IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. REYNALDO SANTOS DUNGO, Defendant and Appellant.	No. S176886

Third District Court of Appeal No. C055923
San Joaquin County Superior Court No. SF100023A
Honorable Charlotte J. Orcutt, Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This supplemental brief is submitted in response to this court's order dated July 13, 2011, asking the parties to address "the significance, if any, of the United States Supreme Court's recent decision in *Bullcoming v. New Mexico* (June 23, 2011) __ U.S. __ [2011 WL 2472799]."

ARGUMENT

I. UNDER *BULLCOMING V. NEW MEXICO*, THE AUTOPSY REPORT IN THIS CASE WAS TESTIMONIAL, AND DR. LAWRENCE'S TESTIMONY RELAYING THE CONTENTS OF THE REPORT TO THE JURY VIOLATED DUNGO'S RIGHT TO CONFRONTATION.

The Supreme Court's most recent decision on the Confrontation Clause is *Bullcoming v. New Mexico* (2011) 564 U.S. __ [131 S. Ct. 2705, 180 L. Ed. 2d 610] (*Bullcoming*). Bullcoming was arrested for driving while intoxicated. A blood sample, taken to determine his blood-alcohol concentration ("BAC"), was sent to a state laboratory. There, a forensic analyst signed a "certificate of analyst," part of a standard form titled "Report of Blood Alcohol Analysis." The certificate reported Bullcoming's BAC as 0.21 grams per hundred milliliters. It also stated that "'[t]he seal of the[e] sample was received intact and broken in the laboratory,'" that "'the statements in [the analyst's block of the report] are correct,'" and that the analyst "'had followed the procedures set out on the reverse of th[e] report.'" (*Bullcoming*, 180 L.Ed.2d at pp. 616-617.)

At Bullcoming's trial, the prosecutor introduced the report and certificate of analyst into evidence as a business record. The state decided not to call the analyst who had actually performed the test and signed the certificate because he recently had been placed on unpaid leave "for a reason not revealed." (*Bullcoming*, 180 L.Ed.2d at p. 618.) Instead, the

prosecutor presented the testimony of a scientist from the same laboratory who neither participated in nor observed the test on Bullcoming's blood sample. The testifying scientist was, however, familiar with blood-alcohol analysis and the laboratory's testing protocols. Defense counsel objected on Confrontation Clause grounds. (*Id.* at pp. 617-618.)

After the New Mexico Supreme Court affirmed Bullcoming's conviction, the United States Supreme Court granted certiorari on the following question: "Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." (*Bullcoming*, 180 L.Ed.2d at p. 619.) The majority concluded, "in line with controlling precedent," that the answer was no:

> As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. Because the New Mexico Supreme Court permitted the testimonial statement of one witness ... to enter into evidence through the in-court testimony of a second person ... we reverse that court's judgment.

(*Ibid.*)

A. Under *Bullcoming*, The Autopsy Report In This Case Is Testimonial.

In reaching this result, the court rejected the state's arguments that the report was nontestimonial, noting that the "argument fares no better here than it did in *Melendez-Diaz*." (*Bullcoming*, 180 L.Ed. 2d at p. 623; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __ [129 S.Ct. 2527, 2533, 174 L.Ed.2d 314, 332] (*Melendez-Diaz*)). The state argued that the affirmations made by the testing analyst were not "'adversarial' or

'inquisitorial," but were instead the observations of "'independent scientis[t]' made 'according to a non-adversarial public duty.'" (*Bullcoming*, 180 L.Ed.2d at p. 623.) The Court rejected the argument and found the document to be testimonial, because just as in *Melendez-Diaz*, where "a state forensic laboratory, on police request, had analyzed seized evidence . . . and reported the laboratory's analysis to police . . ." the certificate in *Bullcoming* had been created solely for an evidentiary purpose and was made in aid of a police investigation. (*Bullcoming*, 180 L.Ed.2d at p. 623.)

The state also attempted to distinguish *Melendez-Diaz* by pointing out that the report of Bullcoming's BAC was unsworn. (*Bullcoming*, 180 L.Ed.2d at p. 623.) The court rejected this argument as well, observing that its precedents established that the absence of an oath was not dispositive in determining whether a statement is testimonial. (*Ibid.*, citing *Crawford v. Washington* (2004) 541 U.S. 36, 52-53, fn. 3 [124 S.Ct. 1354, 168 L.Ed.2d 177] (*Crawford*).)

