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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SIONE P. LUI,

Petitioner.

**STATE'S SUPPLEMENTAL BRIEF ADDRESSING
WILLIAMS V. ILLINOIS AND ARTICLE I, SECTION 22
OF THE WASHINGTON CONSTITUTION**

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ORIGINAL

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A. ISSUES PRESENTED

1. Whether expert scientific testimony that is based partly on test results obtained by non-testifying analysts comports with the Confrontation Clause, where the testifying expert is a supervisor in the relevant laboratory who is fully informed about, and is available for cross-examination on, the testing procedures and quality assurance safeguards in the testing laboratory, and where the expert testifies to his or her own opinions and conclusions based on specialized expertise.

2. Whether the expert scientific testimony referenced above comports with article I, section 22 of the Washington Constitution.

B. RELEVANT FACTS¹

At issue in this murder case is the testimony of two expert witnesses. Dr. Richard Harruff, the Chief Medical Examiner for King County, testified about the cause and manner of death of the victim based primarily on photographs taken as part of an autopsy done by a forensic pathologist who had worked under Dr. Harruff's

¹ The facts of this case are set out in detail in the **Brief of Respondent** filed in the Court of Appeals, in the Court of Appeals opinion (153 Wn. App. 304, 221 P.3d 948 (2009)), and in the **State's Supplemental Brief** (filed in this Court on June 10, 2010). This brief summary is provided for the Court's convenience.

supervision, and whose report Dr. Harruff had signed. The report itself was not admitted into evidence at trial.

Gina Pineda, the associate director and technical leader of the laboratory where some of the DNA testing had been done, gave her expert opinion based on comparisons she made with DNA obtained from the defendant. Pineda based her opinion in part on results obtained by technicians working under her supervision and whose work she had reviewed. No report prepared by those technicians was admitted at trial.

Both experts were fully familiar with, and testified about, the testing that was done, and the protocols and procedures in place in their respective laboratories to ensure proper training and quality control.

C. ARGUMENT

1. THE IMPACT OF WILLIAMS V. ILLINOIS ON THE SIXTH AMENDMENT CONFRONTATION RIGHT.

“[A]s the late Justice Brennan used to say, the first rule of the Supreme Court is that you have to be able to count to five.” Abner Mikva, *The Scope of Equal Protection*, 2002 U. Chi. Legal F. 1, 8 (2002). This maxim determined the outcome of Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221, 183 L. Ed.2d 89 (2012), and

it controls the outcome of this case under the Sixth Amendment's Confrontation Clause.

In Williams, Sandra Lambatos, a forensic scientist at the Illinois State Police Lab, testified that there was a "match" between the defendant's DNA profile and the male DNA profile obtained from vaginal swabs taken from the victim. 132 S. Ct. at 2229-30. DNA testing on the vaginal swabs had been performed at Cellmark Diagnostics Laboratory in Germantown, Maryland. Id. at 2229. The sum total of Lambatos's testimony about Cellmark was that it was an "accredited crime lab" and that the Illinois lab routinely sent evidence to Cellmark for DNA testing. Id. at 2230. Lambatos did not participate in any way in the testing at Cellmark; in fact, there was no evidence in the record that Lambatos had ever even *been* to that laboratory. Id. at 2267, 2268 (Kagan, J., dissenting).

A four-justice plurality² affirmed on two separate bases. First, the plurality relied on the rule of evidence that allows an expert witness to base an opinion on facts or data that are not themselves admissible in evidence, so long as the facts or data are of a type reasonably relied upon by experts in the relevant field; the theory underlying this rule is that the facts or data are not admitted

² Justices Alito, Kennedy and Breyer, and Chief Justice Roberts.

for their truth, but for the limited purpose of explaining the basis for the expert's opinion. Id. at 2233-41; see ER 703. Second, the plurality relied upon the fact that the primary purpose of the DNA testing was not to accuse a specific person of a crime, but to catch an unknown rapist who was still at large; thus, the DNA analysts were not "witnesses against" the defendant in the sense that is historically embodied in the Confrontation Clause. Id. at 2242-44.³

Justice Thomas provided the fifth vote. He rejected the plurality's reliance on the rationale embodied in ER 703, i.e., that the DNA results obtained by Cellmark were not admitted for their truth, and thus were not subject to the Confrontation Clause. Id. at 2255-59 (Thomas, J. concurring in the judgment). He also rejected the plurality's "primary purpose" analysis. Id. at 2261-64. But he nevertheless found the Cellmark report "distinguishable from the laboratory reports that [the Court] determined were testimonial" in Melendez-Diaz v. Massachusetts, 557 U.S.305, 129 S. Ct. 2527, 174 L. Ed.2d 314 (2009), and Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705, 180 L. Ed.2d 610 (2011), because the reports

