

SUPREME COURT COPY

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January 7, 2013

**SUPREME COURT
FILED**

JAN - 8 2013

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

Frank A. McGuire Clerk

Deputy

RE: **Supplemental Letter Brief**

People v. Robert Edwards, Supreme Court of the State of California, Case No. S073316

Dear Mr. McGuire:

Respondent submits this supplemental letter brief in response to this Court's December 19, 2012, order for simultaneous supplemental 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 his conviction for special circumstance murder and death sentence must be reversed because his Sixth Amendment right to confrontation was violated when Dr. Fukumoto relied on the autopsy report prepared by Dr. Richards, in testifying that the injuries to Edwards' victim were painful and inflicted prior to her death. (AOB 150-158; SAOB 43-63.) As both *Williams* and *Dungo* make clear, Edwards's confrontation rights were not violated.

As explained below, the observations of Dr. Richards contained in his autopsy report do not reach the level of formality required to qualify as testimonial because those statements lacked the formality and solemnity of an affidavit or a sworn declaration of

DEATH PENALTY

fact, and were not made for the primary purpose of accusing a targeted individual. Rather, they were the objective observations of a physician pathologist examining the condition of a body pursuant to statutory public health mandates and routine laboratory protocols. Moreover, while Dr. Fukumoto mentioned in his testimony that Dr. Richards also came to the same conclusion about the cause of death, Dr. Fukumoto's opinion was his own, based on personal review of the autopsy photographs, slides, x-rays and description of the body contained in the report, and he was subject to cross examination. (XII RT 2123-2124, 2145.) Dr. Richards did not bear testimony against Edwards.

In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court held that the Sixth Amendment's confrontation clause prohibits the admission of "testimonial" statements of a witness unless the witness is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. (*Id.* at pp. 53-54, 59.) Although the Court did not provide a comprehensive definition of "testimonial," it stated that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68.) The *Crawford* Court thus held that admission of a witness's out-of-court statement to a police officer while the witness was in custody violated the confrontation clause. (*Id.* at pp. 68-69.)

Williams v. Illinois (2012) 567 U.S. ___ [132 S.Ct. 2221, 183 L.Ed.2d 89] is one of three cases decided since 2009, wherein the Supreme Court has applied *Crawford* to the admission of forensic evidence at trial.¹ In *Williams*, the Supreme Court held that

¹ In *Melendez-Diaz v. Massachusetts* (2009) 445 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314], the Court held that the defendant's confrontation rights were violated by the admission into evidence of three affidavits reporting the results of forensic analysis showing that material seized by the police and connected to the defendant was cocaine. (*Id.* at p. 311.) In *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705, 180 L.Ed.2d 610], the Court held that testimony of a laboratory analyst parroting the results of a blood alcohol test he did not perform or observe, together with admission of a

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testimony by an Illinois State Police forensic biologist about a DNA match which relied in part on a DNA profile generated at another laboratory did not violate the confrontation clause. (*Williams v. Illinois, supra*, 132 S.Ct. at pp. 2243-2244.) In *Williams*, five justices agreed that the uncertified results of a DNA analysis, performed by nontestifying Cellmark analysts, were nontestimonial. (*Williams, supra*, 132 S.Ct. at pp. 2238-2242.) Justice Thomas concurred with this conclusion solely because the uncertified analysis lacked the requisite formality and solemnity to be considered testimonial. (*Id.* at p. 2255 (conc. opn. of Thomas, J.)). Justice Thomas reaffirmed that he would not join in any definition of “testimonial” that reaches beyond “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” (*Id.* at p. 2260.)

In *People v. Dungo* (2012) 55 Cal.4th 608, this Court analyzed those decisions in addressing a claim that introduction of statements from an autopsy report through a pathologist who did not prepare the report violated the defendant’s confrontation rights. (*Id.* at pp. 616-619.) This Court has extracted two critical components from the “widely divergent” views of the United States Supreme Court justices. (*Ibid.*) This Court explained that there were two “critical components” in determining whether a statement is testimonial. First, the statement must be made with “some degree of formality or solemnity.” (*People v. Dungo, supra*, 55 Cal.4th at p. 619.) Second, the primary purpose of the statement must pertain in some fashion to a criminal prosecution. (*Ibid.*)

In the specific context of an autopsy report, this Court in *Dungo* found that such reports typically contain two types of statements: “(1) statements describing the pathologist’s anatomical and physiological observations about the condition of the body, and (2) statements setting forth the pathologist’s conclusions as to the cause of the victim’s death.” (*People v. Dungo, supra*, 55 Cal.4th at p. 619.) This Court noted that

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formalized report, violated the defendant’s confrontation rights. (*Bullcoming v. New*
(continued...))

statements in the first category are less formal than those in the second category, and are comparable to observations made by an examining physician for treatment purposes; statements which the United States Supreme Court has held are not testimonial. (*Ibid.*, citing *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 312, fn. 2.) This Court further noted that state law requires autopsy reports in many cases not involving criminal conduct and that the reports serve purposes other than criminal investigation and prosecution, including helping a decedent's relatives decide whether to file a wrongful death lawsuit. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 620.) "In short, criminal investigation was not the primary purpose for the autopsy report's description of [the victim's] body; it was only one of several purposes." (*Ibid.*)

Thus, this Court held that the defendant's confrontation rights were not violated when the testifying pathologist related to the jury some of the observations made by the non-testifying pathologist, which the testifying pathologist partly relied upon in forming his opinion that the victim died of prolonged strangulation. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 621.) "The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*Ibid.*)

It is now settled in California that a statement is not testimonial unless both criteria, degree of formality and primary purpose, are met. (*People v. Holmes* (Dec. 24, 2012, B22971) ___ Cal.App.4th ___ [2012 WL 6674411].) This Court has also concluded that lack of formality alone rendered the blood alcohol report nontestimonial regardless of its primary purpose. (*People v. Lopez* (2012) 55 Cal.4th 569, 582.) Accordingly, since the autopsy report in this case lacked both formality and criminal investigation as a primary purpose, the report was not testimonial. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 621.)

