No. _____

In The

Supreme Court of the United States

VANESSA STUART,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this criminal case, the Alabama courts permitted the introduction into evidence of a State laboratory employee's formal, official, written "reports" to law enforcement, regarding blood alcohol test results concerning blood of the Petitioner (who was listed as the "suspect" in the reports). Those reports were accepted into evidence for the truth of the matters asserted therein: i.e., as evidence of her blood alcohol level. The Alabama courts allowed this even though there was no testimony from the person who performed the test and signed the reports, nor even testimony from any other witness who was personally involved in the testing of the blood samples in question.

The question is whether the decision below is contrary to *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

It is, and the Court should summarily reverse.

PARTIES TO THE PROCEEDING BELOW

The parties are listed in the caption: Vanessa Stuart (who has since legally changed her name to Vanessa American Horse), and the State of Alabama.

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Petitioner Vanessa Stuart respectfully prays that a writ of certiorari issue to review the decision of the Alabama Court of Criminal Appeals affirming her conviction, and the decision of the Supreme Court of Alabama denying review.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is unpublished, and is in the Appendix at 1a-19a. The order of the Alabama Court of Criminal Appeals denying Stuart's timely petition for rehearing is unpublished, and is in the Appendix at 20a. The order of the Supreme Court of Alabama denying Stuart's petition for writ of certiorari is unpublished, and is in the Appendix at 21a-22a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(1). The Supreme Court of Alabama denied Stuart's petition for writ of certiorari on March 16, 2018, and this Petition to this Court is therefore timely under this Court's Rule 13(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

STATEMENT OF THE CASE

Vanessa Stuart was charged in Alabama and was convicted of criminally-negligent homicide and driving under the influence.

At trial, the State introduced governmental laboratory reports of alcohol test results regarding blood taken from Stuart. Stuart objected, specifically invoking the Sixth Amendment's Confrontation Clause. The trial court overruled the objections and admitted the reports. *See* R-645 in state court Record on Appeal ("I object that this is a violation of my client's Sixth Amendment right to confrontation of the witnesses against her."); R-646 to -49;[1] R-650 (objection overruled).

The "reports" were State Exhibits 184 and 185 (Record on Appeal, C-329 to -332). They are on their

[1] "[I]ntroduction of this document will contain the results of a blood alcohol analysis done by another scientist who . . . by all appearances is not going to testify in this case for the State of Alabama. . . . Baletia Sutton, I am understanding, is not going to testify. And this is a fundamental denial of my client's right to cross-examine the witnesses against her in violation of the Sixth Amendment, the confrontation clause."

face official "Alabama Department of Forensic Sciences" documents, titled "Toxicological Analysis Report," and they designate Stuart as the "Suspect." They are, on their face, reports "to" an addressee at the Daphne, Alabama, Police Department. They state as fact what Stuart's blood alcohol level supposedly was. They are *the* evidence of that supposed fact, a fact that was of course very important to the trial. They report high blood alcohol levels.

The reports were admitted for the truth of the matters asserted. (*See*, *e.g.*, opinion of Court of Criminal Appeals, at 3a, taking these exhibits as evidence for the truth of the matter asserted: "Subsequent forensic analysis established that at the time Stuart's blood was drawn, which was over four hours after the wreck, Stuart's blood-alcohol level was .174."). There was no suggestion that they were admitted for non-truth purposes only.

The reports are signed by one person, Forensic Scientist Belicia Sutton. She did not testify. The State gave no reason why not. Stuart was not informed before trial that Sutton would not testify due to any sort of unavailability, nor was Stuart given an opportunity to cross-examine her before trial.