³ While the plurality made reference to the fact that Williams was tried to the bench, they took care to note that they did "not suggest that the Confrontation Clause applies differently depending on the identity of the factfinder." Williams, 132 S. Ct. at 2237 n.4.

admitted in those earlier cases were formally attested to by the analysts who had tested the substance in each case. Id. at 2260. He accordingly concluded that the Cellmark report was not a statement by a “witness” within the meaning of the Confrontation Clause. Id.

At Lui’s trial, the State did not offer, and the court did not admit, the report generated by the analysts at Cellmark. The single-page table of Y-STR results that was shown to the jury during Pineda’s testimony was prepared by Pineda herself for use with her testimony, and was admitted for illustrative purposes only; it bore no formal attestation.⁴ Nor was the autopsy report admitted. Justice Thomas would not find a Confrontation Clause violation in this case. Justice Thomas’s vote, combined with the four votes of the plurality in Williams, would result in affirmance of the conviction under the circumstances of this case.⁵

Moreover, unlike Williams, which relied for its outcome on five votes with no common rationale, there is every indication that

⁴ This table is the fourth page of Ex. 136, which is attached to the **State’s Supplemental Brief** (filed June 10, 2010), as Appendix A. The first three pages merely helped to explain Y-STR testing, and drew no objection. RP 1497-98.

⁵ While the plurality’s “primary purpose” rationale might not apply in Lui’s case, since Lui was identified as a suspect before Cellmark obtained results from the evidence that its lab tested, the ER 703 rationale would support affirmance.

the Court *would* agree on a rationale in finding no Confrontation Clause violation in this case. Unlike in Williams, the experts who testified at Lui's trial were supervisors in their laboratories, with intimate knowledge of both the procedures employed and the specific tests performed. Nor were they "mere conduits" relaying the results of absent analysts; rather, they testified to their expert opinions based on their own highly specialized expertise. These experts were the "witnesses against" the defendant.

A brief examination of the decisions in Melendez-Diaz, Bullcoming and Williams, including the dissents, leads to the conclusion that the Supreme Court would find no Confrontation Clause violation in this case. The dissenters in Melendez-Diaz (the same four justices who make up the plurality in Williams) did not believe that the Confrontation Clause applied at all to scientific evidence derived from laboratory analysis: "No historical evidence supports the Court's conclusion that the Confrontation Clause was understood to extend beyond conventional witnesses to include analysts who conduct scientific tests far removed from the crime and the defendant." Melendez-Diaz, 557 U.S. at 347.⁶

⁶ For a detailed analysis of the effect of Melendez-Diaz on this case, please refer to the **State's Supplemental Brief Addressing Melendez-Diaz v. Massachusetts**, filed in the Court of Appeals on August 17, 2009.

In Bullcoming, the same four dissenters objected to the Court extending the reasoning of Melendez-Diaz to a case where someone from the relevant laboratory (although not the analyst who obtained the result) testified in court and was subject to cross-examination. Bullcoming, 131 S. Ct. at 2723-28. Significantly, one of the five justices in the majority in Bullcoming, Justice Sotomayor, wrote separately “to emphasize the limited reach of the Court’s opinion.” Id. at 2719 (Sotomayor, J., concurring in part). She took care to “highlight some of the factual circumstances that this case does *not* present.” Id. at 2721-22. Justice Sotomayor noted 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 2722. She concluded that “[w]e need not address what degree of involvement is sufficient because here Razatos [who testified] had no involvement whatsoever in the relevant test and report.” Id.⁷

The dissent in Williams, which included Justice Sotomayor, focused on the shortcomings of the expert testimony in that case. The dissent noted that Lambatos had “no idea” how the results of

⁷ For a detailed analysis of the effect of Bullcoming on this case, please refer to the **State’s Supplemental Brief Addressing Bullcoming v. New Mexico**, filed in this Court on July 20, 2011.

Cellmark's testing were generated. Id. at 2265 (Kagan, J., dissenting). This made Lambatos nothing more than "the conduit" for those results. Id. at 2267. The dissent complained that it was Lambatos, "rather than any Cellmark employee," who testified to Cellmark's results, and that Lambatos could not convey "the particular test and testing process" that the analyst employed. Id. Significantly, the dissent pointed out that "none of our cases – including this one – has presented the question of *how many* analysts must testify about a given report." Id. at 2273 n.4 (italics in original). The dissent postulated that "some future case" might present the issue, but noted again that "zero Cellmark analysts" had testified at Williams's trial. Id.