The court concluded that, "[i]n all material respects, the laboratory report in this case resembles those in *Melendez Diaz*," in that law enforcement had provided "seized evidence to a state laboratory required by law to assist in police investigations," the testing analyst had "tested the evidence and prepared a certificate" reporting the results, and the certificate was formalized "in a signed document, . . . headed a 'report.'" (*Bullcoming*, 180 L.Ed.2d at p. 624.) "In sum, the formalities attending the "report of blood alcohol analysis" are more than adequate to qualify [the testing analyst's] assertions as testimonial." (*Ibid.*)

Here, as in *Melendez-Diaz* and *Bullcoming*, law enforcement provided seized evidence, i.e., Pina's dead body, to a forensic analyst working for the sheriff-coroner, who was required by law to investigate that evidence to determine manner and cause of death (Gov. Code, § 27491),

and to turn over to law enforcement its findings and report where, as here, the case involved a suspected homicide. (Gov. Code, § 27491.1.) The involvement of law enforcement here exceeded what was present in *Melendez-Diaz* and *Bullcoming*: a member of law enforcement was actually in the room while Dr. Bolduc was performing the forensic investigation that police had initiated. (8RT 2167-2168.) Like the analysts in *Melendez-Diaz* and *Bullcoming*, the autopsy report in this case is a signed document and is titled a report. Under *Bullcoming*, it is clear that the formalities surrounding the autopsy report in this case are more than adequate to qualify the resulting report as testimonial. (See *United States v. Moore* (D.C. Cir., July 29, 2011) 2011 U.S. App. LEXIS 15666, *100-*104 [finding government's argument that autopsy reports were nontestimonial "foreclosed by *Bullcoming*"].)

B. Under *Bullcoming*, Testimonial Hearsay Cannot Be Introduced Through A Surrogate; Dr. Lawrence's Testimony Thus Violated Dungo's Right To Confrontation.

The Supreme Court also rejected the New Mexico Supreme Court's holding that surrogate testimony satisfied the Confrontation Clause because the analyst had simply written down the result generated by the gas chromatograph machine. (*Bullcoming*, 180 L.Ed.2d at p. 620.) The Court found that, contrary to the state court's conclusion, the analyst's certification "reported more than a machine-generated number." The analyst also had certified certain representations "relating to past events and human actions not revealed in raw, machine-produced data." For example, the certificate asserted that the blood sample was received with the seal unbroken and that the analyst had performed on the sample a particular test and had adhered to the required protocol. Such representations, the Court

found, "are meet for cross-examination." (*Bullcoming*, 180 L.Ed.2d at pp. 620-621.)

The Court also explained that the "potential ramifications" of the state court's reasoning "raise red flags." (*Bullcoming*, 180 L.Ed.2d at p. 621.)

> Most witnesses, after all, testify to their observations of factual conditions or events, e.g., "the light was green," "the hour was noon." Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact – Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. [Citation.] Could an officer other than the one who saw the number on the house or gun present the information in court – so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically "No."

(*Ibid.*, citing *Davis v. Washington* (2006) 547 U.S. 813, 826 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*) and *Melendez-Diaz*, *supra*, 557 U.S. at p. __ [129 S.Ct. 2527, 2546, 174 L.Ed.2d 314, 336] (Kennedy, J., dissenting).)

Moreover, even if the testimonial statement had involved no more than the analyst writing down a machine-generated number, "the comparative reliability of an analyst's testimonial report . . . does not overcome the Sixth Amendment bar." The decision in *Crawford*, the Court observed, had settled that the obvious reliability of a testimonial statement does not dispense with the requirement of confrontation. (*Bullcoming*, 180 L.Ed.2d at p. 621.)

