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 REPLY BRIEF

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ARGUMENT

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

In the trial court, defense counsel began her argument by telling the judge: "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.) Since the argument, our Supreme Court decided *State v. Bullcoming,* 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1, *cert. granted*, No. 09-10876 (Sept. 28, 2010), and a companion case, *State v. Aragon,* 2010-NMSC-008, 147 N.M. 474, 225 P.3d 1280.

As defense counsel said in the trial court, this case is controlled by *Bullcoming*.

The trial court decided the legal issue before trial, based on arguments of counsel. The present record establishes that the State will *not* introduce the absent pathologist's report and would limit its questioning of the testifying pathologist to her *own* findings and opinions:

> 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

(Tr 18.)

As the prosecutor stated, it is a clear distinction. As shown in the brief in chief, it is precisely the distinction drawn in both *Aragon* and *Bullcoming*. It is the difference between violating and complying with the confrontation clause. (BIC at 7-10.) The State proposed to comply with the confrontation clause. The trial court, ruling without the benefit of *Bullcoming* and *Aragon*, erroneously concluded otherwise. Its ruling is plainly contrary to the after-decided controlling authority and should be reversed.

A. The Answer Brief Argues a Hypothetical Case that Is Not Before the Court.

The State's brief in chief is based on the record made by the parties in the trial court. The answer brief's argument is *not* based on the record made below. It begins: "The State seeks to use testimonial hearsay – the findings, data and opinions of Dr. Timothy Williams – to secure a conviction of Ms. Debbie Gonzales without having Dr. Williams confront and cross-examined – face to face the at the jury trial." (AB at 1.) Subsequently it refers to "the problem of allowing the surrogate [*sic*] pathologist to testify about the specific thought processes, procedures, and bias employed by the non-testifying pathologist." (AB at 17.) Many other, similar statements can be found throughout the answer brief.

The State is prepared to assume for purposes of argument that the legal issue presented by this appeal would be different if the facts of record supported the answer brief's arguments. The State further assumes for purposes of argument that

if the record developed at trial actually supports the answer brief's arguments, Defendant will have a legitimate basis to object to Dr. Krinsky's testimony. With respect, those are moot issues on the present record.

The case that is actually before this Court for resolution is one in which the prosecutor said, point-blank, "we're not going to ask Dr. Krinsky about the conclusions and findings of Dr. Williams..." (Tr 13.) *That* is the record on which the trial court based the ruling that the State is appealing, and that is the only record before this Court on appeal.

When the answer brief argues that it would be wrong to permit Dr. Krinsky "to convey to jurors the findings of Dr. Williams" (AB at 11), it is arguing a hypothetical case that is not before this Court. "[T]he principle in this jurisdiction through a long line of decisions is settled that this court will not decide abstract, academic, hypothetical or moot questions..." *New Mexico Bus Sales v. Michael*, 68 N.M. 223, 226, 360 P.2d 639, 641 (1961). *Accord Srader v. Verant*, 1998-NMSC-025, ¶ 39, 125 N.M. 521, 964 P.2d 82 ("reviewing court will not decide academic or moot questions"). The answer brief's arguments based on the assumption that the facts at trial will be different from the facts currently of record are irrelevant to the appellate review of the trial court's legal ruling.

B. By Presenting No Argument or Authority with Respect to the Trial Court's Actual Ruling on the Record Actually Made in the Trial Court, the Answer Brief Effectively Concedes the Trial Court Erred.

At the hearing, the trial court asked the prosecutor: "Mr. Graham, are you saying that Dr. Krinsky is not going to rely one bit on anything that the original doctor did?" (Tr 13.) A moment later, the court said: "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.) While the court did not expressly make any factual findings either from the bench or in its written order, its remarks from the bench make clear that it perceived a confrontation clause problem as long as the testifying expert "rel[ied] one bit on anything that the original doctor did" or relied "on that report in any way, in any shape..." *Aragon* explicitly states that the confrontation clause is not violated if a testifying expert relies in part on the opinion of another, non-testifying expert. *Aragon,* 2010-NMSC-008, ¶ 23 and n.4 (New Mexico law "allows partial reliance on another expert's opinion"). Thus, under the clear command of *Aragon*, the trial court erred in ruling that the confrontation clause prohibited the expert from relying "one bit" on another expert's observations.

