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**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

REYNALDO SANTOS DUNGO,

Defendant and Appellant.

Case No. S176886

Third Appellate District, Case No. C055923
San Joaquin County Superior Court, Case No. SF100023A
The Honorable Charlotte J. Orcutt, Judge

**RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF ON
SIGNIFICANCE OF *BULLCOMING V. NEW MEXICO***

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INTRODUCTION

In a supplemental brief, appellant argues that under *Bullcoming v. New Mexico* (2011) __ U.S. __ [131 S.Ct. 2705] (*Bullcoming*), the autopsy report in this case was testimonial, and that Dr. Lawrence’s testimony violated the confrontation clause. These arguments are misguided. Appellant fails to recognize that autopsy reports are fundamentally different in content and purpose from other types of reports that may end up being used in a criminal prosecution. He also mischaracterizes Dr. Lawrence as a “surrogate witness” when in fact he was an independent expert—unlike the government witness in *Bullcoming* who simply served as a conduit for the findings of a non-testifying analyst.

ARGUMENT

I. AUTOPSY REPORTS ARE FUNDAMENTALLY DIFFERENT FROM OTHER TYPES OF REPORTS THAT MAY END UP BEING USED IN A CRIMINAL PROSECUTION

Appellant argues that the autopsy report in this case was testimonial because, like the blood-alcohol report in *Bullcoming*, it was based on evidence seized by law enforcement officials and was a formal, signed document. He further argues that the involvement of law enforcement in this case exceeded that in *Bullcoming* because a San Joaquin County sheriff’s detective was present when Dr. Bolduc began performing the autopsy. (Appellant’s Supplemental Brief [“ASB”] at 3-4.)

As a preliminary matter, appellant glosses over the fact that in *Bullcoming*, the forensic report was admitted into evidence whereas in this case, the autopsy report was not. Therefore, this Court need not even reach the question of whether an autopsy report contains testimonial statements, although respondent has previously explained why autopsy reports are properly classified as medical reports under California law and thus are not

testimonial in nature. (See Respondent's Opening Brief on the Merits at 21-27.) Nevertheless, respondent will address appellant's arguments in the event that this Court decides that the holding of *Bullcoming* extends to testimony based on reports that have not been introduced into evidence.

Appellant argues that an autopsy report is testimonial when, once the autopsy is completed, the results are turned over to law enforcement. He cites Government Code section 27491.1, which requires the coroner, in circumstances involving a suspected homicide, to notify law enforcement immediately and provide medical information that is directly related to the death.¹ (ASB at 3-4.) However, the possibility that a pathologist might ultimately suspect that a death was the result of criminal conduct does not transform the autopsy report into a testimonial document, any less than an emergency room doctor's medical report shifts from nontestimonial to testimonial status when the patient being treated is a gunshot victim as opposed to, for example, a heart attack victim.²

¹ Government Code section 27491.1 provides: "In all cases in which a person has died under circumstances that afford a reasonable ground to suspect that the person's death has been occasioned by the act of another by criminal means, the coroner, upon determining that those reasonable grounds exist, shall immediately notify the law enforcement agency having jurisdiction over the criminal investigation. Notification shall be made by the most direct communication available. The report shall state the name of the deceased person, if known, the location of the remains, and other information received by the coroner relating to the death, including any medical information of the decedent that is directly related to the death. The report shall not include any information contained in the decedent's medical records regarding any other person unless that information is relevant and directly related to the decedent's death."

² As previously noted in Respondent's Supplemental Brief, reports published by various coroner's offices show that homicides make up a small percentage of the cause of death determinations. (RSB at 8.) For example, in the year in which the victim in this case was murdered, 59 of the 678 deaths investigated by the San Joaquin County Coroner (or 8.7

(continued...)

This Court has held that, in determining whether a statement is testimonial, courts should evaluate the “primary purpose” for which it was made. (See *People v. Blacksher* (Aug. 25, 2011) ___ Cal.4th ___, 2011 WL 3715536, *25-26 [listing six factors that are relevant to this inquiry in the context of a 911 emergency call]; see also *People v. Cage* (2007) 40 Cal.4th 965, 984-988 [applying the “primary purpose” test to find that victim’s statements to police officer in hospital waiting room were testimonial while his similar statements to a treating physician were not].) As respondent has argued previously, the primary purpose of an autopsy report is to document the cause and manner of death pursuant to state statute, regardless of the suspected cause of death. That purpose does not change based on the findings of the autopsy—just as the purpose of a medical report describing a child’s injuries does not change if the treating physician reasonably suspects child abuse and thus is required to make a report to law enforcement. (See Pen. Code, §§ 11165.7, subd. (a)(21), 11166.)

