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9/14/2011

Supreme Court No. 84045-8

COPY

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 SUPPLEMENTAL BRIEF ADDRESSING *WILLIAMS V.  
ILLINOIS*

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## I. INTRODUCTION

The parties have recently filed supplemental briefing regarding the United States Supreme Courts' opinion in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). The court has now requested supplemental briefing regarding whether Lui's appeal should be stayed pending the U.S. Supreme Court's decision in *Williams v. Illinois*, No. 10-8505. Lui will not repeat here the facts set out in his supplemental brief regarding *Bullcoming*.

## II. ARGUMENT

Lui requests that the court issue a prompt ruling in his case and decline to stay the case pending a decision in *Williams*. Lui's direct appeal was filed in January, 2009, and he does not wish to delay the process further.

In any event, it is not clear that any ruling in *Williams* will definitively resolve Lui's case. Since Lui's appeal was filed, the U.S. Supreme Court has decided two cases discussing the application of the Confrontation Clause to forensic evidence: *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), and *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). Both of those decisions involved a ruling in favor of the defense. Both invalidated at least some of the

arguments the State had been making in Lui's case. Nevertheless, after each ruling, the State continued to argue that Lui's case was distinguishable.

It is true that *Williams* may foreclose two more of the State's arguments: 1) that the testimony of a surrogate expert is sufficient as long as she had some supervisory or other personal connection to the work of the non-testifying expert; and 2) that a surrogate expert may rely on the work of others as long as the underlying reports are not admitted into evidence and are not offered "for the truth of the matter asserted."

It seems unlikely that the U.S. Supreme Court would resolve these issues in favor of the State. The reasoning of *Bullcoming* would seem to apply whether or not the underlying 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 the State's approach. See AOB at 27-29;<sup>1</sup> In a related setting, this Court agreed that "courts ought to guard against any 'backdoor' admission of inadmissible

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<sup>1</sup> 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.

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.

Further, there is no reason that the testifying expert should have carte blanche to relate testimonial statements of another analyst simply because the testifier has some “personal connection” to the tests or examination at issue. To be sure, the expert may testify based on her own personal knowledge. For example, if she actually observed the analyst carry out a test from start to finish, she might be qualified to testify in place of the analyst. But knowledge about one portion of a process does not magically give her knowledge about others. Similarly, a supervisor of the analyst might legitimately testify about the qualifications of the analyst and the procedures of the laboratory. But her supervisory role does not imbue her with an omniscient ability to know whether the analyst followed those procedures correctly in a particular case.

Thus, it seems likely that the *Williams* Court will rule that the defendant's confrontation rights were violated.<sup>2</sup> But even if the issues in *Williams* are resolved in Lui's favor, the State may find some other basis for distinguishing his case from *Williams*.

Further, even if the U.S. Supreme Court rules against *Williams*, Lui will likely be entitled to relief. In *Williams*, the jury was instructed that the original analyst's report must not be considered for the truth of the matter asserted. See *People v. Williams*, 238 Ill. 2d 125, 939 N.E. 2d 268 (2010). In Lui's case, however, the jury received no such limiting instruction.

Lui is concerned that if the Court issues stays for this U.S. Supreme Court decision, the process could go on indefinitely. Undoubtedly, the U.S. Supreme Court will continue to accept cases raising various issues regarding the Confrontation Clause and forensic evidence.

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<sup>2</sup> If the Court were not so inclined, there would have been little reason to grant certiorari.

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**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 in January, 2009, that Lui's confrontation rights were violated, it is clear now. This Court should reverse and remand for a new trial without waiting for additional decisions.

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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