The confrontation clause will not be violated if Dr. Krinsky, the testifying pathologist, relies in part on the subjective *opinion* of Dr. Williams. *Aragon*, ¶ 23 and n.4. *A fortiori,* the confrontation clause will not be violated if Dr. Krinsky's

bases her expert opinion in part on objective, factual data committed to writing by Dr. Williams. *Bullcoming*, ¶ 19. The present record could not be clearer: the State does not propose to introduce Dr. Williams' opinions, or his findings, or his conclusions. The prosecutor was categorical about that point: "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 13.) Under *Aragon* and *Bullcoming,* what the prosecutor proposed is precisely what the confrontation clause permits.

Rule 11-702 NMRA allows opinion testimony by "a witness qualified as an expert by knowledge, skill, experience, training or education..." Obviously, all expertise acquired from a teacher, textbook, colleague, scientific paper, and so on – that is, all expertise that is not exclusively based on the information taken in through the expert's own senses – is based on out-of-court statements by someone else. With the exception of expertise based solely on experience, then, expert testimony is necessarily based in substantial part on statements made outside of court by other people and accepted by the testifying witness as authoritative. That is what education is. To say that the confrontation clause prohibits a testifying expert from relying on the opinions, findings, conclusions and observations of

other people in forming her own expert opinions would be to say that Rule 11-702 itself is unconstitutional.[1]

The answer brief does not argue that it would be constitutionally impermissible for Dr. Krinsky to testify about her own conclusions and findings – the actual issue presented to the trial court. The answer brief declines to address the issue presented by the existing record. By failing to adduce any argument or authority to support the trial court's ruling on the factual record actually made in the trial court, and instead devoting 27 pages to an attack on a straw man, Defendant effectively concedes that he cannot find any supporting authority and has no legal argument to make. *State v. Cooper*, 1998-NMCA-180, ¶ 27, 126 N.M. 500, 972 P.2d 1 ("Because Defendant has not offered any facts of record or citations to authority to support his position on these issues, we do not address them."); *State v. Nysus*, 2001-NMCA-102, ¶ 30, 131 N.M. 338, 35 P.3d 993

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[1] It is worth remembering that people know their names, addresses and job titles only because other people told them. Such information is hearsay, in the non-technical meaning (unless it is offered into evidence in court, when it meets the technical legal definition, too). Merriam-Webster, *Webster's New Collegiate Dictionary* 528 (1977) ("**hear·say** \ 'hi(ə)r-sā \ *n:* something heard from another"). *All* knowledge of legal doctrine possessed by lawyers is hearsay – by definition, existing doctrine cannot be learned first-hand. Genuine expertise nearly always consists of hearsay piled on hearsay, usually with no more than a thin layer of first-hand experience on top. After all, how does any doctor "know" that tuberculosis is caused by a bacterium? For that matter, how do any of us "know" that Pasteur lived? Without hearsay, the knowledge base of the average city-dwelling human would be pitifully small in comparison to the knowledge mastered by the average dog.

("When an appell[ee] cites no authority to support a specific proposition, the appellate court presumes that no supporting authority exists."); *State v. Aragon*, 109 N.M. 632, 634, 788 P.2d 932, 934 (Ct. App. 1990) ("issues ... not argued in the briefs have been abandoned").

C. The Answer Brief Does Not Provide any Concrete Example of Testimonial Hearsay that Would Be Heard by the Jury.

The answer brief argues at a high level of abstraction and never descends into particulars. The answer brief does not identify, much less analyze, any specific testimonial statement from Dr. Williams that the State proposes to present to the jury. Instead of subjecting any actual statement to legal analysis under the confrontation clause, the answer brief combines emotive rhetoric such as "laundering" (AB at 5) with vague references to "the substance" or "the contents" of Dr. Williams' report being in some unspecified way "conveyed" to jurors. (AB at 18-19.) The answer brief is forced to argue so abstractly, using such vague descriptions of the evidence, can cannot support its references with quotations from or citations to the existing record, because the present record does not support the contention that *any* actual, identifiable testimonial hearsay will be presented to the jury.