Nor does the fact that a detective was present when the autopsy commenced alter the primary purpose of the autopsy report. There was no evidence here that the detective influenced Dr. Bolduc’s findings in any way. While the detective’s presence might have caused Dr. Bolduc to be especially attentive to signs of foul play, there is no reason to believe that it altered his methods or findings. (See *Moreno Denoso v. State* (Tex. App. 2005) 156 S.W.3d 166, 180 [“Even though autopsy results are partially subjective, they are generally prepared by officials with no motive to fabricate the results of the reports, and as a general rule, a medical

(...continued)

percent) were classified as homicides. (See San Joaquin County Sheriff, *Annual Report of the Coroner* (2006) 11, 13 <http://www.sjgov.org/sheriff/annrpts06.pdf>.)

examiner's office is not such a uniquely litigious and prosecution-oriented environment as to create an adversarial context"]; see also Zabrycki, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embodiment the Qualities of a Testimonial Statement* (2008) 96 Cal. L. Rev. 1093, 1125 ["Even when the medical examiner conducts an autopsy on a homicide victim, his role differs from the role of the police and prosecutor. . . . The medical examiner performs an autopsy to determine the cause and time of death without considering who caused the death or how to prove who caused the death."].) Accordingly, the detective's presence during part of the autopsy does not alter the analysis of whether the report or the contents of it were testimonial.³

II. DOCTOR LAWRENCE WAS NOT A "SURROGATE WITNESS"

Appellant contends that the facts of this case "resemble in all material respects those present in *Bullcoming*" because Dr. Lawrence was called as a "surrogate witness" to testify about a forensic test he did not perform or observe. (ASB 6-7.) He further contends that Dr. Lawrence did not simply

³ Appellant cites *United States v. Moore* (D.C. Cir. July 29, 2011) ___ F.3d ___, 2011 WL 3211511, in which the Court of Appeals for the District of Columbia held that the contents of an autopsy report were testimonial based, in part, on the presence of law enforcement officers during the autopsy and the inclusion of police records as part of the autopsy report. (*Id.* at *34.) In this case, there is no evidence that Dr. Bolduc's autopsy report was supplemented with any police reports. Further, the Court of Appeals in *Moore* did not utilize the "primary purpose" test, but rather found that the report was testimonial because it was made under "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Id.*, quoting *Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___, 129 S.Ct. 2527, 2532.) That test, one of three possible "formulations" of testimonial previously cited by the Supreme Court, was not referred to at all in *Bullcoming*.

offer an independent opinion on the cause of death, but also relayed the contents of Dr. Bolduc's report to the jury, which was instructed that it had to decide whether that information was truthful and accurate. (ASB 7-9.)

Preliminarily, appellant mischaracterizes the record by suggesting that all of the information on which Dr. Lawrence based his opinion regarding the duration of strangulation was contained in Dr. Bolduc's autopsy report. (See ASB at 7.) Dr. Lawrence testified that he also reviewed many photographs of the victim's body. (7 RT 1845.) It is not entirely clear from Dr. Lawrence's testimony which findings in the autopsy report were also depicted in the photographs. But Dr. Lawrence did state that some of the photos showed an absence of extreme bruising on the victim's neck, which he cited as a factor in concluding that the strangulation occurred over a period of four to five minutes. (7 RT 1850.)

More fundamentally, Dr. Lawrence was not a "surrogate witness." Unlike the testifying analyst in *Bullcoming*, Dr. Lawrence did not serve as a mere "conduit" who testified as to the findings and conclusions of a report by another forensic analyst who was not called as a witness. Instead, Dr. Lawrence rendered an independent opinion on the cause and circumstances of death. That Dr. Lawrence might have revealed some hearsay—or even some testimonial hearsay—in the process of rendering that opinion does not mean that his testimony violated the Confrontation Clause. As the Fourth Circuit Court of Appeals has stated:

[A]n expert's use of testimonial hearsay is a matter of degree. . . . The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford*⁴ problem.

⁴ *Crawford v. Washington* (2004) 541 U.S. 36.

(*United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 635.)

