IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs. No. 29,763

DEBBIE GONZALES,

Defendant-Appellee.

Criminal Appeal from the 13th Judicial District Court
Sandoval County
Hon. George Eichwald, Presiding

PLAINTIFF-APPELLANT STATE OF NEW MEXICO'S BRIEF IN CHIEF

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SUMMARY OF PROCEEDINGS

On November 15, 2007, Defendant repeatedly stabbed a disabled man, Gregory Parker, in his own home, killing him. While stabbing him she seriously injured her own hand, necessitating a hospital visit and, according to a letter she wrote the judge, eventual surgery. She confessed her guilt to police. (RP 31-32, 84, 203.) She was charged with second degree murder. (RP 1.) Before trial, she announced that she would be pursuing a diminished capacity defense, even though second degree murder is not a specific intent crime. (RP 187.)

Mr. Parker was autopsied by Dr. Timothy Williams, a forensic pathologist fellow at the Office of Medical Examiner, under the supervision of Dr. Rebecca Irvine, the attending physician. (RP 247; Amended DS at 3-4.) Dr. Williams is now living in Washington State. (Amended DS at 4.) Dr. Irvine, the attending physician, now resides in Australia. (*Id.*) Because of the expense and logistical difficulty of bringing either back for trial, the State elected not to do so. Rather, it filed a witness list naming a third forensic pathologist, Dr. Clarissa Krinsky, of the OMI. (RP 215.)

Defendant filed a Motion to Exclude State's Witness, seeking an order prohibiting Dr. Krinsky from testifying on the asserted ground that permitting her to testify in person, subject to cross-examination, concerning her own opinions would deprive Defendant of her right to confront witnesses against her in violation

of *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). (RP 246.) At the conclusion of a relatively brief motions hearing limited to argument from counsel, the trial court granted the motion. (Tr 18.) The State timely filed a notice of appeal that certified the appeal was not taken for purposes of delay and that the evidence excluded was substantial proof of a fact material to the proceeding. (RP 269; *see also* RP 267.) This Court has jurisdiction under NMSA 1978, § 39-3-3(B) (1972).

Statement of Pertinent Facts.

The hearing on the defense motion to exclude the witness was held on August 6, 2009. (Tr 3.) Defense counsel Leila L. Hood began her argument as follows:

> Your Honor, there, of course, in New Mexico has been a line of cases that is somewhat different than the **Melendez-Diaz** case, and that is being reconsidered. There is a case up at the New Mexico Supreme Court right now by the name of **Bullcomings** *[sic]*, I think is the title of the case, and that's -- all I know is that they haven't made a decision yet, but it addresses the same issue.

(Tr 4; typography as in original.)

Ms. Hood argued that the autopsy performed by Dr. Williams was itself "testimonial." (Tr 5.) She said that if Dr. Krinsky were permitted to testify, "it would be akin to me trying to, you know, cross-examine her through his report, which is crazy, because I can't test, you know, his opinions through the crucible of cross-examination." (Tr 5-6.) She said that when she interviewed Dr. Krinsky, "I

asked her questions. She said, Well, you'd have to ask Dr. Williams that. I don't know." (Tr 6.) She continued: "but to adversarial tests *[sic]* through the crucible of cross-examination is what's really the crux of this. And I cannot do that through Dr. Krinsky, because she will be able to say, you'll have to ask Dr. Williams that." (Tr 6.)

Mr. Graham, the prosecutor, made two points in response. First, "The state's not going to try to admit to autopsy report from Dr. Williams." (Tr 9.) Second:

> What we do have is another forensic pathologist from OMI who reviews all those records, makes a determination of her own based on what she finds from photographs, from the defendant's body -- excuse me, the victim's body in this case -- and then draws her own independent conclusions about the types of wounds that were suffered and whether this was suicide, by accidental death, or homicide in this case.
>
> Dr. Krinsky will be testifying about her own conclusions after a review of those records. Not Dr. William's conclusions. Not about the entry of a report prepared by Dr. Williams, but about her own conclusions that she drew as a forensic scientist, forensic pathologist in this case, looking at a record before her.

(Tr 9-10.)

Mr. Graham elaborated on this point as follows:

> In this case, Dr. Krinsky would be testifying to her own conclusions that she derived from a scientific review of the business records of OMI. So I think it's a very different factual scenario [than *Melendez-Diaz*]. This is not a case where the defense must just sit back and stare at a black and white piece of

> paper and not be able to say a thing about it. This is absolutely a case for the confrontation clause does come into effect.
>
> The defendants -- or defense can cross-examine this state's witness in detail about the findings, about what she did to prepare for her testimony, what records she reviewed, what conclusions she drew from those photographs, from the video, from the other information she had. So there is not a violation of the confrontation clause in [*sic*; and] **Melendez-Diaz** in this case.

