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 RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF ON SIGNIFICANCE OF *BULLCOMING V. NEW MEXICO*

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ARGUMENT

I. THE UNITED STATES SUPREME COURT HAS NOT ADOPTED RESPONDENT'S PROPOSED RULE THAT A FORENSIC REPORT BE PREPARED SOLELY FOR A LAW-ENFORCEMENT PURPOSE TO QUALIFY AS TESTIMONIAL.

Respondent correctly observes that only four justices joined footnote six of the court's decision in *Bullcoming v. New Mexico* (2011) __ U.S. __ [131 S.Ct. 2705, 180 L.Ed.2d 610] (*Bullcoming*). (Respondent's Supplemental Brief (RSB) at p. 4.) However, respondent incorrectly concludes from Justice Thomas's failure to join that footnote that "it appears that a majority of the Court was willing to find [the non-testifying analyst's] report 'testimonial' only because it was created 'solely' for law-enforcement purposes." (RSB at p. 4.) Even leaving aside that the Court actually observed that the report was prepared solely for an "'*evidentiary* purpose'" (*Bullcoming*, 131 S.Ct. at p. 2716), rather than for a "law enforcement" purpose as respondent would have it,[1] respondent's position lacks merit.

First, while it is true that Justice Thomas does not endorse the *Bullcoming* plurality's "primary purpose" test, neither has he endorsed respondent's "sole purpose" test. In his concurring opinion in *Michigan v.*

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[1] In response to the State's argument that the affirmations made by the analyst were not adversarial or inquisitorial, but were rather observations of an independent scientist made "'according to a non-adversarial public duty,'" the Court wrote: "That argument fares no better here than it did in *Melendez-Diaz*. A document created solely for an 'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial." (*Bullcoming*, 131 S.Ct. at p. 2717, citing *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __ [129 S.Ct. 2527, 174 L.Ed.2d 314]

Bryant (2011) __ U.S. __ [131 S.Ct. 1143, 1167, 179 L.Ed.2d 93] (conc. opn. of Thomas, J.), which addressed the admissibility of statements a dying victim made to police, Justice Thomas explained his position:

> Rather than attempting to reconstruct the "primary purpose" of the participants, I would consider the extent to which the interrogation resembles those historical practices that the Confrontation Clause addressed.

(*Id.* at p. 1167 (conc. opn.).) He observed that the police in that case had interacted with the victim "under highly informal circumstances, while he bled from a fatal gunshot wound." (*Ibid.*) He concluded that the statements were not testimonial because the police interrogation at issue "bears little if any resemblance to the historical practices that the Confronation Clause aimed to eliminate." (*Ibid.*) This was because the police questioning was not "'a formalized dialogue,' did not result in 'formalized testimonial materials' such as a deposition or affidavit, and bore no 'indicia of solemnity.' [Citations]." (*Ibid.*) Significantly, Justice Thomas also observed, "Nor is there any indication that the statements were offered at trial 'in order to evade confrontation.' [Citation]." (*Ibid.*)

Justice Thomas *has* endorsed the "solemn declaration or affirmation made for the purpose of proving some fact" formulation for determining whether a statement is testimonial (e.g., *Davis v. Washington* (2006) 547 U.S. 813, 836 [126 S.Ct. 2266, 165 L.Ed.2d 224][Thomas, J., conc. & dis.] (*Davis*).) He also has expressed concern, repeatedly, about prosecutorial use of a substitute witness to introduce a declarant's out-of court statement precisely to *evade* cross-examination of the declarant. (*Id.* at p. 839 [Thomas, J., conc. & dis.]; *Giles v. California* (2008) 554 U.S. 353, 378 [128 S.Ct. 2678, 171 L.Ed.2d 488] [Thomas, J., conc.].) Justice Thomas's reasoning thus supports appellant's position that the introduction of the

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(*Melendez-Diaz*).)

substance of Dr. Bolduc's formal autopsy report through the testimony of Dr. Lawrence, who was called as a witness specifically in order to avoid the awkwardness of having Dr. Bolduc subject to cross-examination (5RT 1501), violated appellant's right to confrontation.

Second, the *Bullcoming* majority simply did not purport to adopt a "sole purpose" test to determine whether a particular statement is testimonial. The Court considered a *number* of factors – including that law enforcement had provided the evidence to be tested to a state laboratory required to assist in police investigations, that the analyst had tested the evidence and prepared a certificate concerning the result, that the certificate was "'formalized' in a signed document . . . headed a 'report,'" and that the report contained a legend referring to court rules providing for the admission of the certified analysis – in support of its conclusion that "the formalities attending the 'report of blood alcohol analysis' are *more than adequate* to qualify [the analyst's] assertions as testimonial." (*Bullcoming*, 131 S.Ct. at p. 2717 [emphasis added].)

