litigants will also benefit from a clearer standard.

This Court has already determined that article I, section 22 provides greater protection than the Confrontation Clause of the Sixth Amendment. *See State v. Martin*, 171 Wn.2d 521, n.2, 252 P.3d 872 (2011). For that reason, it does not appear that an analysis of the *Gunwall*<sup>7</sup> factors is necessary. In an excess of caution, however, Lui will go through the analysis.

*Gunwall* sets out six relevant factors: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." *Gunwall*, 106 Wn.2d at 58.

As to all factors except number four, the analysis is the same as in *State v. Martin*, supra. Factors one and two favor an independent interpretation because article I, section 22 guarantees the right "to meet the witnesses against him face to face," whereas the Sixth Amendment merely

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<sup>7</sup> *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

provides a defendant with the right “to be confronted with the witnesses against him.” *Martin*, 171 Wn.2d at 529. Factor three, the constitutional and common law history factor, also favors an independent interpretation. *See Martin* at 529-30.

As to factor four, there is a preexisting body of state law rejecting the use of hearsay statements against the defendant on the pretext that they are not offered for the truth of the matter asserted. *See, e.g., State v. Mason*, 160 Wn.2d 910, 922, 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”); *State v. Martinez*, 78 Wn. App. 870, 899 P.2d 1302 (1995), *review denied*, 128 Wn.2d 1017, 911 P.2d 1342 (1996) (defense arson expert must base his opinion only on testimony presented by other witnesses, and not on hearsay statements); *State v. Wicker*, 66 Wn. App. 409, 832 P.2d 127 (1992) (fingerprint technician’s testimony that his analysis was “verified” by a senior technician amounted to an impermissible hearsay statement of the senior technician, even though the testimony was purportedly not offered for the truth of the matter asserted); *State v. Aaron*, 57 Wn. App. 277, 787 P.2d 949 (1990) (officer’s testimony that dispatcher told him suspect possessed a blue jeans jacket was

impermissible hearsay and a violation of article I, section 22, although purportedly admitted for the limited purpose of the officer's state of mind). Thus, preexisting Washington law disfavors the use of out of court statements that are likely to be taken for their truth, even if purportedly offered for some other purpose.

Further, there is preexisting state law rejecting the notion that one expert witness may testify about the statements of another. *See State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002), *review denied*, 148 Wn.2d 1001, 60 P.3d 1212 (2003) (laboratory supervisor's testimony regarding drug testing was inadmissible hearsay because based on notes of subordinate); *State v. Wicker, supra*, (fingerprint technician testified that his own analysis was verified by a senior technician; court finds violation of hearsay rules and confrontation clause). *See also, State v. Pugh*, 167 Wn.2d at 853 (Sanders, J., dissenting), citing *State v. Stentz*, 30 Wash. 134 (1902)<sup>8</sup>, and *State v. Eddon*, 8 Wash. 292, 36 P. 139 (1894), for the proposition that Washington has historically interpreted the "face to face" requirement strictly.

The fifth *Gunwall* factor supports an independent constitutional analysis in every case. *See Martin* at 533, n.6.

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<sup>8</sup> Abrogated on other grounds by *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001).

As for factor six, it is quite common for states to impose their own restrictions on the manner in which the prosecutor presents testimony.

*Cf. State v. Foster*, 135 Wn.2d at 484 (opinion of C. Johnson)

(constitutionality of closed-circuit testimony a matter of local and state concern).

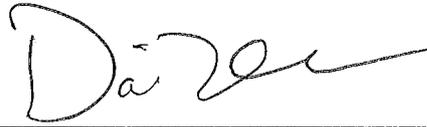
Thus, this Court should conclude that the state constitution flatly prohibits testimony by surrogate expert witnesses. An expert's reliance on tests and analysis performed by non-testifying analysts cannot be reconciled with the notion of "face-to-face" confrontation. Our constitutional protections should not be evaded by the ready device of sending a "supervisor" to testify about work done by others. Further, this clear standard will benefit judges and litigants in criminal cases because they will know which witnesses must appear at trial.

## V. CONCLUSION

Thus, whether the case is analyzed under the Washington or federal constitution, the admission of surrogate expert testimony violated Lui's constitutional rights. He is entitled to a new trial because the State cannot show that "the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *State v. Watt*, 160 Wn.2d 626, 636, 160 P.3d 640 (2007).

DATED this 31<sup>st</sup> day of August, 2011.

Respectfully submitted,



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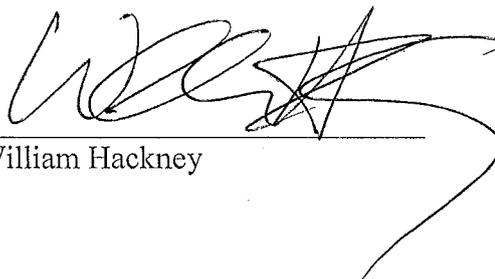
**CERTIFICATE OF SERVICE**

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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