(Tr 11.)

He concluded as follows:

> One significant problem the Court had with the Massachusetts law in **Melendez-Diaz**, as I said, was the very fact that there was no witness at all. Here we do have a witness, so it's a key difference, a key distinction between Melendez-Diaz and this case. In this case, what the state seeks to do is to have Dr. Krinsky testify in her own expert capacity as a forensic pathologist as to the conclusions she drew after reviewing all the records in the OMI file. I believe that's appropriate. The only records from OMI which will be sought to be introduced, will be photographs that were taken during the course of the autopsy...

(Tr 12-13.)

At the conclusion of Mr. Graham's argument, the trial court asked: "Mr. Graham, are you saying that Dr. Krinsky is not going to rely one bit on anything that the original doctor did?" (Tr 13.) When Mr. Graham said she would certainly review what Dr. Williams did, and that the defense would be able to "attack her on her review of those records," the trial court asked, "How can she attack, though, the original reports? ... How can she properly confront the report that has been prepared by the original doctor, that would be Dr. Williams?" (Tr 13-14.) Mr.

Graham replied that the defense would be able to "confront the witness, not the report." (Tr 14.) He repeated: "We're not going to admit the report." (Tr 14.)

The trial court pointed out that in *Melendez-Diaz* the Supreme Court discussed the possibility of a drug analyst being dishonest or incompetent. The trial court continued: "And I think that's where I'm going here is whether the defense, in this situation, has an opportunity to see whether the report that's prepared by Dr. Williams was prepared by doctor, in this case, who was competent to do that. And that's what I'm getting at." (Tr 14.) Mr. Graham began to answer, but the judge cut him off, asking: "If Dr. Krinsky is relying on that report in any way, in any shape -- in any way at all, then don't you think that the defense has the right to find out whether Dr. Williams was competent to prepare that report?" (Tr 14.)

Mr. Graham replied that the defense could seek to discredit Dr. Williams by questioning Dr. Krinsky, but that the key point was that "[t]he state is going to put a witness on the stand who will testify as to what she found in those records and what conclusions she is able to draw upon her findings and those records." (Tr 15.)

Ms. Hood then argued as follows:

> I cannot test his veracity, whether he or not he's a good scientist, through her.
>
> She will say, as she did I spoke to her, You've got to talk to Dr. Williams about that. Because he put things in his report – let me give you an example, Judge, of something I asked her about.

> For example, he put his report that -- he said, "Both of these arteries --" where the person was stabbed, he bled out, that's allegedly how he died -- "Both of these arteries are major vessels which carry a high volume of blood under significant pressure. Injuries of these vessels would, without immediate medical care, result in a high volume of blood loss."
>
> And I asked her, So the statement in the report here, without immediate medical care, what does that mean? And she said, You'd have to ask Dr. Williams that.
>
> And I can't ask him if he's not here at trial. I can't cross-examine him about whether or not the person would have lived, for example, whether he thought the person would have lived if they had gotten medical attention sooner, that type of thing. ...
>
> Impeachment of a witness who read another person's report is not confrontation of that particular witness. That's just crazy talk to say that I could be able to do that in front of the jury.

(Tr 16-17.)

Mr. Graham argued in rebuttal:

> Your Honor, I simply believe that what counsel was attempting to argue there is the very root of distinction that the state is bringing. Counsel said, Well, I couldn't question Dr. Krinsky about a conclusion or finding made by Dr. Williams. And what the state is saying is we're not going to ask Dr. Krinsky about the conclusions and findings of Dr. Williams, we'll ask her about her own conclusions and findings, and she can be cross examined on those. It's a clear distinction between confronting the witness will testify and not. And here you can confront the witness.

(Tr 18.)

The trial court then granted the motion to exclude Dr. Krinsky from testifying, without making any factual findings or specifying the grounds for the

ruling. (Tr 18.) It subsequently entered a written order that likewise did not contain any factual findings or specify its legal basis. (RP 265.)

ARGUMENT

I. THIS CASE IS CONTROLLED BY *BULLCOMING*, WHICH HELD THAT AN EXPERT MAY TESTIFY REGARDING HER OWN OPINIONS WITHOUT OFFENDING THE CONFRONTATION CLAUSE.