Thus has the application of the Confrontation Clause to scientific evidence progressed to date. In Melendez-Diaz, certificates alone were offered to establish the results of scientific testing. 557 U.S. at 308. In Bullcoming, the State introduced a forensic lab report containing a certification through the testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. 131 S. Ct. at 2710. In both cases, the Court found a Confrontation Clause violation.

In Williams, an expert witness testified to results from a laboratory with which she had no connection and about whose operations and procedures she knew nothing. 132 S. Ct. at 2268 (Kagan, J., dissenting). But because the Cellmark report “lack[ed] the solemnity of an affidavit or deposition” (132 S. Ct. at 2260 (Thomas, J., concurring in judgment)), the Court found no Confrontation Clause violation. 132 S. Ct. at 2244.

This Court now has before it the next case in this continuum. At Lui’s trial, hands-on supervisors who were intimately familiar with the relevant laboratory’s procedures, and specifically with the testing employed in the case, testified at trial and were subject to cross-examination. No affidavits or declarations or sworn reports were admitted. At least five justices of the United States Supreme Court would agree that the Confrontation Clause was not violated here. This Court should so hold.

While there has been little time since the decision in Williams for other courts to weigh in, the Rhode Island Supreme Court on June 22, 2012, addressed an issue remarkably similar to the one now before this Court. In State v. Lopez, 45 A.3d 1, 10 (R.I. 2012), Matthew Quartaro, a supervisor at Cellmark, testified as an expert witness regarding the results of DNA testing performed by a team

of DNA analysts. Quartaro did not himself perform any part of the testing, which was carried out by analysts who worked under his supervision. Id. at 10-11. He reviewed their work by looking at their notes, conclusions and data. Id. at 11 n.25. Quartaro testified to a “match” between the defendant’s DNA profile and profiles obtained from various items of evidence. Id. at 11. The only part of the report admitted into evidence was an allele table based on computer-generated graphs from the raw data.⁸ Id.

The Rhode Island Supreme Court concluded that the Confrontation Clause was satisfied: “Quartaro was the preeminent testifying witness. He testified as to his own conclusions; he did not act as a conduit of the opinions of, or parrot the data produced by, other analysts.” Id. at 14. After careful analysis of the effect of Bullcoming on the case, and taking into account the recent decision in Williams v. Illinois,⁹ the court held:

[W]here defendant had ample opportunity to confront Quartaro – the witness who undertook the critical stage of the DNA analysis, supervised over and had personal knowledge of the protocols and process of all stages involved in the DNA testing, reviewed the notes and data produced by all previous analysts, and

⁸ From the description of this allele table, it appears to be similar to page 4 of Ex. 136.

⁹ The court found its determination “further buttressed by the recent decision of Williams v. Illinois.” Lopez, 45 A.3d at 14 n.28.

testified to the controls employed by the testing lab to safeguard against the possibility of testing errors – the Confrontation Clause was satisfied.

Lopez, 45 A.3d at 16.

Other courts that have recently addressed similar issues involving expert scientific testimony have recognized that whether the Confrontation Clause is satisfied in a given case is dependent on the *facts of that case*. See, e.g., Commonwealth v. Munoz, 461 Mass. 126, 136, 958 N.E.2d 1167 (2011) (“Of necessity, the adequacy of a defendant’s opportunity for meaningful cross-examination of a particular expert witness can be ascertained only on a case-specific basis.”); United States v. Ramos-Gonzalez, 664 F.3d 1, 5 (1st Cir. 2011) (citing necessity of “case-by-case assessment as to the quality and quantity of the expert’s reliance”).

The two expert witnesses at Lui’s trial testified to their own opinions based on their own highly specialized expertise. They were not conduits for the results or opinions of others. No reports prepared by others, formal or otherwise, were introduced into evidence. The experts supervised the respective labs where the testing was done, and were knowledgeable about the protocols and procedures in place to ensure proper training and quality control.

Lui was able to meaningfully cross-examine these experts. Under these facts, there was no Confrontation Clause violation.

2. THE CONFRONTATION RIGHT UNDER
ARTICLE I, SECTION 22 OF THE WASHINGTON
CONSTITUTION.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. Article I, section 22 of the Washington Constitution provides that “[i]n criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face.” The question before this Court is whether the state provision provides broader protection in this case than does the federal one and, if so, whether the state provision was violated here.