The Court next rejected the state court's assertion that surrogate testimony was adequate because the surrogate qualified as an expert with respect to the machine and the laboratory's procedure. A surrogate witness "could not convey what [the testing analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process

he employed.[] Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part.[]" The Court pointed out that, had the testing analyst testified, "Bullcoming's counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for [the testing analyst's] removal from his work station." Thus, live testimony from the testing analyst could not be characterized as "'a hollow formality.'" (*Bullcoming*, 180 L.Ed.2d at pp. 621-622 [citations and footnotes omitted].) Indeed, even if most analysts "would not recall a particular test," the testimony of the analyst who actually performed the test "would have enabled Bullcoming's counsel to raise before a jury questions concerning [the testing analyst's] proficiency, the care he took in performing his work, and his veracity. In particular, Bullcoming's counsel likely would have inquired on cross-examination why [the testing analyst] had been placed on unpaid leave." (*Bullcoming*, 180 L.Ed.2d at p. 622, fn. 7.)

The Court next stressed that courts are not free to develop exceptions to the requirement of confrontation based on a conclusion that the values behind the Clause could be sufficiently served absent confrontation. (*Bullcoming*, 180 L.Ed.2d at p. 622.) It found instructive a recent case involving the right to counsel of choice, *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146 [126 S.Ct. 2557, 165 L.Ed.2d 409]. In that case, the Court found that if a "particular guarantee" of the Sixth Amendment is violated, a substitute procedure cannot cure the violation. Just as "representation by substitute counsel does not satisfy the Sixth Amendment, neither does the opportunity to confront a substitute witness." (*Bullcoming*, 180 L.Ed.2d at p. 623.)

The facts of the instant case resemble in all material respects those present in *Bullcoming*. The government called as a surrogate witness Dr. Lawrence, the employer of the investigating pathologist, Dr. Bolduc.

Although Dr. Bolduc was not shown to be unavailable, Dr. Lawrence was allowed to relay to the jury the factual representations in Dr. Bolduc's autopsy report – e.g., that the voice box and hyoid bone were not fractured, that there were hemorrhages in the neck organs consistent with fingertips during strangulation, that the body showed signs of lack of oxygen such as petechiae in the eyes, that there were bite marks on the tongue (7RT 1846-1848), that there was an absence of extreme bruising (7RT 1850), and that there was no indication that Pina was having an asthma attack (7RT 1853) – although, as with the analyst in *Bullcoming*, Dr. Lawrence neither performed nor observed the autopsy at issue.

While some degree of participation in testing by the surrogate witness might alter the Confrontation Clause analysis, such as where the surrogate witness was actually present when the testing was performed, so that requiring the testing analyst's testimony could fairly be considered a hollow formality (see *Bullcoming*, 180 L. Ed. 2d 610, 622 (majority opinion); *id.* at p. 629 (Sotomayor, J., concurring in part) [suggesting that outcome would be different if "a supervisor who observed an analyst conducting a test testified about the results or a report about such results"]; *State v. McMillan* (N.C. Aug. 2, 2011) 2011 N.C. App. LEXIS 1625, *16-*18 [no Confrontation Clause violation where testifying pathologist was actually present at autopsy]), in this case Dr. Lawrence did not participate in and was not present during the autopsy. (7RT 1855.) Thus, Dr. Lawrence, precisely like the surrogate witness in *Bullcoming*, was unable to "convey what [Bolduc] knew or observed about the events his [autopsy report recorded], i.e., the particular test and testing process he employed," or "expose any lapses or lies on the [Bolduc's] part." (*Bullcoming*, 180 L.Ed.2d at p. 622.)

Nor can it be said that Dr. Lawrence simply offered an independent opinion as to cause of death. As with the testifying analyst in *Bullcoming*,

who admitted that he could not know that the testing analyst followed the required protocol without actually observing the analysis (*Bullcoming*, 180 L.Ed.2d at p. 622, fn. 8), Dr. Lawrence's opinion relied on the accuracy of the representations made by Dr. Bolduc in his report, such as Dr. Bolduc's description of hemorrhages in all layers of the neck muscles (7RT 1847), – i.e., on Dr. Bolduc's *testimony*, although Dr. Lawrence, not having been present when Dr. Bolduc made his observations, could not confirm that Dr. Bolduc's report was truthful, complete, or accurate. (See *People v. Loy* (July 7, 2011) 52 Cal.4th 46, __ [2011 Cal. LEXIS 6796, *43-*44] [expert's testimony to foundational fact concerning when sample was collected violated defendant's right to confront witnesses].)