Standard of review: The trial court made no findings of fact. Whether Dr. Krinsky's in-court testimony regarding her own opinions was prohibited by the confrontation clause is a question of law, reviewed de novo, without deference to the trial court's ruling. *State v. Bullcoming,* 2010-NMSC-007, ¶ 10, 147 N.M. 487, 226 P.3d 1.

As noted in the Summary of Proceedings, Ms. Hood began her argument by telling the trial court that *Bullcoming,* which was then pending in the Supreme Court, "addresses this same issue." (Tr 4.) Since then, *Bullcoming* has been decided. The trial court ruled without the benefit of *Bullcoming* and its companion case, *State v. Aragon,* 2010-NMSC-008, 147 N.M. 474, 225 P.3d 1280, or this Court's subsequent decisions interpreting *Bullcoming* and *Aragon,* such as the very recent *State v. Nez*, 2010-NMCA-__, No. 26,811 (July 20, 2010). When viewed in light of this recent authority, it is plain that the trial court's order prohibiting Dr. Krinsky's from testifying about her own expert opinions was in error.

The prosecution does not intend to introduce Dr. Williams' report. (Tr 9-13, 18.) Nor does it intend to ask Dr. Krinsky about the conclusions reached by Dr. Williams. (*Id.*) Rather, as Mr. Graham repeatedly told the court, the State will ask Dr. Krinsky only about her *own* expert opinions. (*Id.*) The defense obviously will have the opportunity to cross-examine Dr. Krinsky about her *own* opinions.

In *Aragon*, the Supreme Court stated that the confrontation clause poses no barrier to an expert testifying about her own opinions:

> The State also contends that admission of [non-testifying expert] Champagne's chemical forensic report did not violate Defendant's confrontation rights in any meaningful way because [testifying expert] Young testified about the report and was subject to cross-examination. *The State's argument would have merit if Young had expressed his own opinion* based upon the underlying data that contributed to the opinion announced in the report. It is proper to "admit opinion testimony based, *in part,* upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession."

Aragon, 2010-NMSC-008, ¶ 23 (citation omitted; first italics added, second italics in original). The court dropped a footnote to underline the important point that New Mexico case law "allows partial reliance on another expert's opinion." *Id.* n.4.

In *Aragon*, the dispositive question was "whether Young's testimony was an expression of his own opinion or whether he was merely parroting Champagne's opinion." *Id.* ¶ 26. The court concluded that Young merely parroted Champagne's opinion, and therefore the confrontation clause was violated. *Id.* ¶¶ 28-29.

"Young's testimony regarding Champagne's report violated Defendant's right of confrontation because it introduced Champagne's opinion, not his." *Id.* ¶ 33. However, the court went on to state, in a discussion directly applicable to the present case:

> Had Young unequivocally testified that it was his opinion that the substance at issue was methamphetamine weighing 1.05 grams with a 64.3% purity, Defendant could have cross-examined him concerning these opinions. The basis for such opinion might have been the underlying data and Champagne's notes if Young testified that these are the types of facts or data reasonably relied upon by chemical forensic experts in forming opinions. *See* Rule 11-703. Indeed, the underlying data and notes may have been admitted consistent with Rule 11-703 had the court determined "that their probative value in assisting the jury to evaluate the expert's opinion substantially outweigh[ed] their prejudicial effect." *Id.* ***Under such circumstances, Defendant would have had the opportunity to effectively cross-examine Young, and his right to confrontation would not have been violated.***

Id. (italics and boldface added).

Thus the question in the present case is whether Dr. Krinsky will testify to her own opinion, or whether instead she will merely parrot that of Dr. Williams. As shown in the Summary of the Case, Mr. Graham repeatedly told the judge that the State had no intention of introducing Dr. Williams' report or opinion and instead would ask Dr. Krinsky about her *own* opinions:

> Dr. Krinsky will be testifying about her own conclusions after a review of those records. Not Dr. William's conclusions.
> ...

> In this case, Dr. Krinsky would be testifying to her own conclusions...
>
> In this case, what the state seeks to do is to have Dr. Krinsky testify in her own expert capacity as a forensic pathologist as to the conclusions she drew after reviewing all the records in the OMI file. ...
>
> And what the state is saying is we're not going to ask Dr. Krinsky about the conclusions and findings of Dr. Williams, we'll ask her about her own conclusions and findings, and she can be cross examined on those.

(Tr 10-13.)