This Court ordinarily approaches such questions by employing a Gunwall¹⁰ analysis. A central focus of this analysis is the language of the two parallel provisions, especially any differences in the texts. State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Both provisions at issue here give a defendant the right to confront or meet “the witnesses against him.” Thus, as to the critical issue in this case – *who* are the persons that the

¹⁰ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

defendant has a right to confront (i.e., the scope of the right) – there appears to be no difference between the two provisions. The phrase “face to face” in the Washington provision specifies the *manner* of confrontation.

Historically, the “face to face” language appears to have made little difference in interpreting the parallel constitutional provisions. Almost 50 years ago, this Court noted that “[t]he purpose of the state and federal constitutional provisions pertaining to the right of confrontation appear to be the same in any event.” In re Pettit v. Rhay, 62 Wn.2d 515, 519-20, 383 P.2d 889 (1963).

Moreover, the United States Supreme Court has long interpreted the federal provision to require “face-to-face” confrontation, despite the lack of specific language to that effect. See, e.g., Dowdell v. United States, 221 U.S. 325, 329-30, 31 S. Ct. 590, 55 L. Ed. 753 (1911) (Philippine statute based on Sixth Amendment secures the right to meet the witnesses face to face at trial); Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674 (1934) (“the privilege to confront one’s accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment”); California v. Green, 399 U.S. 149, 156-57, 90 S. Ct. 1930, 26 L. Ed.2d 489 (1970) (vice that gave impetus to

Confrontation Clause was denial of opportunity to challenge accusers “in a face-to-face encounter in front of the trier of fact”); Coy v. Iowa, 487 U.S. 1012, 1016, 108 S. Ct. 2798, 101 L. Ed.2d 857 (1988) (“We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”); but see Maryland v. Craig, 497 U.S. 836, 849, 110 S. Ct. 3157, 111 L. Ed.2d 666 (1990) (Confrontation Clause reflects a *preference* for face-to-face confrontation at trial).

This Court has concluded that article I, section 22 merits an independent analysis as to both the manner and the scope of the confrontation right. State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (2009).¹¹ Nevertheless, the Court has never expanded the *scope* of the confrontation right in Washington based explicitly on the “face to face” language. See State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998) (addressing only the *manner* of confrontation); State v. Shafer, 156 Wn.2d 381, 391-92, 128 P.3d 87 (2006) (declining to invalidate child hearsay statute based on state confrontation right); Pugh, 167 Wn.2d at 828-29, 843 (declining to

¹¹ The Court accordingly concluded that a Gunwall analysis is no longer necessary. Pugh, 167 Wn.2d at 835.

find that excited utterance hearsay statements violate state confrontation right).

This Court recently analyzed article I, section 22 independently of the Sixth Amendment's Confrontation Clause in the context of a prosecutor's comments at trial concerning a defendant's opportunity to hear all of the witnesses testify, and then tailor his own testimony accordingly. State v. Martin, 171 Wn.2d 521, 533, 252 P.3d 872 (2011). However, the Court did not focus on the "face to face" language in reaching this conclusion. In directly comparing the rights mentioned in the two provisions, the Court noted that "our state's confrontation clause provides several rights that are not specifically set forth in the Sixth Amendment, namely, the right to appear and defend in person, the right to have a copy of the charge, the right to testify in one's own behalf, and the right to appeal in all cases." Id. at 529.

Moreover, this Court has recognized the practical concerns inherent in expanding the scope of the confrontation right based on the "face to face" language. "[T]he state confrontation clause has not 'been read literally, for to do so would result in eliminating all

exceptions to the hearsay rule.” Pugh, 167 Wn.2d at 836 (quoting State v. Ryan, 103 Wn.2d 165, 169, 691 P.2d 197 (1984)).¹²

A number of other states have included the same “face to face” language in their own state constitutions. In interpreting the effect of article I, section 22 on the confrontation right in this case, it may assist this Court to look at how those states have addressed the scope of their citizens’ confrontation rights.