In short, the vagueness and generality of the answer brief is an effective concession that the trial court erred.

If, at trial, Dr. Krinsky does begin to convey "the substance" or "the contents" of Dr. Williams' report to the jurors, Defendant is entitled to object. The State has never contended otherwise, and certainly did not ask for a ruling that would prohibit Defendant from lodging an objection in that contingency. That particular contingency was simply not the subject of the pretrial hearing in limine, at which the question presented was whether Dr. Krinsky could testify as to her *own* opinions, her *own* findings and her *own* conclusions. (Tr 10-13.) It ought to go without saying that such statements from a testifying witness are not hearsay at all, Rule 11-801(C) NMRA ("'Hearsay' is a statement, other than one made by the declarant while testifying..."), and therefore are not testimonial hearsay. *United States v. Faulkner,* 439 F.3d 1221, 1226 (10th Cir. 2006) ("One thing that is clear from *Crawford* is that the Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement. ... In other words, the Clause restricts only statements meeting the traditional definition of hearsay.").

The confrontation clause places no restriction whatsoever on the introduction of Dr. Krinsky's own findings, conclusions and opinions. *Whorton v. Bockting,* 549 U.S. 406, 420 (2007); *Crawford v. Washington,* 541 U.S. 36, 59 n.9 (2004). The trial court erred in ruling otherwise.

D. The Autopsy Photographs Are Not Testimonial Statements.

On the present record, "[t]he only records from OMI which will be sought to be introduced, will be photographs that were taken during the course of the autopsy..." (Tr 13.) The answer brief, being cast in such vague and generalized terms, does not contend that the photographs would constitute testimonial hearsay. Nonetheless, it is worth underlining that the photographs, being the "statements" of a camera, are not testimonial statements subject to the confrontation clause. *People v. Cooper*, 56 Cal. Rptr. 3d 6, 26 (Cal. App. 2d Dist. 2007) ("Photographs and videotapes are demonstrative evidence, depicting what the camera sees. They are not testimonial and they are not hearsay...") (citations omitted); *United States v. Weiland*, 420 F.3d 1062, 1076-77 (9th Cir. 2005) ("With respect to ... the records of conviction and the information contained therein, the fingerprints, and the photograph, ... these records do not fall within the prohibition established by the Supreme Court in *Crawford.*"); *United States v. Beach*, 196 Fed. Appx. 205, 209 (4th Cir. 2006) ("Beach has failed to demonstrate how photographs of seized evidence could conceivably constitute the 'testimonial' statements that *Crawford* bars."); *Sevin v. Parish of Jefferson*, 621 F. Supp. 2d 372, 383 (E.D. La. 2009) ("Because a camera is not a witness that is amenable to cross-examination, and because a photograph of a vehicle is not a 'testimonial statement,' introduction of

the Redflex photographs into evidence does not implicate the Confrontation Clause.").

This result is directly supported by *Bullcoming*, ¶ 19 ("Defendant's true 'accuser' was the gas chromatograph machine"). One of the authorities relied on by *Bullcoming* in the cited paragraph is *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008), an opinion by Judge Easterbrook of the Seventh Circuit that makes the key point with force:

> A physician may order a blood test for a patient and infer from the levels of sugar and insulin that the patient has diabetes. The physician's diagnosis is testimonial, but the lab's raw results are not, because data are not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone. If the readings are 'statements' by a 'witness against' the defendants, then the machine must be the declarant. Yet how could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests.

Id. at 362.

Putting a camera on the witness stand would be no less ludicrous. Pursuing the line of thought demonstrates why the confrontation clause must, and does, draw a line between "witnesses against" a defendant and those people who might conceivably possess information possibly relevant to the defense. For instance, it is possible the person wielding the camera (not necessarily Dr. Williams, so far as the record reveals) might have wielded it in such a way as to create a false impression, although it is difficult to imagine why anyone would want to do so.

