

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0223

STATE OF WEST VIRGINIA,

Respondent,

v.

FRANKLIN JUNIOR KENNEDY,

Petitioner.

SUPPLEMENTAL BRIEF OF THE RESPONDENT,
STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

BARBARA H. ALLEN
MANAGING DEPUTY ATTORNEY GENERAL
State Capitol, Room E-26
Charleston, West Virginia 25305
Telephone 304-558-2021
State Bar ID No. 1220
mistril1@aol.com

Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0223

STATE OF WEST VIRGINIA,

Respondent,

v.

FRANKLIN JUNIOR KENNEDY,

Petitioner.

SUPPLEMENTAL BRIEF OF THE RESPONDENT,
STATE OF WEST VIRGINIA

Comes now the State of West Virginia, by counsel, Barbara H. Allen, Managing Deputy Attorney General, and files this supplemental brief addressing the following issue: What effect, if any, does the recent plurality decision of the United States Supreme Court in *Williams v. Illinois*, No. 10-8505 (June 18, 2012), have on certain questions currently pending before this Court in the instant case.

The State will briefly review the relevant questions herein, then review the *Williams* decision, and then analyze the issue upon which this Court has ordered additional briefing.

I.

In the instant case, the pathologist who performed an autopsy on the victim was not called as a witness at the Petitioner's trial. However, his autopsy report was admitted into evidence and was one of the bases for opinions expressed by the State's expert witness, Dr. Sabet, as to the cause and manner of the victim's death.

This presents two Confrontation Clause issues, both of which were briefed and argued by the State: first, whether the autopsy report was a testimonial document, and thus inadmissible in evidence, where the pathologist who performed the autopsy did not testify; and second, whether the State's expert pathologist could nonetheless rely in part on his review of the autopsy report as a basis for his opinions.

With respect to the first issue, the State conceded that the autopsy report was testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), because it was prepared “. . . for the *purpose* of establishing or proving some fact at trial.” *Melendez-Diaz, supra*, 557 U.S. at 324 (emphasis supplied).¹ In that regard, West Virginia Code § 61-12-3 provides, in relevant part, that:

(d) The chief medical examiner shall be responsible to the director of the division of health in all matters except that the chief medical examiner shall operate with independent authority for the *purposes* of:

(1) The performance of death investigations conducted pursuant to section eight of this article;

(2) The establishment of cause and manner of death; and

(3) The formulation of conclusions, opinions or testimony in judicial proceedings.

(Emphasis supplied.)

With respect to the second issue, the State argued in its brief that the Confrontation Clause was not implicated by Dr. Sabet's testimony because “[a]ny physician qualified as an expert may

¹*Melendez-Diaz* distinguished business records from public records by utilizing this purpose test: “Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial.” *Id.*

give an opinion about physical and medical cause or injury or death” and “[t]his opinion may be based in part on an autopsy report.” *State v. Kennedy*, 205 W. Va. 224, 231, 517 S.E.2d 457, 464 (1999), citing *State v. Linkous*, 177 W. Va. 621, 625 & n.3, 355 S.E.2d 410, 414 & n. 3 (1987), and Syl. Pt. 5, *State v. Jackson*, 171 W. Va. 329, 298 S.E.2d 866 (1982). The State further argued that this was completely consistent with West Virginia Rules of Evidence 703, which provides that if an expert bases his or her opinion upon facts or data reasonably relied upon by experts in the particular field, the facts or data need not be admissible in evidence.

Subsequent to submission of the parties’ briefs but prior to oral argument, the United States Supreme Court issued its opinion in *Bullcoming v. New Mexico*, 564 U.S. ___, 180 L. Ed. 2d 610, 131 S. Ct. 2705 (2011), holding that an expert analyst could not testify as a “surrogate” for the analyst who had prepared a forensic report, notwithstanding that the expert was a knowledgeable representative of the laboratory who could explain the lab’s processes and the details of the report: “The accused’s right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had the opportunity, pre-trial, to cross-examine that particular scientist.” *Id.*, 564 U.S. ___, 180 L. Ed. 2d at 616, 131 S. Ct. At 2710. The State brought this authority to the attention of the Court and, at oral argument, conceded that Dr. Sabet, insofar as he had relied on another pathologist’s autopsy report, was a “surrogate witness” whose testimony violated the Confrontation Clause under *Bullcoming*.