The trial court allowed the exhibits to be introduced through the testimony of Jason Hudson, who (at the time of trial) was toxicology section chief of the Department of Forensic Sciences. He was the only person affiliated with the Department to testify. But there is no evidence that Hudson was involved in the testing of

Stuart's blood, nor even in personally supervising the testing. As the Court of Criminal Appeals wrote, "In fact, Dr. Hudson was not employed by the DFS at the time of the analysis." (8a). As reflected in Hudson's testimony, R-678:

> Q. You were not present when the blood was handled, correct?
>
> A. Correct.
>
> Q. You were not present when it was received. In fact, you didn't even live in the state of Alabama when it was received by the Department of Forensic Sciences, correct?
>
> A. I know I did not work for the Department of Forensic Sciences. And I can't recall exactly when I moved but you're correct –

There is not a bit of evidence or even any claim by the State, in the proceedings below, that Hudson had any personal involvement in the testing of Stuart's blood. True he was the supervisor of the office at the time of trial; but there is no evidence or even contention that he was personally involved even in a supervisory way in this blood testing, which was done long before trial.

On appeal to the Court of Criminal Appeals, Stuart argued the Confrontation Clause issue. (*E.g.*, Brief of Appellant, p. 23 ("The allowance by the trial court of allowing the introduction of the blood evidence results through this witness violated the defendant's rights under the Confrontation Clause in direct contradiction to the United States Supreme Court holding in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011)."). The

Court of Criminal Appeals addressed the issue, yet affirmed. It held that the presence of Hudson as a witness was sufficient under the Confrontation Clause. (8a to 13a). Stuart sought review in the Supreme Court of Alabama; her petition for certiorari argued that the decision of the Court of Criminal Appeals was in direct conflict with *Bullcoming*. (*E.g.*, Petition for Writ of Certiorari, p. 2, section heading "Confrontation Clause": "The basis of this petition for the writ is that the decision is in direct conflict with a prior decision of the United States Supreme Court on the same point of law and nearly identical facts," and going on to discuss *Bullcoming*). The Supreme Court of Alabama denied review.

Stuart is presently incarcerated.

REASONS FOR GRANTING THE WRIT AND FOR SUMMARILY REVERSING

The decision below is flatly contrary to *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). This Court should grant review, and should summarily reverse.

The State was allowed to introduce forensic lab reports as exhibits to prove Stuart's blood alcohol level, through the testimony of a person (Jason Hudson) who neither signed the reports, nor performed nor observed the tests reported. Again, there is *no* claim by the State that he actually performed or observed these tests of Stuart's blood. As the Court of Criminal Appeals wrote,

"In fact, Dr. Hudson was not employed by the [forensic science department] at the time of the analysis." (8a).

In *Bullcoming* this Court held:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification – made for the purpose of proving a particular fact – through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Bullcoming, 564 U.S. at 652. The Confrontation Clause does not allow the introduction of such reports "through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Id.* "The accused's right is to be confronted with the analyst who made the certification . . . ," *id.*

The testimony of another scientist "who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on [the defendant's] blood sample" is not enough to satisfy the Constitution. *Id.* at 651.

> As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. Because the New Mexico Supreme Court permitted the testimonial statement of one witness, i.e., Caylor, to enter into evidence through the in-court testimony of a second person, i.e., Razatos, we reverse that court's judgment.

Id. at 657-58. "[T]he analysts who write reports that the prosecution introduces must be made available for confrontation . . . ," *id.* at 661. The Constitution "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Id.* at 662. "In short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way." *Id.* at 663.

There is simply no way to square the decision below with *Bullcoming*. And there is no room, in our judicial system, for state courts to flout this Court's decisions.

There is no doubt that the reports in this case were "testimonial" within the meaning of Confrontation Clause doctrine including *Bullcoming* itself. *Id.* at 663-65. They were created as an official report, explicitly framed on their face as reports "to" a police

department, about "evidence" regarding a "suspect" (Stuart). They stated facts clearly designed for use in criminal proceedings – blood alcohol levels of the "suspect" – and were signed by the person who had done the tests. There is, further, no room for doubt that the reports were introduced, admitted, and used for the truth of the matters asserted in them: i.e., Stuart's supposed blood alcohol levels. Neither the State nor the courts below denied these points.

And yet here, the State did – and the state courts allowed – exactly what *Bullcoming* forbids. Stuart had the right to confront the witness whose testimonial statements of fact were contained in the "reports": Belicia Sutton. The courts below deprived Stuart of that right, saying that it was good enough to have the testimony of Hudson – even though there is no claim that he was involved in the testing of this blood at all. *Bullcoming* does not allow this. That is exactly what *Bullcoming* holds.