Following the decision in *Bullcoming*, a North Carolina appeals court rejected a constitutional challenge to testimony by a pathologist who recounted the findings of another doctor's autopsy report in offering an opinion on the cause of death. (*State v. McMillan* (N.C.App. Aug. 2, 2011) ___ S.E.2d ___, 2011 WL 3276707.) The court held that this testimony did not violate the confrontation clause because the testifying witness was present during the autopsy and testified to her own independent opinion as to the cause of death. (*Id.* at *6.) In finding that *Bullcoming* was distinguishable, the court noted that Justice Sotomayor's concurring opinion "made it clear that the case would have been different had the other analyst witnessed the test or rendered an independent opinion." (*Id.* at *7, citing *Bullcoming, supra*, 131 S.Ct. at p. 2722 (Sotomayor, J., concurring).) Appellant seeks to distinguish *McMillan* on the ground that Dr. Lawrence was not present during the autopsy. (See ASB 7.) However, he fails to recognize that Justice Sotomayor cited the trial witness's independent expert opinion as an entirely distinct scenario not covered by the holding in *Bullcoming*. Dr. Lawrence's testimony falls within that category.

Appellant also cites this Court's recent decision in *People v. Loy* (2011) 52 Cal.4th 46, in which the court suggested that the trial court violated the defendant's right to confrontation when it permitted an expert to testify to a foundational fact about when an evidentiary sample was collected. (*Id.* at pp. 68-69.) However, the foundational fact in *Loy* was inherently different from the description of the victim's injuries that Dr. Lawrence relied on here because the former required no expert testimony to explain its significance. (See *id.* at p. 69 ["[W]hen the sample was collected was a simple question of fact that the jury could decide for itself without expert guidance"], italics in original.) Accordingly, *Loy* does not support

the proposition that Dr. Lawrence violated appellant's right to confrontation when he referred to the victim's injuries during his testimony.

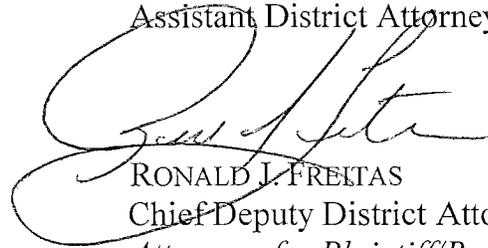
Finally, it bears repeating that appellant had an opportunity to cross-examine Dr. Lawrence regarding any aspect of Dr. Bolduc's autopsy, including the accuracy of Dr. Bolduc's description of the victim's injuries (or lack thereof). Appellant also had the opportunity to cross-examine Dr. Lawrence about any shortcomings in Dr. Bolduc's methodology or performance problems Dr. Bolduc experienced in the workplace. Instead of challenging the accuracy of Dr. Bolduc's findings, or Dr. Bolduc's abilities as a pathologist, defense counsel focused his cross-examination on exploring a possible explanation for how a brief squeezing of the victim's neck could have resulted in the injuries and condition recorded by Dr. Bolduc. (See 7 RT 1855-1871.) This avenue of cross-examination underscores the fact that Dr. Lawrence's credibility—and his value as an expert—hinged on the quality of his interpretation of the victim's condition and injuries, not on the accuracy of Dr. Bolduc's autopsy report.

CONCLUSION

For these reasons, and the reasons cited in respondent's prior briefs, the decision of the Court of Appeal should be reversed.

Dated: September 9, 2011 Respectfully submitted,

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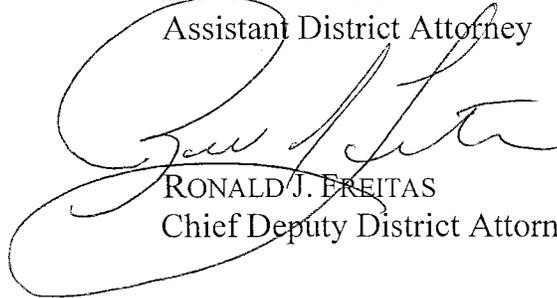
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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF ON SIGNIFICANCE OF *BULLCOMING V. NEW MEXICO*** uses a 13 point Times New Roman font and contains 2,042 words.

Dated: September 9, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

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I declare:

I am employed in the Office of the District Attorney, San Joaquin County, 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 District Attorney, San Joaquin County, 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 District Attorney, San Joaquin County, is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 9, 2011, I served the attached RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF ON SIGNIFICANCE OF *BULLCOMING V. NEW MEXICO* by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the District Attorney, San Joaquin County, at 222 East Weber, Room 202, Stockton, CA 95202, addressed as follows:

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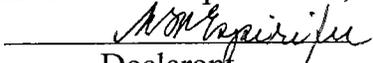
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 9, 2011, at Stockton, California.


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