The State argued strongly, however, that any error was harmless. The fact is that the autopsy report in this case was completely silent with respect to the only contested medical issue at trial: the manner in which the fatal injuries were inflicted. (The Petitioner’s defense at trial was that his wife had committed the crime, and that he had seen her strike the victim with a rock. Dr. Sabet testified,

on the basis of the autopsy photographs, not the autopsy report, that the injuries were not consistent with blows from a rock or stone.) Significantly, although the Petitioner’s counsel had objected to admission of the autopsy report, he had not objected to admission of the autopsy photographs.

Finally, with respect to both of the Confrontation Clause issues, the State argued that *Crawford v. Washington, supra*, should not be given retroactive application in any event because it was a new rule and was not a “. . . watershed rule of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” *Whorton v. Bockting*, 549 U.S. 406, 417 (2007), citing *Teague v. Lane*, 489 U.S. 288 (1989).

This brings us to the United States Supreme Court’s most recent Confrontation Clause decision, *Williams v. Illinois*, No. 10-8505 (2012), pending at the time of oral argument in this case but decided thereafter.

II.

It is fair to say – and indeed, many commentators already have – that *Williams* is a fractured opinion in which only one thing can be said with certainty: that five Justices are looking to limit the scope of *Crawford*, *Melendez-Diaz* and *Bullcoming*, but cannot agree on a rationale for so doing.

In *Williams*, the facts were as follows:

In petitioner’s bench trial for rape, the prosecution called an expert who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of petitioner’s blood. On direct examination, the expert testified that Cellmark was an accredited laboratory and that Cellmark provided the police with a DNA profile. The expert also explained the notations on [chain of custody] documents admitted as business records, stating that, according to the records, vaginal swabs taken from the victim were sent to and received back from Cellmark.

Williams, supra, Plurality Opinion at 1-2.

The Cellmark analyst who prepared the DNA profile was not called as a witness, and the Cellmark report was not admitted into evidence as an exhibit; rather, the prosecution's expert reviewed, relied upon and testified about the contents of the report. The issue before the Court, then, was whether the expert's testimony, which "... informed the trier of fact that the [Cellmark] testing of L.J.'s vaginal swabs had produced a male DNA profile implicating [the defendant]," violated the Confrontation Clause. *Id.*, Dissenting Opinion at 7.

A plurality of four Justices held that the case was not governed by *Crawford*, *Melendez-Diaz* or *Bullcoming* for two reasons. First, the Cellmark report at issue was not testimonial, because it was not created for "the sole purpose of providing evidence against a defendant . . .," and was not "... quite plainly [an] affidavit[]" *Id.*, Plurality Opinion at 11, citing *Melendez-Dias*, *supra*, 557 U.S. at 330. Second, the Cellmark report was not offered for the truth of the matter therein, but only as "... basis evidence [which] can help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion." *Id.*, Plurality Opinion at 24.² And even if the Cellmark report were construed as having been offered for the truth therein, it was still not hearsay because it was not "... made for the purpose of proving the guilt of a particular criminal defendant at trial . . .," since at the time Mr. Williams had not even been identified as a suspect. *Id.*, Plurality Opinion at 30-31.

²In this regard, the plurality found it significant that Williams had a bench trial. "The dissent's argument would have force if petitioner had elected to have a jury trial. In that event, there would have been a danger of the jury's taking [the expert's] testimony as proof that the Cellmark profile was derived from the sample obtained from the victim's vaginal swabs. Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury." *Id.*, Plurality Opinion at 18-19.

Justice Breyer, who joined the four-Justice plurality, nevertheless wrote a concurring opinion discussing “. . . the outer limits of the ‘testimonial statements’ rule set forth in *Crawford* . . .,” and adhering to his previous dissenting views in *Melendez-Diaz* and *Bullcoming*. *Id.*, Concurring Opinion of Breyer, J., at 1. The gist of Justice Breyer’s lengthy concurrence was that although the plurality’s limiting principles for application of *Crawford*, *Melendez-Diaz* and *Bullcoming* are indeed “artificial,” no one had “. . . produced a workable alternative . . .” In Justice Breyer’s view:

I would consider reports such as the DNA report before us presumptively to lie outside the perimeter of the [Confrontation] Clause as established by the Court’s precedents. Such a holding leaves the defendant free to call the laboratory employee as a witness if the employee is available. Moreover, should the defendant provide good reason to doubt the laboratory’s competence or the validity of its accreditation, then the alternative safeguard of reliability would no longer exist and the Constitution would entitle defendant to Confrontation Clause protection. Similarly, should the defendant demonstrate the existence of a motive to falsify, then the alternative safeguard of honesty would no longer exist and the Constitution would entitle the defendant to Confrontation Clause protection.

