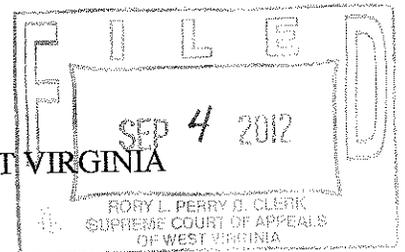


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,
Plaintiff Below,
Respondent

V.

CASE NO.: 11-0223

FRANKLIN JUNIOR KENNEDY,
Defendant Below,
Petitioner

PETITIONER'S REPLY SUPPLEMENTAL BRIEF

A handwritten signature in cursive script, appearing to read "Steven K. Mancini".

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Now before this Honorable Court comes Petitioner, Franklin Junior Kennedy, by counsel, and provides this *Reply Supplemental Brief* in this matter, upon the issue of the relevance of *Williams v. Illinois*, ___ U.S. ___, 132 S.Ct. 2221 (2012) to the assignment of error in this matter.

Petitioner's Supplemental Brief was filed in this Court July 31, 2012. The *Supplemental Brief of the Respondent* was filed August 17, 2012. Petitioner now submits this reply.

Despite this Court's directive to address the impact of *Williams*, the *Supplemental Brief of the Respondent* addresses a number of issues before coming to *Williams*, and Petitioner briefly responds accordingly.

Upon the issue of whether the autopsy report in this matter was a testimonial document, the State conceded, at oral argument upon the *Petition of Appeal*, that the autopsy report was a testimonial document. *Respondent's Brief*, p. 2. This is clear pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527 (2009); and *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S.Ct. 2705 (2011).

The State implied in its prior brief that, nevertheless, the Confrontation Clause is not implicated here, because Dr. Sabet's testimony can be viewed as based in part upon the autopsy report. *Resp. Brief*, p. 2-3. Yet, the State relies here on *State v. Kennedy*, 205 W.Va.

224, 517 S.E. 2d 457 (1999). *Kennedy* (this same case, previously before the Court), however, was overruled by this Court in *State of West Virginia v. James Allen Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006), and specifically upon the Confrontation Clause issue.

The State also argued previously, repeated in its reply brief, that any error was harmless. The State's reason is that Dr. Sabet's testimony was upon "the only contested medical issue at trial", whether a rock was used to strike the victim, and was based upon the "autopsy photographs", and not the "autopsy report". *Resp. Brief*, p. 3-4.

Petitioner responds that the autopsy photographs are part of the autopsy report. Dr. Sabet's testimony regarding the autopsy photographs surely incorporates his studying the rest of the autopsy report, especially the description of the victim's wounds. The two can not be separated.

Also, there is the additional contested conclusion of Dr. Sabet that some of the victim's wounds were more consistent with having been inflicted by a male, rather than a female, assailant. Such an opinion, which strains credulity, had not been offered by Dr. Livingston (who had performed the autopsy and authored the autopsy report). This add-on opinion by Dr. Sabet all the more necessitated Petitioner's ability to confront Dr. Livingston.

Petitioner's testimony was that his wife had killed the victim out of jealousy over Petitioner's affair with her.

The State states that *Crawford* should not be applied retroactively.

First, Petitioner states that this Court can, and should, apply *Crawford*, *Mechling*, *Melendez-Diaz*, and *Bullcoming* to Petitioner's case. This is a fundamental matter of procedural due process.

Also see *Briscoe v. Virginia*, 559 U.S. ____, 130 S.Ct. 1316 (2010), where the United States Supreme Court vacated the Virginia Supreme Court's decision which had found no Sixth Amendment violation in a case where the defendant at trial had been denied his right to confront the analyst who had signed the lab certificates. The United States Supreme Court remanded for further proceedings in light of *Melendez-Diaz*.

Secondly, it is noted that *Defendant's Motion for New Trial* was decided in the trial court. Petitioner thereafter perfected his appeal to this Court. This is a direct appeal.

Thirdly, this Court already has, at oral argument, heard argument by counsel, and questioned counsel, upon this point. The parties' Supplemental Briefs were ordered upon the impact of *Williams*.

The State simply states that it "believes that the *Williams* case does not alter the positions taken by undersigned counsel at oral argument". *Resp. Brief*, p. 8. The State then, again, lists its points.

What *Williams* specifically does not do, however, is overrule *Melendez-Diaz* or *Bullcoming*. As explained in *Petitioner's Supplemental Brief*, *Williams* is easily distinguished from Petitioner's case.

Crawford, *Melendez-Diaz*, and *Bullcoming* all apply to Petitioner's case.

Near the end of *Respondent's Supplemental Brief*, the State offers, "If, on the other hand, the Court concludes that the [autopsy] report was testimonial, then the State continues to believe that *Bullcoming* dictates the outcome of this issue: 'In short, when the State elected to introduce [analyst] Caylor's certification [of the lab report], Caylor became a witness *Bullcoming* had the

right to confront. Our precedent [*Melendez-Diaz, supra*] cannot sensibly be read any other way.’

Bullcoming v. New Mexico, supra, 564 U.S. ____, 180 L.Ed. 2d at 623, 131 S.Ct. at 2716.”

Resp. Brief, p. 11. Third bracketed portion added.

The State expressly agrees: “[T]he State conceded that the autopsy report was testimonial
...” *Resp. Brief*, p.2.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has served, by first-class mail, sent today, September 4, 2012, a true copy of the attached *Petitioner's Reply Supplemental Brief* upon the following:

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Managing Deputy Attorney General
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