No later decision of this Court has overruled *Bullcoming* in this regard. As discussed above, there is no dispute that these reports were admitted into evidence for the truth of what Sutton stated there about Stuart's blood alcohol level. And there is no dispute that the reports were testimonial under *Bullcoming*. Neither the State nor the courts below disputed those things; nor could they. The plurality opinion in *Williams v. Illinois*, 567 U.S. 50 (2012), is therefore inapposite. *Bullcoming* remains the law that governs this case.

The State argued that Hudson's testimony was good enough because the relevant office in the Department of Forensic Science uses a so-called "team approach." (State Brief to Alabama Court of Criminal Appeals, pp. 16, 17). The State argued – and the Court of Criminal Appeals accepted (8a to 13a) – that Hudson's testimony was therefore good enough under *Chambers v. State*, 181 So. 3d 429, 437-38 (Ala. Crim. App. 2015) (adopting this sort of "team approach" analysis to allow lab-supervisor testimony).

But it is not necessary in this case to argue any nuances of the law about the Confrontation Clause ramifications of any so-called "team approach," because there is no evidence that Hudson was even part of a "team" with any involvement in testing *Stuart's blood*. Recognizedly, Justice Sotomayor, concurring in *Bullcoming*, noted the possibility that testimony from a witness other than the signer of the report might arguably suffice for constitutional purposes if that witness had personal involvement in the particular test at issue. But that question, reserved by Justice Sotomayor, was about possible testimony by a person who was actually involved in the particular test at issue: the test of the defendant's blood. There was no disagreement that, without such personal involvement in the test of the defendant's blood, the surrogate witness was not enough to satisfy the Confrontation Clause.

> Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. Razatos

> conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing. App. 58. The court below also recognized Razatos' total lack of connection to the test at issue. 147 N.M., at 492, 226 P.3d, at 6. It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.

Bullcoming, 564 U.S. at 672-73 (Sotomayor, J., concurring).

Here, the facts are materially the same as in *Bullcoming*. There is no evidence that Hudson had any "personal connection" to the testing of Stuart's blood, or that he "observed [Sutton] conducting a test" on Stuart's blood; there is no showing that he had any "involvement whatsoever in the relevant test and report." *Id.* Again as the Court of Criminal Appeals wrote, "In fact, Dr. Hudson was not employed by the DFS at the time of the analysis." (8a). Had Hudson testified that he had observed and supervised Sutton in the performance of *this* test and analysis, we would have the question reserved by Justice Sotomayor concurring in *Bullcoming*. But he did not; and so we do not have that reserved question.

The best and indeed all that the Court of Criminal Appeals could say about Hudson's testimony, in response to Stuart's *Bullcoming* argument, was this: he "gave extensive testimony regarding the policies and procedures of the DFS's toxicology laboratory. This included controls in the analysis and the laboratory's standard practice of having the results of the analysis independently reviewed." (13a). And the Court cited his testimony that, "as the [toxicology] section chief, I'm fundamentally the toxicology supervisor so I'm responsible for the day-to-day workflow in the laboratory, testing assignments for cases, as well as personnel management." (13a).

But to allow that, as enough to justify what was done to Stuart here, is just contrary to *Bullcoming*. A person who can testify about how the lab process works is not good enough to satisfy the Constitution. A person who cannot testify – at the very least – to having been personally involved in observing the particular testing at issue in the case is not good enough to satisfy the Constitution. Again, at the risk of repetition, the holding of the Court in *Bullcoming*:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification – made for the purpose of proving a particular fact – through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that

> order does not meet the constitutional requirement.

Bullcoming, 564 U.S. at 652. The testimony of another scientist "who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on [the defendant's] blood sample" is not enough to satisfy the Constitution. *Id*. at 651. The Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Id.* at 662. The Alabama courts and the Alabama prosecutors simply did not follow the holdings of *Bullcoming*.

CONCLUSION

Lower courts must follow this Court's decisions. Alabama's courts failed to do that, here. This Court should summarily reverse the decision below. In the alternative, Stuart respectfully requests that the Court grant review and set the case for briefing and argument.

Respectfully submitted,

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