Id., Concurring Opinion of Breyer, J., at 14.³

Justice Thomas, in concurrence, agreed with the plurality on only one thing: that “. . . disclosure of Cellmark’s out-of-court statements through the expert testimony of Sandra Lambatos did not violate the Confrontation Clause.” *Id.*, Concurring Opinion of Thomas, J., at 1. Other than that, he disagreed – at length – with each and every point of the *ratio decidendi* offered by the plurality, terming it a “flawed analysis.” *Id.* He also disagreed with Justice Breyer, who had proposed a so-called “workable alternative” to *Crawford*, *Melendez-Diaz* and *Bullcoming*, noting

³In *Melendez-Diaz*, the majority had specifically addressed and rejected Justice Breyer’s proposed rule, holding that with respect to the Confrontation Clause, “[i]ts value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.” *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at 324-25.

that “. . . the defendant’s subpoena power ‘is no substitute for the right of confrontation.’” *Id.*, Concurring Opinion of Thomas, J., at 15 n. 6, citing *Melendez-Diaz*, *supra*, 557 U.S. at 324.

Justice Thomas proposed an entirely different rule for determining whether a document is or is not testimonial under *Crawford*: whether the document bears the “indicia of solemnity” marking the practices that the Confrontation Clause was designed to eliminate, “. . . namely, the ex parte examination of witnesses under the English bail and committal statutes passed during the reign of Queen Mary.” *Id.*, Concurring Opinion of Thomas J., at 8. Under this test, only depositions, affidavits, prior testimony, statements resulting from “formalized dialogue” such as custodial interrogation, and documents having the indicia of depositions or affidavits by virtue of being sworn and/or certified declarations of fact, would be deemed testimonial. *Id.*, Concurring Opinion of Thomas, J., at 8-9.

Four Justices in dissent pointed out that with respect to the plurality opinion, “. . . in all except its disposition, [the plurality] opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication.” *Id.*, Dissenting Opinion at 3.

In the view of the dissenting Justices, the Cellmark report in *Williams* cannot be distinguished in any material respect from the report in *Melendez-Diaz*, and the testimony of the expert in *Williams* cannot be distinguished in any material respect from the “surrogate testimony” in *Bullcoming*, both of which, *Melendez-Diaz* and *Bullcoming*, “. . . straightforwardly applied our decision in *Crawford*.” *Id.*, Dissenting Opinion at 7.

The four dissenting Justices disagreed with each and every point of the *ratio decidendi* offered by the plurality, as had Justice Thomas, but also disagreed with Justice Thomas’ “Marian examination practices” test:

Indeed, Justice Thomas’s approach, if accepted, would turn the Confrontation Clause into a constitutional gee-gaw – nice for show, but of little value. The prosecution could avoid its demands by using the right kind of forms with the right kind of language. (It would not take long to devise the magic words and rules – principally, never call anything a “certificate.”)

Id., Dissenting Opinion at 24.

This brings us to the question this Court requested the parties to brief: what effect, if any, does the decision in *Williams* have on the issues pending before the Court in the instant case.

III.

The State believes that the *Williams* case does not alter the positions taken by undersigned counsel at oral argument: that assuming the retroactive application of *Crawford*, the autopsy report in the instant case was testimonial and thus inadmissible; and the testimony of the State’s expert witness, Dr. Sabet, was improper under *Bullcoming*, but only insofar as he (Dr. Sabet) relied on the autopsy report for formulating his opinions.⁴ However, the State believes, and continues to strongly argue, that these issues are purely academic in this case: *Crawford* should not be given retroactive application, and/or any error in the case was harmless beyond a reasonable doubt.

The Autopsy Report

A close examination of the *Williams* opinion indicates that only Justice Thomas would most assuredly deem the autopsy report in this case to be non-testimonial, because it does not meet his “Marian examination practices” test: it is not a certification, and it is not attested. *Williams v. Illinois, supra*, Concurring Opinion of Thomas, J., at 8-9.