Finally, the dissenting justices in *Bullcoming* – Chief Justice Roberts and Justices Kenndy, Breyer, and Alito – all *joined* Justice Sotomayor's majority opinion in *Michigan v. Bryant, supra*, which used the "primary purpose" test to determine whether the police interrogation at issue in that case was testimonial. (E.g., *Michigan v. Bryant*, *supra*, 131 S.Ct. at p. 1150.)

II. RESPONDENT'S ATTEMPTS TO DISTINGUISH *BULLCOMING* LACK MERIT.

A. Whether The Document Containing The Testimonial Statement Is Admitted Or A Live Witness Instead Conveys The Substance Of The Statement, The Defendant Is Entitled To Confront The Declarant.

Respondent observes that the holding of *Bullcoming* is not "directly applicable" in part because the autopsy report itself was not introduced into evidence. (RSB at p. 6.) The issue, though, is whether one or more of Dr. Bolduc's *testimonial statements* were introduced into evidence against appellant. That the statements were introduced through a live witness's testimony rather than through the report itself is a distinction without a difference. (See *Crawford v. Washington* (2004) 541 U.S. 36, 51 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) [observing that Sir Walter Raleigh "was, after all, perfectly free to confront those who read [testimonial statements] in court"]; *Davis*, 547 U.S. at p. 826 [confrontation clause cannot be evaded by having police officer recite testimonial hearsay of declarant]; *Melendez-Diaz*, 129 S.Ct. at p. 2546 [Kennedy, J., dissenting] [the court has made it clear "that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second"].)

If the substance of a pathologist's testimonial statements are presented for their truth, whether the conduit is a witness or a document, the pathologist becomes a witness the defendant has a right to confront. Respondent fails to put forward *any* reason, much less a sound reason, for precluding the admission of *documents* containing testimonial statements while admitting the *same* statements through a surrogate witness's oral testimony. Such an approach would eviscerate the protections of the Confrontation Clause.

B. Dr. Bolduc's Autopsy Report Is Testimonial.

Respondent next claims that *Bullcoming* supports its argument that the autopsy report in this case was not testimonial. (RSB at pp. 6-8.) The argument rests largely on respondent's mistaken premise that "*Bullcoming* shows that a majority of the Supreme Court considers a forensic report to be testimonial only if its sole purpose – rather than its primary purpose – is for use in a criminal prosecution." (RSB at p. 7.) As shown in Section I, *ante*, the *Bullcoming* decision shows no such thing. Rather, the *Bullcoming* majority considered a variety of factors in reaching its conclusion that the formalities attending creation of the report were "more than adequate" to qualify the assertions in the report as testimonial. (*Bullcoming*, 131 S.Ct. at pp. 2716-2717.)

Respondent points out that coroners have duties independent of police and criminal investigations, and argues that since "only a small minority of autopsies result in homicide determinations, it cannot be said that the primary or sole purpose of autopsy examinations is to generate evidence for later use at trial." (RSB at pp. 7-8.) It does not matter, however, that *most* autopsy reports are not testimonial. As this court has acknowledged, the high court's confrontation clause jurisprudence makes it clear that whether a particular statement is testimonial requires a case-specific determination, based on a number of factors. (See, e.g., *People v. Blacksher* (Aug. 25, 2011) __ Cal.4th __ [2011 Cal. LEXIS 8582, *75].)

In *this* case, a homicide investigation was already underway when police turned Pina's body over to the coroner. (8RT 2144-2145, 2161.) A homicide detective was present during the autopsy. (8RT 2167-2168.) Bolduc was required by law to investigate and ascertain the manner and cause of death and to create a formal report detailing his findings. (Gov. Code, §§ 27491, 27491.4.) He was required to notify law enforcement whenever there were reasonable grounds to suspect that a death was a

homicide. (Gov. Code, § 27491.1). At least in cases where homicide is clearly suspected at the outset, as in this case, the coroner's statutory duties "are not sufficiently independent of a police investigation to make an autopsy report non-testimonial." (*State v. Johnson* (Minn. App. 2008) 756 N.W.2d 883, 890.)

