

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 SUPPLEMENTAL BRIEF

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Now before this Honorable Court comes Petitioner, Franklin Junior Kennedy, by counsel, and provides this *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.

The assignment of error is that, in light of *West Virginia v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006); *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 trial court erred in denying *Defendant's Motion for New Trial* below.

At trial, a Dr. Livingston of the West Virginia Medical Examiner's Office had performed the autopsy, and prepared the autopsy report in this case, while a Dr. Zia Sabet appeared and testified regarding the autopsy report and results.

Petitioner contends that his Constitutional right to confront witnesses against him had thereby been violated.

Petitioner now states that *Williams v. Illinois* does not overrule *Melendez-Diaz* or *Bullcoming*. Moreover, *Williams* can readily be distinguished from Petitioner's case.

"[Post - *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004)] decisions are not challenged in this case and are to be deemed binding precedents, but they can and should be distinguished on the facts here." *Williams*, at 2242, fn 13.

In *Williams*, involving a bench trial for sexual assault, the United States Supreme Court held that the expert's testimony matching a DNA profile (produced by an outside laboratory) to a profile produced by the state lab from a sample of Williams' blood, did not violate the Confrontation Clause. Justice Alito authored the opinion. Justice Thomas concurred in the judgment, while disputing the plurality's reasoning. Justices Kagan, Scalia, Ginsburg, and Sotomayor dissented.

Justice Alito's plurality opinion focuses on the issue that, in *Williams*, in contrast to *Melendez-Diaz* and *Bullcoming*, the question is the constitutionality of permitting an expert witness to discuss the testimonial statements of others if those statements are not themselves admitted into evidence. *Williams*, at 2240.

Williams is readily distinguished from the instant case on this point. The testimonial statement here, the autopsy report, was indeed admitted as evidence at trial.

Even if the autopsy report had not been admitted at trial, an opinion offered by the expert at trial upon the information in the autopsy, if presenting inadmissible evidence, would only be admitted at a bench trial and not in a jury trial. *Williams*, at 2234-2235. Petitioner's trial was a jury trial.

Even if an expert's hearsay testimony at trial is not offered for the truth of the matter asserted, it is not likely that a jury could be instructed regarding that distinction, which is why the bench trial/jury trial distinction is important. See *Williams*, at 2236.

In the instant case, Dr. Sabet's testimony at trial upon the autopsy was clearly offered for the truth of the matters asserted.

In fact, Dr. Sabet's testimony presented an important additional opinion which all the more necessitated Petitioner's ability to confront Dr. Livingston, who had performed the autopsy and authored the autopsy report. That is, Dr. Sabet testified that the victim's puncture wounds to her chest were more consistent with having been inflicted by a male assailant than a female assailant. Dr. Livingston had not offered such an opinion.

This is important since Petitioner testified at trial that it was his wife who, out of jealousy over Petitioner's relationship with the victim, had killed her.

Also, where the plurality saw the expert's testimony in *Williams* as outside the range of "formalized statements such as affidavits, depositions, prior testimony, or confessions" (*Williams*, at 2242), the autopsy report in the instant matter is clearly within such scope.

An autopsy report is " 'made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial.' " (*Williams, dissent*, at 2266, quoting *Melendez-Diaz*, 557 U.S. 305, 310-311, referring to laboratory certificates, quoting *Crawford*, 541 U.S., at 51-52).

Not only is Petitioner's case easily distinguishable from *Williams*, but, also, in not overruling *Melendez-Diaz* or *Bullcoming*, *Williams* does not bind this Court anyway, nor would it control this Court even if it had overruled those cases.

Nor should it. "[The lab] report [*Williams*] is identical to the one in *Bullcoming* (and *Melendez-Diaz*) in "all material respects". *Williams, dissent*, at 2266, quoting *Bullcoming*, 131 S.Ct., at 2717.

"But in all except its disposition, [Justice Alito's] opinion is a dissent: Five Justices

specifically reject every aspect of its reasoning and every paragraph of its explication.” *Williams, dissent*, at 2265.

The dissent also states:

“Have we not already decided this case? [Witness] Lambatos’s testimony is functionally identical to the “surrogate testimony” that New Mexico proffered in *Bullcoming*, which did nothing to cure the problem identified in *Melendez-Diaz* (which, for its part, straightforwardly applied our decision in *Crawford*).” *Williams, dissent*, at 2267.

Crawford, Melendez-Diaz, and *Bullcoming* all apply to Petitioner’s case. *Williams* overrules neither and is easily distinguished from Petitioner’s case.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has served, by first-class mail, sent today, July 31, 2012, a true copy of the attached *Petitioner's Supplemental Brief* upon the following:

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