⁴As noted earlier, the State’s position at oral argument was different from the position taken in its brief, because the *Bullcoming* case had been decided in the interim.

The Justices in the *Williams* plurality found the Cellmark report to be non-testimonial for several reasons.

First, the Cellmark report was not created for “the sole purpose of providing evidence against a defendant . . .,” and was not “. . . quite plainly [an] affidavit[] . . .” *Id.*, Plurality Opinion at 11, citing *Melendez-Dias*, *supra*, 557 U.S. at 330. In this case, in contrast, the Petitioner had already been taken into custody by the time the autopsy report was prepared; and it was clearly anticipated that it would be used as evidence in a criminal prosecution, in that the manner of death was deemed to be “homicide” and the report was immediately sent to both the McDowell County Sheriff and the McDowell County Prosecuting Attorney.⁵ Further, West Virginia Code § 61-12-3(d)(3), discussed at p. 2, *infra*, designates “. . . formulation of conclusions, opinions or testimony in judicial proceedings . . .,” as a primary purpose for the preparation of an autopsy report.

Second, the Cellmark report was utilized only as a basis for the opinions given by the prosecution’s expert witness. The report was not admitted into evidence. Thus, in the plurality’s view, the report was not offered for the truth of the matter therein, meaning that it was not hearsay and was outside the ambit of the Confrontation Clause. In this case, in contrast, the autopsy report was entered into evidence and was sent to the jury as an exhibit.

Third, although the plurality did not find this to be dispositive, it noted (at some length) that if *Williams* had elected to have a jury trial, “. . . there would have been a danger of the jury’s taking

⁵And in any event, it is difficult to reconcile the *Williams* plurality’s “evidence against a defendant” test with the opinion in *Melendez-Dias*, where the Court specifically rejected the argument that analysts were not “accusatory” witnesses in that they did not directly accuse *Melendez-Dias* of wrongdoing. The Court wrote that “. . . they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction – that the substance he possessed was cocaine.” *Melendez-Dias v. Massachusetts*, *supra*, 557 U.S. at 313 (emphasis in original).

[the expert's] testimony as proof that the Cellmark profile was derived from the sample obtained from the victim's vaginal swabs." *Williams v. Illinois, supra*, Plurality Opinion at 18-19. In this case, the Petitioner did have a jury trial, and the autopsy report did go to the jury; therefore, the danger which was purely theoretical in *Williams* was real in the Petitioner's trial.

In light of the above, the State believes that the *Williams* plurality would find it difficult, if not impossible, to conclude that the autopsy report in this case was not testimonial. The bottom line, however, is that even if the plurality did so conclude, that would not settle the issue. It is well established that a plurality opinion in a case results only in a judgment in that case; it does not set precedent, although its reasoning may be persuasive to other courts in further development of the law. See John F. Davis & William L. Reynolds, "Juridical Cripples: Plurality Opinions in the Supreme Court," 1974 Duke L.J. 59, 61-62: "Those joining in a plurality opinion may speak with the authority accorded wise men, but their voices do not carry the authority of the Supreme Court as an institution." This general rule has special force where, as here, five Justices in *Williams* disagreed with every single aspect of the plurality's *ratio decidendi*, leading Justice Kagan to note wryly that ". . . in all except its disposition, [the plurality] opinion is a dissent . . ." *Williams v. Illinois, supra*, Dissenting Opinion at 3.

The Testimony of Dr. Sabet

Whether or not Dr. Sabet's testimony violated the Petitioner's rights under the Confrontation Clause, insofar as the testimony relied on the autopsy report prepared by a non-testifying pathologist, is dependent on this Court's determination of the first issue: whether the autopsy report was a testimonial document. If the Court concludes that the report was not testimonial pursuant to the rationale of any one or more of the tests explicated by the plurality, by Justice Breyer in concurrence,

or by Justice Thomas in concurrence, then the State would rely upon the argument made in its brief (prior to the decision in *Bullcoming*), specifically, that this Court's precedents permit one pathologist to give testimony by referencing information provided in an autopsy report completed by another pathologist. *State v. Kennedy*, 205 W. Va. 224, 231, 517 S.E.2d 457, 464 (1999); *State v. Linkous*, 177 W. Va. 621, 625 & n. 3, 355 S.E.2d 410, 414 & n. 3 (1987); Syl. Pt. 5, *State v. Jackson*, 171 W. Va. 329, 298 S.E.2d 866 (1982). *See also* W. Va. R. Evid. 703, which provides that if an expert bases his or her opinion upon facts or data reasonably relied upon by experts in the particular field, the facts or data need not be admissible in evidence.

