SUPREME COURT COPY

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

110 WEST A STREET, SUITE 1100
SAN DIEGO, CA 92101
P.O. BOX 85266
SAN DIEGO, CA 92186-5266

Public: (619) 645-2001
Telephone: (619) 645-2276
Facsimile: (619) 645-2191
E-Mail: Arlene.Sevidal@doj.ca.gov

January 17, 2013

SUPREME COURT
FILED

JAN 18 2013

Frank A. McGuire Clerk

Deputy

Frank A. McGuire, Clerk
Court Administrator and Clerk
Supreme Court of California
350 McAllister Street, First Floor
San Francisco, California 94102-4797

RE: **Supplemental Reply Letter Brief**
People v. Robert Edwards, Supreme Court of the State of California, Case No. S073316

Dear Mr. McGuire:

Respondent submits this supplemental reply letter brief in response to this Court's December 19, 2012, order for simultaneous supplemental letter briefs limited to the question of "the effect, if any, of *Williams v. Illinois* (2012) ___ U.S. ___ [132 S.Ct. 2221], and *People v. Dungo* (2012) 55 Cal.4th 608, on the issues in this case."

Edwards contends in his supplemental letter brief that this Court did not address, in *Dungo*, whether the opinions of the autopsy surgeon were subject to the Confrontation Clause. Edwards also argues that professional opinions are testimonial under *Williams* because they are sufficiently formal and because their primary purpose was for possible use in a criminal trial. Contrary to Edwards' assertions, *Williams* and *Dungo* make clear that Edwards's confrontation rights were not violated.

In *Williams,* five justices, Justice Thomas and the plurality, agreed that most laboratory reports and other documents in a laboratory's file are insufficiently formal to

DEATH PENALTY

qualify as testimonial statements. Justice Thomas opined in his concurrence that "the Confrontation Clause reaches ""formalized testimonial materials,"" such as depositions, affidavits, and prior testimony, or statements resulting from ""formalized dialogue,"" such as custodial interrogation. (*Williams, supra*, 132 S.Ct. at pp. 2259-2260.) According to Justice Thomas, the Cellmark report "lack[ed] the solemnity of an affidavit or deposition" because it was neither "a sworn nor a certified declaration of fact," thus rendering it nontestimonial. (*Ibid.*) Conversely, he noted that the certificates in *Melendez-Diaz* were sworn before a notary public by the analysts who had tested a substance for cocaine and that the analyst's blood-alcohol report in *Bullcoming v. New Mexico* (2011) 564 U.S. __ [131 S.Ct. 2705, 180 L.Ed.2d 610] included a certificate with certain affirmations about the procedures used during the test. (*Williams, supra*, 132 S.Ct. at p. 2260.)

And, while Justice Thomas acknowledged that the certified report at issue in *Bullcoming* had qualified as testimonial because its author formally certified its accuracy (*Williams, supra*, 132 S.Ct at p. 2260), the four justices in the *Williams* plurality were not willing to go even that far in the *Bullcoming* case itself. There, as dissenters, Justices Kennedy, Alito, and Breyer, and Chief Justice Roberts concluded that "impartial lab reports like the instant one, reports prepared by experienced technicians in laboratories that follow professional norms and scientific protocols," are not the products of "formal interrogation in preparation for trial" that the Confrontation Clause guards against. (*Bullcoming v. New Mexico, supra*, 131 S.Ct. at p. 2726 (dis. opn. of Kennedy, J.); see also pp. 2723-2724 [finding significance in the fact that the *Bullcoming* lab report was not a "sworn statement," in contrast to the documents in *Melendez-Diaz*, which were "'quite plainly affidavits'"].) These four justices did not delve deeply into the question of formality in *Williams* because they agreed that the Cellmark report was not made with the necessary primary purpose that would potentially qualify it as testimonial. (*Williams, supra*, 132 S.Ct at pp. 2242-2244.) They noted, however, that "[t]he Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions,

prior testimony, and confessions, that the Confrontation Clause was originally understood to reach." (*Id.* at p. 2228.)

