Case No. S177046

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VIRGINIA HERNANDEZ LOPEZ, Defendant and Appellant.	)	Court of Appeal Case No. D052885 Superior Court Case No. SCE274145

On Petition for Review from a Decision of the
Court of Appeal, Fourth Appellate District, Division One

APPELLANT'S RESPONSE TO THE PEOPLE'S SUPPLEMENTAL BRIEF RE *BULLCOMING v. NEW MEXICO*

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In accordance with this court's order of July 13, 2011, appellant Virginia Hernandez Lopez hereby submits this response to the People's Supplemental Brief Re Bullcoming v. New Mexico (June 23, 2011) ___ U.S. ___ [180 L.Ed.2d 610, 131 S.Ct. 2705].

I.

THE US SUPREME COURT DECISION IN BULLCOMING CONCLUSIVELY ESTABLISHES THAT THE BLOOD DRAW EVIDENCE IN THIS CASE WAS ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSE

The People assert that the U.S. Supreme Court's recent decision in Bullcoming is a "narrow opinion that has little effect on this case." With all due respect, the People's position is an exercise in wishful thinking. The Bullcoming decision has everything to do with this case, and is, in fact, dispositive.

A. Justice Sotomayor's concurring opinion is not binding, nor is it applicable to the case at Bar

The People rely primarily on Justice Sotomayor's concurring opinion in Bullcoming to support their theory that the decision has "little effect" on this case. The People's argument falls flat for

several reasons. First, despite the People's characterization of Justice Sotomayer's concurring opinion as "pivotal", it in fact represents the opinion of a single justice—no other justice joined in the concurrence---and therefore it is neither binding nor pivotal. Moreover, the concurring opinion focuses on hypothetical scenarios that were not before the court in Bullcoming and are not before the court in this case. Accordingly, Justice Sotomayor's concurrence does nothing to lessen the dispositive impact of Bullcoming's majority opinion.

1. Willey, the testifying analyst, had no meaningful connection to the testing

The People note that in Bullcoming, the court emphasized that the testifying witness, Razatos, had no connection to the BAC report generated by the testing analyst, Caylor. They also note that Justice Sotomayor indicated that the result in Bullcoming might have been different had the testifying witness been a "supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." (Bullcoming, supra, 131 S.Ct. at 2722.) The point is irrelevant.

First, Justice Sotomayor's speculation that the result might have been different had the testifying witness been a "supervisor" did not contemplate any person holding the title of "supervisor" of the lab; rather, she specifically contemplated "a supervisor who observed an analyst conducting a test". (Id., at p. 2722 [emph.added].)

Here, although Willey was a "supervisor" in the lab where the blood test was conducted, (RT 455), and he "reviewed" the BAC report prepared by Mr. Peña, his "review" apparently came well after-the-fact, and only in preparation for his testimony in this case. Indeed, Mr. Willey admitted on cross-examination that he "did not have anything to with this sample other than testify about it" (RT 469) and he did not even know if Mr. Peña was there or not when the results were being generated. (RT 469.) Willey's name or initials do not appear anywhere as a reviewer on the report generated by Peña. To the contrary, the report indicates that it was "technically and administratively reviewed" by one "M. Ochoa" on August 31, 2007 (twelve days after the purported blood draw). Mr. or Ms. Ochoa did not testify, nor is there any indication in the record as to who this person is.

Thus, as in Bullcoming, the testifying witness had no involvement whatsoever with the actual testing of the defendant's blood. His testimony was limited to his general knowledge about the procedures which should have been followed in testing blood. He had no personal knowledge as to whether those procedures were actually followed in this case. Thus, Justice Sotomayor's hypothetical that the result might be different when the testifying analyst was a supervisor who actually observed the testing, is entirely irrelevant to these facts.

2. Willey's opinion falls squarely within the scope of Bullcoming

The People next note that Justice Sotomayor opined that the Bullcoming decision does not involve "an expert witness [] asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence". (Id. at 2722 [emph. added].) The People go on to recite Willey's qualifications as an "expert". But again, these observations are irrelevant to the facts before this court.

Here, as in Bullcoming, and unlike the hypothetical situation posited by Justice Sotomayor, the "underlying testimonial report" was

itself admitted into evidence.[1] Here, as in Bullcoming, "aside from reading a report that was introduced as an exhibit, [the testifying analyst] offered no opinion about Petitioner's blood alcohol content." (Ibid.) Justice Sotomayor emphasized that "we would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." [Id, at 2722, [emph. added].) But this was not the situation in Bullcoming and it is not the situation here, since in both cases, the testimonial statements were introduced into evidence. Willey's "expert testimony" was based on nothing but that testimonial statement (the accuracy of which he had no personal knowledge) and was therefore inadmissible under Bullcoming.