If, on the other hand, the Court concludes that the 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, 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.

Retroactivity/Harmless Error

As it did in its brief and at oral argument, the State urges this Court to resolve this case by holding that *Crawford v. Washington, supra*, is not retroactive. The United States Supreme Court has already so held with respect to federal court cases, *Whorton v. Bockting*, 549 U.S. 406, 417 (2007). Although state courts are free to apply *Crawford* retroactively in state court proceedings if they so choose, *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008), the State has found only one case in which a state court has done so. *State v. Forbes*, 119 P.3d 144 (N.M. 2005), *cert denied*, *New Mexico v. Forbes*, 549 U.S. 1274 (2007). As the State argued in its brief, *Forbes* is specifically limited to what the New Mexico Supreme Court termed the "very special facts" of that case, and was

premised on a finding that *Crawford* had not announced a “new rule,” a finding that was later rejected by a unanimous United States Supreme Court in *Whorton v. Bockting, supra*, 549 U.S. at 406.

Additionally or in the alternative, any error in the admission of the autopsy report in this case was harmless beyond a reasonable doubt. The autopsy report contains not one word as to the identity of the assailant or the mechanism by which the victim’s injuries were suffered, the only two issues which were disputed at the trial. The only factual dispute between the State’s witness, Dr. Sabet, and the Petitioner, who testified in his own defense, was whether the blunt force injuries to the victim’s head could have been caused by a rock – a subject not addressed in the autopsy report. Dr. Sabet testified that the injuries, which were represented in photographs to which no objection was made, were inconsistent with having been inflicted by a rock or a stone; rather, he opined that the injuries were consistent with the victim’s head being smashed against a wall, or a car, or maybe the ground. (Trial Transcript, pp. 262, 266, 273-74.) This testimony was significant because the Petitioner had given a statement to his attorney – who turned it over to the prosecuting attorney, deeming it to be helpful – in which he said that his wife, in the course of killing Lashonda, had “used a rock.” (Trial Transcript, p. 383.)

CONCLUSION

For all of the reasons set forth in the State’s brief, in its oral argument, and in this supplemental brief, the judgment of the Circuit Court of McDowell County should be affirmed. The State does not believe that the plurality decision of the United States Supreme Court in *Williams v. Illinois*, No. 10-8505 (June 18, 2012) is dispositive of any issues in this case; and to the extent this Court may deem the decision to be persuasive, the decision in this case should be unaffected because

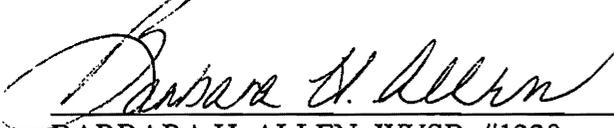
(a) the Petitioner is not entitled to retroactive application of *Crawford v. Washington*, 541 U.S. 36 (2004), and (b) any error in admission of the autopsy report and/or the testimony of Dr. Sabet, insofar as he relied on that report, was harmless beyond a reasonable doubt.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "Barbara H. Allen", is written over a horizontal line.

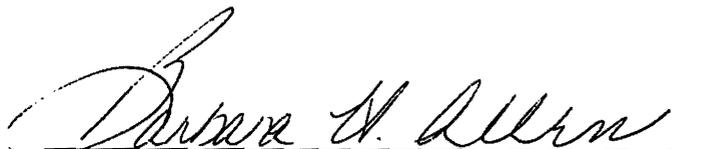
BARBARA H. ALLEN, WVSB #1220
MANAGING DEPUTY ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, WV 25305
304-558-2021

CERTIFICATE OF SERVICE

I, Barbara H. Allen, do hereby certify that a copy of the within "Supplemental Brief of the Respondent, State of West Virginia" was served on all counsel of record by United States mail, first-class postage prepaid, on the 17th day of August, 2012, addressed as follows:

Steven K. Mancini, Esq.
P. O. Box 5514
Beckley, WV 25801

The Honorable Sidney H. Bell
McDowell County Prosecuting Attorney
93 Wyoming Street, Suite 207
Welch, WV 24801


BARBARA H ALLEN