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Mexico, *supra*, 131 S.Ct. at pp. 2243-2244.)

In light of *Dungo*, Edwards cannot possibly prevail on his claim that Dr. Fukumoto's testimony violated his rights under the confrontation clause. Dr. Fukumoto reached an independent conclusion on the cause of death (asphyxiation due to ligature strangulation) based on his personal review of the photographs, x-rays, and microscopic slides taken during the autopsy.² (VII RT 2123-2124, 2138, 2142.) Dr. Fukumoto also offered his own independent opinion on whether the photographs showed movement by Deeble while the ligature was around her neck (VII RT 2125-2126), whether it was extremely painful for Deeble to have the ligature around her neck and pressure in her ear to the extent that her ear drums were torn (VII RT 2128), whether the incision to her left ear drum was painful (VII RT 2129), whether the lacerations at her ankle were consistent with wires coming together (VII RT 2130), whether there was flattening on the bridge of Deeble's nose which may have reflected a fracture (VII RT 2142), whether Deeble suffered blunt force trauma to the area above her neck (VII RT 2133), whether a tremendous amount of force was inflicted to damage Deeble's pancreas (VII RT 2135), whether the injuries to Deeble's genital area were consistent with being caused by a mousse can (VII RT 2138), and whether the injuries to the vaginal and rectal areas were caused before death and would have been highly painful (VII RT 2138).

While Dr. Fukumoto may have relied upon Dr. Richards's observations of Deeble's body in forming his expert opinion, that reliance did not violate Sixth Amendment protections. For instance, Dr. Fukumoto did testify that Dr. Richards described two scratch lacerations with a dot going in an upwards direction on Deeble's right ankle which were probably caused by two wires coming together. (VII RT 2129-

² While the report apparently contained information concerning the cause and manner of death, the autopsy report was not admitted into evidence. Except for mentioning that Dr. Richards' cause of death was the same as the one arrived at by Dr. Fukumoto, Dr. Fukumoto testified about his own opinions that he reached after personally reviewing all of the photographs, x-rays and slides taken during the autopsy. (VII RT 2123-2124, 2138, 2142.)

2130.) Dr. Fukumoto testified that after looking at the photograph, he agreed with this assessment. (VII RT 2130.) Dr. Fukumoto also stated that Dr. Richards noted a marked engorgement in the upper neck and face area and a crescent on the nose that indicated a fracture. (VII RT 2130-2131.) Dr. Fukumoto additionally testified that Dr. Richards noted the presence of food in Deeble's stomach that was relatively untouched by the digestive process. (VII RT 2136.) According to Dr. Fukumoto, Dr. Richards also noted that the anus was dilated. (VII RT 2137.) Finally, Dr. Fukumoto opined that the cause of death was asphyxiation, which was consistent with Dr. Richards' opinion regarding the cause of death. (VII RT 2139.) However, because those statements were not testimonial, Edwards did not have a constitutional right to confront and cross-examine Dr. Richards about his observations. (*See People v. Dungo, supra*, 55 Cal.4th at p. 619 [observations by examining pathologist about the condition of the victim's body "are not testimonial in nature"].)

Similarly, Dr. Fukumoto was not a surrogate witness for Dr. Richards. Rather, based on the observations made in the autopsy and the photographs, slides and x-rays taken from the autopsy, Dr. Fukumoto came to his own opinions, about which he testified. While Dr. Fukumoto stated that his opinion as to cause of death was consistent with Dr. Richards' opinion as to cause of death (VII RT 2139), Dr. Fukumoto clearly specified that it was his opinion that Deeble's cause of death was asphyxiation or lack of air to the body, due to ligature strangulation. (VII RT 2139.)

Finally, even if the testimony by Dr. Fukumoto conveying Dr. Richards' conclusion regarding the cause of death could rise to the level of a Sixth Amendment violation of Edwards' confrontation rights, the lack of prejudice is readily apparent. Not only was the cause of death not a crucial part of the prosecution's case, it was not even in issue. (*Compare, People v. Dungo, supra*, 55 Cal.4th at p. 647 (Corrigan, J., dissent)). Indeed, even assuming arguendo, the autopsy report met the requirements of formality and primary purpose, since Dr. Fukumoto's opinions regarding the victim's injuries being painful and inflicted prior to death were based on his independent review of the autopsy

photographs and slides, and he was subject to cross-examination, Edwards cannot show prejudice. (*See, Ibid.*)

For all the reasons set forth in Respondent's Brief, Supplemental Brief, and this Supplemental 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,

A handwritten signature in black ink, appearing to read 'Arlene A. Sevidal', written in a cursive style.

ARLENE A. SEVIDAL
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

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 7, 2013, I served the attached **SUPPLEMENTAL 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:

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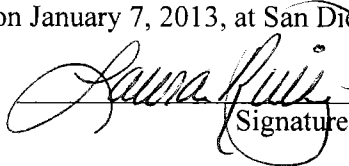
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 7, 2013, at San Diego, California.

Laura Ruiz
Declarant


Signature