Even more so than in *Bullcoming*, requiring Dr. Bolduc's testimony could hardly be characterized as a "hollow formality." The very reason the prosecution decided not to call Dr. Bolduc as a witness was because his abundant professional "baggage" (5RT 1494-1495) made it "too awkward to make them easily try their cases" (5RT 1501). In short, the state decided to present Dr. Bolduc's findings through Dr. Lawrence precisely so that Dr. Bolduc's *testimony* would not be cross-examined.

C. While The United States Supreme Court Has Granted Certiorari In A Case To Address Whether An Expert Witness May Testify About The Results Of Forensic Testing Performed By Non-Testifying Analysts, The Outcome Here Is Mandated Under *Bullcoming*.

Bullcoming did not directly address the question whether an expert witness could render an opinion based on "underlying testimonial reports that were not themselves admitted into evidence." (*Bullcoming*, 180 L.Ed.2d at p. 629 (Sotomayor, J., concurring in part).) On June 28, 2011, the Court granted certiorari in *Williams v. Illinois* (10-8505), which presents the question, "Does a state rule of evidence allowing an expert

witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violate the Confrontation Clause?"

This case, however, does not simply involve an expert expressing an opinion based on underlying testimonial reports. Although the autopsy report itself was not admitted into evidence, its *contents* were relayed to the jury through Dr. Lawrence's testimony. Dr. Bolduc's testimonial statements thus *were* admitted into evidence. The jury was even instructed that it had to decide whether the information upon which Dr. Lawrence relied was truthful and accurate. (1CT 272; 11RT 2901.) *Bullcoming* thus governs this case.

Allowing the prosecution to introduce the testimonial contents of a an autopsy report through the in-court testimony of a surrogate pathologist, even if the document itself is not admitted, would eviscerate Court's holdings in *Melendez-Diaz* and *Bullcoming*. This result would be logically inconsistent and would fail to adequately protect the defendant's right to confrontation. Such a rule would allow prosecutors to sanitize reports by problematic analysts simply by having some other expert parrot the testimonial statements "directly to the jury in the guise of expert opinion." (*United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 635 [citation and internal quotation marks omitted].) Permitting the introduction of the contents of a testimonial document on the theory that it is not admitted for its truth but instead merely explains the basis of the expert's opinion would truly elevate form over substance. This is especially so when, as here, the value of the expert's opinion is largely dependent on the accuracy, truthfulness, completeness, and competence of the investigating analyst.

In this case, as in *Bullcoming*,the state introduced into evidence the contents of a testimonial document whose creator was never subject to cross-examination. As this case demonstrates, if prosecutors are permitted

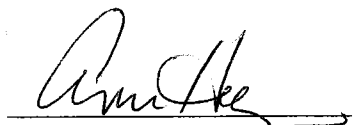
to introduce the testimonial findings of one forensic pathologist through a surrogate pathologist who did not perform or observe the autopsy at issue, a defendant's right to test, through confrontation, the credibility and competence of the person who actually conducted the autopsy will be non-existent. Cross-examining a surrogate about a report that he has read is simply not the equivalent of cross-examining the report's author, just as cross-examining a detective about a witness's statement is not the equivalent of cross-examining the actual witness.

CONCLUSION

Appellant respectfully requests that the judgment of the Court of Appeal, Third Appellate District, be affirmed.

Dated: August 10, 2011

Respectfully submitted,



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CERTIFICATE PURSUANT TO CRC RULE 8.504(D)(1)

I, Ann Hopkins, counsel for respondent Reynaldo Santos Dungo, certify pursuant to the California Rules of Court that the word count for this document is 2,798 words, excluding the tables, the quotation of issues required by rule 8.520(b)(2), this certificate, and any attachment permitted under rule 8.504(d)(3). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Oakland, California, on August 10, 2011.

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I declare that I am over the age of 18, not a party to this action and my business address is P.O. Box 23711, Oakland, California 94623. On the date shown below, I served the within APPELLANT'S SUPPLEMENTAL BRIEF to the following parties hereinafter named by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as follows:

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