Mr. Graham's argument precisely anticipated *Aragon*. We now know, after *Aragon* and *Bullcoming*, that his argument was exactly right. The confrontation clause would be offended only if Dr. Krinsky was a mere parrot, reciting Dr. Williams' opinions and conclusions. But the confrontation clause is satisfied if Dr. Krinsky gives her own opinions from the stand, subject to cross-examination. So long as Dr. Krinsky gives her own opinions, no confrontation clause issue is even presented by this case.

A. Defense Counsel's Argument that She Could Not Confront Dr. Williams Is Irrelevant, if Dr. Williams' Opinions Are Not Presented to the Jury.

Ms. Hood argued in the trial court that she would be unable to cross-examine Dr. Krinsky about *Dr. Williams' opinions*, such as what precisely he meant by his use of the phrase "immediate medical attention" in the report. (Tr 16-17.) But unless Dr. Williams' opinions and choice of words are presented to the

jury during direct examination, such cross-examination is beyond the scope of cross-examination anyway, Rule 11-611(B) NMRA, as well as irrelevant and a waste of time. Rule 11-402, 11-403 NMRA. The sixth amendment guarantees a right to confront "witnesses against" one, U.S. Const. amend. VI, and unless the jury hears Dr. Williams' opinions, he simply is not a witness against Defendant.

B. The Trial Court's Concerns Do Not Raise a Confrontation Clause Issue.

The trial court asked Mr. Graham, "How can [Ms. Hood] properly confront the report ...?" (Tr 13-14.) The question answers itself, because there is no constitutional right to confront evidence that is *not* presented to the jury. *Commonwealth v. Brown*, 987 A.2d 699, 709-710 (Pa. 2009) ("As no statements, incriminating or otherwise, were actually provided to the jury, neither the Confrontation Clause nor the hearsay rule was violated.").

The trial court referred to the discussion of fraudulent laboratory practices found in the *Melendez-Diaz* opinion. (Tr 14.) The Supreme Court's point was that an affidavit setting forth the professional opinion of a non-testifying expert could be fraudulent. 129 S.Ct. at 2536-37, 174 L.Ed. 2d at 326. That concern is eliminated by the simple expedient adopted in *Melendez-Diaz* itself – withholding

the non-testifying expert's conclusions from the jury. The State repeatedly stated it did not intend to introduce Dr. Williams' conclusions into evidence.[1]

A hypothetical possibility exists that the facts or data on which the testifying expert bases her opinion might themselves be fraudulent, even if the testifying expert herself is honest. But that same hypothetical possibility exists every time an expert relies on facts and data not in evidence. Rule 11-703 NMRA. The possibility also exists with regard to learned treatises, or statements in ancient documents, or statements affecting interests in property, all of which require no sponsoring witness at all – and no cross-examination – at all. Rule 11-803(R) NMRA.

More to the immediate point, the hypothetical potential unreliability of the underlying facts or data upon reasonably relied upon by experts in the particular

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[1] Consequently the question whether the autopsy report, or any portion of it, constitutes "testimonial hearsay" is not presented by this case. See *People v. Cortez*, __ N.E.2d __, 2010 Ill. App. LEXIS 625, 11-15 (Ill. App. Ct. 1st Dist. June 22, 2010) ("we are nevertheless unpersuaded that *Melendez-Diaz* upsets our prior holdings" that autopsy reports are non-testimonial). The question is difficult because the Supreme Court uses contradictory phrases to define "testimonial hearsay." *Melendez-Diaz* stated both that the drug certificates at issue were testimonial because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" and/or because the "*sole purpose* of the affidavits was to provide 'prima facie evidence'" of the drug's identity, etc. 129 S.Ct. at 2532 (italics in original). As regards autopsy reports, it can readily be seen that two inquiries might well prompt opposite answers.

field, Rule 11-703 NMRA, is not a confrontation clause concern. The amendment grants a defendant the right to confront "witnesses against him," U.S. Const. amend. VI, not "compilers of facts or data upon which witnesses against him base their opinions." Nor does the confrontation clause exist to police the sources of data upon which experts rely in their own fields. *Melendez-Diaz* states this point straight out: "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." 129 S.Ct. at 2532, 174 L.Ed. 2d at 322 n.1.