But then, it is equally possible that the lens was ground in such a way as to introduce distortion, or that the number of pixels in the image were insufficient to accurately capture the three-dimensional reality in the examining room, or that the memory card was defective in a way that altered the visual data in a critical way undetectable to the untrained human eye, or that the download to the computer resulted in a subtle loss of data, or that the computer program used to receive the photograph was less-than-optimal, or indeed that digital cameras are inherently less reliable than film. Does that mean the prosecution is required to put on the stand every engineer, technician, designer or machine operator responsible for any of those components? And then we could go into the lighting in the morgue. As Hollywood technicians know, lighting can make a huge difference to the result. Must the prosecution bring in the architect, lighting manufacturer and installing electrician? Then, too, on whose authority are we to trust that the technology used by Hewlett-Packard or Epson in their printers is capable of reproducing the information caught by the camera without error? In short, there is an endless receding series of factors involved in the presentation of any photograph in court. Who can say with absolute certainty that none of it would be relevant to the jury's evaluation of the testifying expert's opinions?

The people of the United States in 1868, in the immediate aftermath of the Civil War, did not ratify the fourteenth amendment, which made the sixth

amendment applicable to the states, as judicially acknowledged after the passage of 97 years, *Pointer v. Texas*, 380 U.S. 400 (1965), in order to guarantee criminal defendants the right to cross-examine anyone who might possibly be in possession of possibly relevant information. As of 2004, we know the American people of 1868 ratified the fourteenth amendment to guarantee state-court defendants the right to confront "witnesses against" them, with "witnesses" defined as those who provide testimony, a category of evidence that includes not just testimony but also testimonial statements. *Crawford*, 541 U.S. at 52. The question before the trial court in this case was whether the State was proposing to introduce testimony or testimonial statements. On the record before the court, it was not so proposing. The confrontation clause "has no application" to the evidence described on the record by the prosecutor. *Whorton*, 549 U.S. at 420. The trial court erred in ruling otherwise.

E. Miscellaneous Points in Response to the Answer Brief.

The answer brief argues that "[i]f Dr. Krinsky is allowed to testify in [Dr. Williams'] place, *his* opinions, findings, skills, bias, risk of error, exercise of judgment and tests can not be effectively challenged." (AB at 12; italics added.) But the answer brief does not explain: bias about *what?* risk of error in *what?* exercise of judgment about *what?* and, *what* tests? Much less does it explain why

those matters would even be relevant, so long as Dr. Williams' opinions and findings are not presented to the jury. (BIC at 10-11.)

The answer brief states that "Dr. Krinsky's opinions will necessarily and exclusively rely upon the materials generated by Dr. Williams." (AB at 15.) No record citation is provided to support the factual assertion that Dr. Krinsky's opinions will "exclusively" rely on materials generated by Dr. Williams. Moreover, in this passage the answer brief acknowledges that it is talking about "materials generated by Dr. Williams." The implicit underlying contention is that "materials generated by Dr. Williams" is the same thing as "testimonial hearsay from Dr. Williams." *Bullcoming* is to the contrary. In that case, the testifying expert based his own opinion on "materials generated by" the non-testifying analyst. *Bullcoming*, 2010-NMSC-007, ¶ 6. And yet the confrontation clause was not violated when those materials were presented into evidence – one step beyond what the State proposes to do in the present case – because the materials so generated were not testimonial statements. *Id.* ¶¶ 19-20.

The answer brief's description of what Judge Eichwald "found" (AB at 24) finds no support in the record. The judge made no such findings. And if the judge was truly "able to see the handwriting on the wall" (*id.*), one can only hope he is spared King Belshazzar's fate. Daniel 5:1–31.

CONCLUSION

For the foregoing reasons and for the reasons given in the brief in chief, 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,

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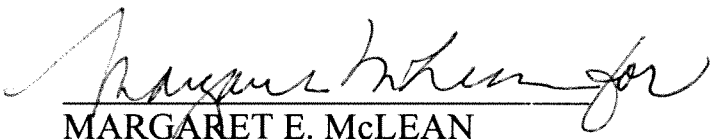

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