Respondent cites a handful of cases for the proposition that factual findings in autopsy reports are not testimonial, only two of them decided after *Melendez-Diaz*. (RSB at p. 7, citing *People v. Hall* (N.Y. 2011) 84 A.D.3d 79, 83-85; *People v. Cortez* (Ill. 2010) 931 N.E.2d 751, 756; *United States v. Feliz* (2d Cir. 2005) 467 F.3d 227, 237.) In each of these cases, the courts found that all or portions of an autopsy report were admissible under the business records exception to the hearsay rule. (*People v. Hall*, *supra*, 84 A.D. 3d at pp. 81-82; *People v. Cortez*, *supra*, 931 N.E.2d at p. 756; *United States v. Feliz*, *supra*, 467 F.3d at pp. 233-235.) The reasoning employed in these cases has been criticized as "strain[ed]," and as reintroducing through the "back door" of the business-records exception the *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597] reliability factor rejected by the *Crawford* court. (Yanovitch, *Dissecting the Constitutional Admissibility of Autopsy Reports After Crawford* (2007) 57 Cath. U.L. Rev. 269, 288.) One commentator has criticized the *Feliz* analysis as "incorrect," and its arguments as "makeweights." (Burke, *The Test Results Said What? The Post-Crawford Admissibility of Hearsay Forensic Evidence* (2008) 53 S.D. L.Rev. 1, 19.)

An autopsy report prepared in the case of a suspected homicide is a formal report prepared by a government agent pursuant to an investigation conducted by that agent in anticipation of litigation, and thus is not admissible as a business record. It is instead testimonial. (See *Melendez-Diaz*, 129 S.Ct. at p. 2538; see also Appellant's Answer Brief On The Merits, at pp. 23-26.)

C. Dr. Lawrence's Connection To Dr. Bolduc Does Not Make Him Competent To Testify To The Truth Of The Statements Made In The Autopsy Report.

Respondent next suggests that this case may require a different result than the one reached in *Bullcoming* because Dr. Lawrence had hired Dr. Bolduc and was his supervisor, and because Dr. Lawrence claimed to be familiar with Bolduc's work and confident in his ability and skills. (RSB at p. 9.) Interestingly, Dr. Lawrence testified that he was familiar with Bolduc's work and confident in his ability and skills to explain why he had not bothered to investigate the allegation that, for example, Dr. Bolduc had mistakenly concluded in one autopsy that a person had died of strangulation when in fact the person had died of asthma. (See 1CT 189-190; 5RT 1510.)

Respondent apparently posits that some nebulous connection to a report's *author* will somehow qualify a substitute witness to testify to the contents of any report generated by the author. In *Bullcoming*, however, the justices repeatedly suggested that it was a connection to the specific *procedure* and *report* at issue, rather than to the report's author, that might change the result. (See *Bullcoming*, 131 S.Ct. at p. 2712 [testifying witness "had neither observed nor reviewed [declarant's] analysis"]; *id.* at p. 2713 [testifying witness "did not participate in testing Bullcoming's blood"]; *id.* at p. 2715 ["surrogate testimony . . . could not convey what [declarant] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed"].) Justice Sotomayor's concurrence similarly suggested that it was a connection to the specific procedure at issue, not the report's author, that might require a different result: "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 p. 2722 [conc. opn. of Sotomayor, J.] (emphasis added).)

The majority opinion summarizes the *Melendez-Diaz* holding as follows: "Absent stipulation, the Court ruled, the prosecution may not introduce [a forensic analyst's] report *without offering a live witness competent to testify to the truth of the statements made in the report.*" (*Bullcoming*, 131 S.Ct. at p. 2709.) As with the witness in *Bullcoming*, Lawrence could not testify to the truth of the statements in Bolduc's report. He could not possibly testify to what Bolduc knew and observed during Pina's autopsy because he did not take part in *any* manner in the autopsy conducted by Bolduc. (7RT 1850 ["I wasn't there"].) The fact that he hired Bolduc and believed in him is not does not justify having him relay Bolduc's testimonial statements to jurors. The Confrontation Clause provides that *jurors*, not a surrogate witness chosen by the prosecution, are tasked with evaluating the reliability and credibility of witnesses whose testimony is offered against an accused. (See *Bullcoming*, 131 S.Ct. at p. 2715, fn. 7 [testimony of analyst who performed test would have enabled defense to raise "before a jury" questions concerning analyst's proficiency, the care he took in performing work, and his veracity].)

D. The Admission Of Testimonial Hearsay Does Not Cease To Violate A Defendant's Right To Confrontation Where The Testifying Expert Also Provides An Independent Opinion.

Respondent next argues that the result might be different because Dr. Lawrence offered his independent opinion, based on "the underlying facts." (RSB at pp. 9-10.) Similarly, while ackowledging that *Bullcoming* undermines the rationale of *People v. Geier* (2007) 41 Cal.4th 555 (RSB at pp. 13-15), respondent argues that the result of that case can be justified, in part because "the witness in *Geier* was providing evidence of the DNA test results as an independent expert, and not as a mere conduit for another person's scientific conclusions." (RSB at p. 15.)