3. The report at issue here was not solely instrument-generated data

Finally, the People assert that Justice Sotomayor found it "significant" that the state in Bullcoming did not introduce only

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1 The report created by Mr. Peña was admitted as People's Exhibit 18, over defense objection. (RT 1028, CT 63.)

machine-generated data. But neither did the state in this case. Here, as in Bullcoming, the state introduced a report which included non-machine generated, testimonial statements.

The People misleadingly assert that the "top page" of the report merely "summarizes" the data on the following, instrument-generated pages. But the top page is a hand-written document (apparently prepared by Mr. Peña, whose initials, identified by Mr. Willey (RT 466), appear on the page). The handwritten notes provide important information which does not appear anywhere on the machine-generated print outs, such as identification of the defendant as the person from whom the draw was taken, the type of draw, and the time and date of the draw. This information is accusatory and critical to establish whether or not this defendant was under the influence of alcohol at the time of the accident. Thus, this hand-written, non-instrument generated data, which appears nowhere else in the report, is plainly testimonial and plainly inadmissible under Bullcoming. Further, the question of whether a purely machine-generated report falls within the scope of Bullcoming (an issue which Justice Sotomayor expressly states was not decided in Bullcoming, (Id. at

2722)) is simply not at issue here.

II.

BULLCOMING UNDERMINES THE RATIONALE AND THE RESULT IN GEIER

The People concede that Bullcoming undermines the rationale of this court decision in People v. Geier (2007) 41 Cal.4th 555, but assert that it does not undermine the result in Geier. Again, the People are wrong.

The People point to purported "key differences" between the circumstances in Bullcoming and Geier, specifically, the fact that in Geier, the testifying witness, (the lab director), was also the supervisor of the analyst who conducted the testing and the person who "reviewed and cosigned" the report. In Geier, they assert, the accusatory DNA match was not reached and conveyed through the nontestifying technician's report, (which, they state, did not assume evidentiary value as did the report in Bullcoming) but rather through the independent opinion of the testifying witness. But again, as is set forth above, in this case, the testifying witness, Mr. Willey, did not observe or supervise the testing and did not 'review and cosign" the

report. Indeed, he admitted he "did not have anything to with this sample other than testify about it" (RT 469) and he did not even know if Mr. Peña was there or not when the results were being generated. (RT 469.) Further, the report at issue here was admitted into evidence and the report was the sole basis for Willey's "independent opinion" as to the defendant's BAC.

III.

THE PENDING WILLIAMS CASE IS DISTINGUISHABLE FROM THIS CASE

The People assert that the US Supreme Court's grant of review in People v. Williams (2010) 238 Ill.2d 125, 939 N.E.2d 268, (cert. granted June 28, 2010, No. 10-8505) may be relevant to this case. They are again mistaken.

In Williams, the underlying report was not introduced into evidence. "The evidence against the defendant was [the non-testifying witness's] opinion, not [the] report and the testimony was introduced live on the witness stand." (People v. Williams, supra, 939 N.E.2d at 279.) Here, the absent analyst's report was introduced as evidence. Although Mr. Willey testified as to his opinion of defendant's blood

alcohol based on the report, he had no knowledge whatsoever as to the accuracy of the report. As lab supervisor, he testified to what procedures should have been followed. He had no knowledge as to whether those procedures were actually followed. The defendant was deprived of the opportunity to cross-examine the analyst who actually tested her blood as to the procedures he utilized in generating the report. Thus, Mr. Willey's opinion, based solely on the improperly admitted testimonial report, was itself inadmissible.

CONCLUSION

The Bullcoming decision is indistinguishable from the case at bar in all material respects. Accordingly, it is dispositive. The blood draw evidence in this case was introduced in violation of defendant's constitutionally guaranteed right to confront witnesses against her. Reversal is required.

Respectfully submitted,

DATED: 9/11/13 MAZUR & MAZUR

By: _____
Janice R. Mazur , Attorneys for
appellant Virginia Lopez

CERTIFICATE OF WORD COUNT

The undersigned certifies that this Brief contains 1550 words, as counted by the WordPerfect word processing program used to generate this brief.

DATED: 9/9/11

JANICE R. MAZUR, attorney
for appellant

AFFIDAVIT OF SERVICE BY MAIL

I am employed in the State of California, County of San Diego. I am over the age of eighteen and not a party to this action. My business address is 13465 Camino Canada, No. 106-103, El Cajon, CA 92021.

On September 9, 2011 I mailed documents described as **APPELLANT'S RESPONSE TO THE PEOPLE'S SUPPLEMENTAL BRIEF RE *BULLCOMING v. NEW MEXICO*** via the United States mail in Whitefish, Montana in postage prepaid envelopes to interested parties in this action addressed as following:

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Virginia Lopez (Appellant)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Whitefish, Montana on this 9th day of September, 2011.

JANICE R. MAZUR