Rule 11-703 NMRA places the burden on the State as the proponent of the evidence to lay a foundation sufficient to show that the facts and data reviewed by Dr. Krinsky were of "a type reasonably relied upon by experts in the particular field in forming opinions." Whether it carries that initial burden is a routine matter under the Rules of Evidence, to be decided in the first instance by the trial court based on a factual record, and decided implicitly by the jury when it chooses whether or not to credit the expert's opinion. *See* UJI 14-5050 NMRA. It is not a constitutional question.

D. Taking the Trial Court's Ruling to Its Logical Conclusion Would Require Exhumation and Re-Autopsy If an Examining Forensic Pathologist Should Die Before Trial.

If the trial court's ruling were correct, and it were impermissible per se for a forensic pathologist to give her own opinions based on the record of an autopsy performed by a different pathologist, the results were be not only absurd but ghoulish. If the examining pathologist dies before trial, which is presumably not rare in cold cases, no information concerning the cause and manner of death could be presented unless the victim's body were exhumed and re-autopsied. If the victim had been cremated, the crime would be unpunishable.

If the trial court's ruling is correct, in other words, it is in a murderer's interest to seek the death of the forensic pathologist, especially when the victim has been cremated. If he or she can get away with killing the pathologist, he or she will likely get away with the first murder, too. It seems highly improbable that the Framers intended to provide such a perverse incentive to dangerous people, or such a perverse disincentive to public service by physicians. *Melendez-Diaz*, 129 S.Ct. at 2535.

E. Cases from Around the Country Support the Supreme Court's Analysis in *Aragon*.

The vast weight of post-*Melendez-Diaz* authority from around the country agrees with the analysis in *Aragon,* that an expert may properly base his or her opinion testimony on facts or data gathered by another. For example, in *Commonwealth v.*

Hensley, 913 N.E.2d 339 (Mass. 2009), a Dr. Zane prepared the autopsy report but did not testify. The Supreme Judicial Court concluded that "there was no error in admitting the testimony of Dr. Flomenbaum regarding his opinion as to the cause of death. Dr. Flomenbaum appeared as a witness at the trial, opined as an expert on the basis of information on which experts ordinarily and may properly rely, and was subject to cross-examination." Id. at 348. *Accord Commonwealth v. Pena,* 913 N.E.2d 815 (Mass. 2009) ("Dr. Flomenbaum was not foreclosed from forming and testifying to an opinion based on Dr. Cannon's autopsy report."). *See also State v. Lui,* 221 P.3d 948 (Wash. Ct. App. 2009), *review granted,* 228 P.3d 17 (Wash., Mar. 30, 2010) ("Here, in contrast [to *Melendez-Diaz*], the autopsy and DNA reports were not offered in lieu of live testimony. Indeed, the reports themselves were not admitted into evidence at all. ... [E]xpert witnesses are not required to have personal, firsthand knowledge of the evidence on which they rely."); *State v. Dilboy,* 160 N.H. 135, 146-152, __ A.2d __ (N.H. 2010).

In a case involving a post-mortem toxicology analysis, the Georgia Supreme Court found not confrontation clause violation when "[t]he toxicologist who testified had reviewed the work of the doctor who had originally prepared the report and reached the same conclusion that the [deceased] victim's blood sample tested negative for cocaine." *Rector v. State,* 681 S.E.2d 157 (Ga. 2009), *cert. denied,* 130 S. Ct. 807, 175 L. Ed. 2d 567 (2009). *See also State v. Mobley,* 684

S.E.2d 508, 510-513 (N.C. Ct. App. 2009); *People v. Johnson,* 915 N.E.2d 845 (Ill.App. 1 Dist. 2009).

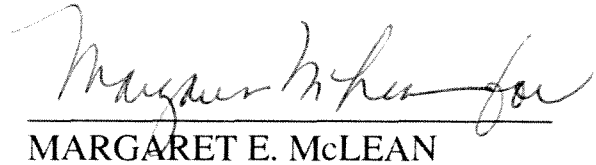
CONCLUSION

Aragon is on point. So long as Dr. Krinsky testifies about her own opinions, the confrontation clause is satisfied by her appearance for cross-examination. If at any point she crosses the line and begins to parrot Dr. Williams' opinions, the defense is entitled to object.

The trial court erred in excluding Dr. Krinsky from testifying about her own expert opinions. Its order should be reversed and this case remanded with instructions to permit Dr. Krinsky to testify regarding her own opinions, in accordance with *Aragon* and *Bullcoming.*

Respectfully submitted,

GARY K. KING
Attorney General



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CERTIFICATE OF SERVICE

A copy of this document was served on Kate Baldridge by hand-delivery to the Public Defender's box in this Court on July 22, 2010.