Massachusetts was the first state to include the phrase “to meet the witnesses against him face to face” in its state constitution. Commonwealth v. Amirault, 424 Mass. 618, 628-29, 677 N.E.2d 652 (1997); Mass. Declaration of Rights, part I, art. 12. Based on this language, the Supreme Judicial Court of Massachusetts invalidated a seating arrangement that allowed child witnesses to testify without facing the defendant. Amirault, 424 Mass. at 632. But Massachusetts has limited its independent interpretation to the *manner* in which the confrontation right is exercised, declining to extend broader protection as to the *scope* of the right:

The State Constitution has been interpreted to provide a criminal defendant more protection than the

¹² The Court cited as examples dying declarations, statements of coconspirators, and public records. Pugh, 167 Wn.2d at 836.

Sixth Amendment in certain respects [citing Amirault], but when the question involves the relationship between the hearsay rule and its exceptions, on the one hand, and the right to confrontation, on the other hand, “the protection provided by art. 12 is coextensive with the guarantees of the Sixth Amendment”

Commonwealth v. Nardi, 452 Mass. 379, 388 n.10, 893 N.E.2d 1221 (2008) (citations omitted). See also Commonwealth v. Barbosa, 457 Mass. 773, 780 n.7, 933 N.E.2d 93 (2010) (protection provided by article 12 is coextensive with guarantees of Sixth Amendment).

The Indiana Constitution, article I, section 13, also includes the “face to face” language. The Supreme Court of Indiana, recognizing this difference, noted that “the ‘face to face’ language in the Indiana clause, as in other states, has not always been interpreted literally. Otherwise, the testimony of all absent witnesses, whether unavailable through death or illness or threat, would never be admissible at trial.” Miller v. State, 517 N.E.2d 64, 71 (Ind. 1987).

In a subsequent case in which the court invalidated, under the Indiana provision, a statute allowing a child witness to testify via

videotape without hearing or seeing the defendant at the time the testimony was recorded, the court interpreted the wording of Indiana's confrontation provision: "The words 'face to face' as used in the passage is an adverbial phrase modifying 'to meet,' and thus describes *how* a criminal defendant in this state and the State's witnesses are to meet." Brady v. State, 575 N.E.2d 981, 987 (Ind. 1991) (italics added).

Other states whose constitutional confrontation provisions include the "face to face" language have similarly found no difference between the state right and the corresponding Sixth Amendment right, at least as to the *scope* of the confrontation right. See State v. Naucke, 829 S.W.2d 445, 454-55 (Mo. 1992) (equating state confrontation right with federal counterpart, and noting that literal interpretation of "face to face" requirement would preclude *all* hearsay exceptions); State v. Self, 56 Ohio St.3d 73, 79, 564 N.E.2d 446 (1990) (state "face to face" provision "provides no greater right of confrontation than the Sixth Amendment"); Commonwealth v. Willis, 716 S.W.2d 224, 227, 229 (Ky. 1986) (holding that the "face to face" requirement in the state constitution "is basically the same" as the Sixth Amendment right to

confrontation); State v. Sanchez, 201 Wis.2d 219, 227, 548 N.W.2d 69 (1996) (state constitutional provision requiring “face to face” confrontation “provides a right identical to that stated in the federal Constitution’s confrontation clause”); State v. McGriff, 672 A.2d 1027, 1030, 1030 n.2 (Del. 1996) (“face to face” language in state constitutional provision “is not absolute”; admission of hearsay statements may be allowed); State v. Lewis, 235 S.W.3d 136, 144-45 (Tenn. 2007) (no evidence excluded under state confrontation clause’s “face to face” language that is not also excluded under federal counterpart).

Neither the language nor the logic of article I, section 22 requires this Court to expand the scope of the confrontation right in this context. The “face to face” language in Washington’s constitutional provision addresses *how* the witnesses must be confronted in court, not *which persons* are necessary witnesses. The defendant’s proposed interpretation would lead, as many courts have recognized, to the elimination of *all* exceptions to the hearsay rule. This Court should reject the invitation to interpret the state constitutional language independently in this context.

D. CONCLUSION

For all the foregoing reasons, this Court should affirm the Court of Appeals' decision affirming Lui's conviction.

DATED this 31st day of August, 2012.

Respectfully submitted,

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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 **705 Second Avenue, Suite 1300, Seattle, WA 98104-1797**, containing a copy of the **State's Supplemental Brief Addressing Williams v. Illinois and Article I, Section 22 of the Washington Constitution 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
Done in Seattle, Washington

Date

08/31/12

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Dear Supreme Court Clerk:

Attached for filing in the above-subject case, please find State's Supplemental Brief Addressing Williams v. Illinois and Article I, Section 22 of the Washington Constitution.

Please let me know if you should have difficulties with this electronic filing. Thank you.

Sincerely,

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