There is no question that the prosecution could have called Dr. Lawrence as an expert witness and asked him to render an independent opinion as to cause and manner of death, *provided* a properly admitted foundation was laid for the opinion. The problem here is that the "underlying facts" were presented to jurors by having Dr. Lawrence testify to the substance of Dr. Bolduc's report. The case-specific foundational *facts* upon which an expert's opinion is based must be proved by competent, admissible evidence. (See *People v. Loy* (July 7, 2011) 52 Cal.4th 46, __ [2011 Cal. LEXIS 6796, *43-*44].) Where those *facts* are established by the introduction of testimonial statements, the defendant has a right to confront the author of the statements.

Just as one police officer cannot testify to what another officer observed and contemporaneously reported (e.g., the read-out of a radar gun), even if the testifying officer is "equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures" (*Bullcoming*, 131 S.Ct. at pp. 2714-2715 (maj. opn.)), one forensic pathologist should not be permitted to testify to what another forensic pathologist observed and contemporaneously reported in a particular case (e.g., there were hemorrhages in all layers of the neck muscles – 7RT 1848-1849), no matter how many years of experience the substitute pathologist may have, and no matter that the substitute *also* testifies to an opinion based on what the absent pathologist observed and reported.

The Confrontation Clause is concerned with preventing prosecutorial use of *ex parte* testimonial statements against an accused without an opportunity to cross-examine the declarant. (*Crawford*, 541 U.S. at p. 50.) Whether or not Dr. Lawrence *also* relayed his "independent" opinion, it remains that Dr. Bolduc's *ex parte* testimonial statements were used against appellant, and that appellant had no opportunity to cross-examine him.

Because Bolduc's testimonial statements were used as evidence against appellant, appellant's right to confrontation was violated.

E. The Opportunity To Cross Examine Dr. Lawrence About Dr. Bolduc's Professional Problems Was Not An Adequate Substitute For Confronting Dr. Bolduc.

Respondent suggests that this case is different from *Bullcoming* because the defense could have questioned Dr. Lawrence about Dr. Bolduc's professional problems. (RSB at pp. 10-11.) However, as the Third District observed, when asked about specific allegations concerning Bolduc's performance in prior cases, Dr. Lawrence testified that "'th[ose] situations are something that is difficult for me to address because I don't have the detail and none of them make sense to me.'" (Slip opn., at p. 11; 5RT 1499.)

Respondent acknowledges that the *Bullcoming* majority concluded that a surrogate's testimony prevented the defendant from testing the credibility and proficiency of the testing analyst, but argues that this language is inapplicable here. (RSB at p. 11, citing *Bullcoming*, 131 S.Ct. at p. 2715 & fn. 7.) Respondent first reasons that this language was based on the premise that the information in the report was testimonial, and because Bolduc's report was not testimonial, the same reasoning does not apply. (RSB at p. 11.) Of course, if this court concludes that the autopsy report was not testimonial, it must also conclude that appellant had no right to confront Dr. Bolduc. Appellant has demonstrated, however, that Bolduc's autopsy report *was* testimonial.

Respondent also reasons that cross examination of a surrogate was sufficient because Lawrence was not a "mere conduit" for the contents of Bolduc's report but also provided "an independent expert opinion." Hence, respondent reasons, Bolduc's "credibility was not as important to the jury"

as was the credibility of the analyst in *Bullcoming*. (RSB at p. 11.) In other words, as long as a substitute pathologist adds the gloss of an independent opinion to the "underlying facts" observed and reported by the pathologist who authored the autopsy report, there is no confrontation clause problem.

Such a rule would permit prosecutors to easily evade the confrontation requirement by simply presenting the "findings" of even an incompetent or dishonest analyst through a more jury-friendly expert, as long as the testifying expert additionally testifies to an "independent opinion," the very value of which is dependent on the *truth* of the testimonial statements made by the actual *witness* to the "underlying facts." Respondent does not set forth any sound reason for deviating for the general 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." (*Bullcoming*, 131 S.Ct. at p. 2713.)

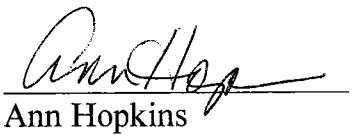
Finally, respondent argues that requiring the author of an autopsy report to testify may imperil some prosecutions. (RSB at p. 11.) Appellant has previously addressed this argument. (See Appellant's Answer Brief To Amicus Curiae CDAA, at pp. 12-15.) All constitutional rights impose some burden on the state. The United States Supreme Court has made it clear this does not justify dispensing with the right. (*Crawford*, 541 U.S. at p. 62.)

CONCLUSION

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

Dated: September 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 3,198 words, excluding the tables, 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 September 10, 2011.

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PROOF OF SERVICE

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, CA 94623. On the date shown below, I served the within APPELLANT'S RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF ON SIGNIFICANCE OF *BULLCOMING V. NEW MEXICO* 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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