In any event, as this Court noted in *Dungo,* "formality is not enough to make an extrajudicial statement testimonial; the statement must also have a primary purpose pertaining to the investigation and prosecution of a crime. (*People v. Lopez, supra*, 55 Cal.4th 569, 582, 147 Cal.Rptr.3d 559, 286 P.3d 469 ["all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution" ...].)" *People v. Dungo, supra,* 55 Cal.4th at p. 620, fn. 5.) The autopsy report upon which Dr. Fukumoto relied for his opinions had no such primary purpose. (*Id.* at pp. 620-621; *Williams, supra*, 132 S.Ct. at p. 2243.) Rather, the autopsy report sought to determine how Deeble, the victim, died, not who was responsible. As this Court noted in *Dungo,* the preparation of an autopsy report is governed by California's Government Code section 27491, which requires a county coroner to "inquire into and determine the circumstances, manner, and cause" of certain types of death. Some of these deaths result from causes unrelated to criminal activities, while other deaths result from the commission of a crime. (*People v. Dungo, supra,* 55 Cal.4th at 620.) With respect to all of the statutorily specified categories of death, however, the scope of the coroner's statutory duty to investigate is the same, regardless of whether the death resulted from criminal activity. (*Ibid.*) Moreover, as noted in *Dungo* the usefulness of autopsy reports is not limited to criminal investigation and prosecution, but serve many other equally important purposes. (*Id.*, at p. 621.) Therefore, contrary to Edwards' assertions, under *Williams* and *Dungo*, the observations of Dr. Richards recorded in his autopsy report do not reach the level of formality required to qualify as testimonial, as it was not an affidavit or a sworn declaration of fact, nor did the statement have criminal investigation as the primary purpose.

Moreover, while Dr. Fukumoto mentioned that Dr. Richards also came to the same conclusion about the cause of death, Dr. Fukumoto's opinion was his own, based on his

personal review of the autopsy photographs, slides, x-rays and description of the body contained in the report, and Dr. Fukumoto was subject to cross examination. (XII RT 2123-2124, 2145.) Dr. Fukumoto's description to the jury of objective facts about the condition of Deeble's body, facts he derived from Dr. Richard's autopsy report and its accompanying photographs, slides, and x-rays did not give Edwards a right to confront and cross-examine Dr. Richards. The facts that Dr. Fukumoto related to the jury were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation right, and criminal investigation was not the primary purpose for recording the facts in question. Edwards' Confrontation Clause rights were not violated.

Finally, Edwards' argument in his supplemental letter brief that the State conceded that the defendant's right to confront witnesses was violated by the admission of hearsay testimony regarding the opinion of the autopsy surgeon in *Merolillo v. Yates* (9th Cir. 2011) 663 F.3d 444, is inapposite. In *Merolillo*, the state did not concede that there was Confrontational Clause violation. Rather, the California Court of Appeal had already held that the trial court erred in admitting Dr. Garber's opinion testimony, but found the admission harmless. (*Id.* at p. 452.) The only issue certified for appeal before the Ninth Circuit was "whether petitioner was prejudiced by the admission of hearsay evidence that the victim's death was caused by brain trauma." (*Id.*, at pp. 452-453.) Therefore, there was no concession by the state that the admission of the hearsay opinion of the autopsy surgeon violated the petitioner's Confrontation Clause rights. In any event, Ninth Circuit authority is not binding on this Court. (*See People v. Bradford* (1997) 15 Cal.4th 1229, 1292.)[1]

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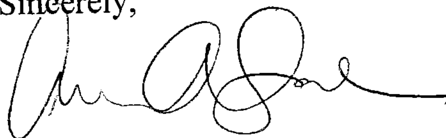
[1] Edwards also mentions in his supplemental letter brief that a question the prosecutor asked Sgt. Jessen, "Isn't it true that in your mind, based upon information you had received from other people, lab personnel, that this list of people that the defense had mentioned as people who had provided inadequate samples were eliminated as donors of semen and fluids at the crime scene?" (X RT 2838) and Sgt. Jessen's subsequent

(continued...)

For all the reasons set forth in Respondent's Brief, Supplemental Brief, the Supplemental Letter Brief and this Supplemental Reply Letter Brief, Edwards' claim that his Confrontation Clause rights were violated by the admission of Dr. Fukumoto's testimony regarding the autopsy conducted by Dr. Richards should be rejected.

Sincerely,



ARLENE A. SEVIDAL
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

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affirmative answer, violated the Confrontation Clause. As explained in Respondent's Supplemental Brief at pages 61 to 69, Edwards' Confrontation Clause rights were not violated because no out of court statements by lab personnel were admitted for the truth of the matter asserted, and Sgt. Jessen was available for cross-examination. Neither *Dungo* nor *Williams* assist Edwards on this issue because it is clear the Confrontation Clause and *Crawford* were not implicated.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Robert Edwards**
No.: **S073316**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 17, 2013, I served the attached **SUPPLEMENTAL REPLY LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

Quin A. Denvir
Attorney at Law
1614 Orange Lane
Davis, CA 95616
Atty. for Def. (2 copies)

The Honorable Tony J. Rackauckas
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

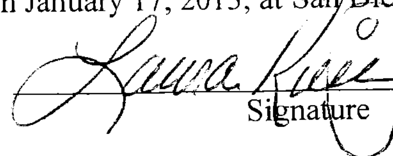
The Honorable John J. Ryan
Orange County Superior Court
700 Civic Center Dr. West, Dept. 45
Santa Ana, CA 92701

Michael Laurence
Executive Director
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, California 94107

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814 E-15

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 17, 2013, at San Diego, California.

Laura Ruiz
Declarant



Signature

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