In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

VIRGINIA HERNANDEZ LOPEZ,

Defendant and Appellant.

Case No. S177046

Fourth Appellate District, Division One, Case No. D052885
San Diego County Superior Court, Case No. SCE274145
The Honorable Lantz Lewis, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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1. Was appellant denied her right of confrontation under the Sixth Amendment when the trial court admitted into evidence the results of blood-alcohol level tests and a report prepared by a criminalist who did not testify at trial?

2. Was the error prejudicial in light of the testimony of a supervising criminalist about testing procedures at the lab?

3. How does the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527, 174 L.Ed.2d 314] affect this Court's decision in *People v. Geier* (2007) 41 Cal.4th 555.

INTRODUCTION

This case arises from a judgment of conviction against Virginia Lopez after she drove under the influence of alcohol, collided head-on with another vehicle, and killed the driver. Her blood was drawn and was sent to a sheriff's department crime laboratory where blood-alcohol readings were obtained through a GCMS instrument.[1] The technician placed the vial of Lopez's blood into the instrument, and the instrument generated printouts that contemporaneously recorded the results. The technician then recorded the results on a report that was reviewed and co-signed by the technician's supervisor. The reading was .09 percent ethanol alcohol.

At Lopez's trial, the lab supervisor who oversaw the testing and independently evaluated the results testified about the GCMS instrument,

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[1] "GCMS," or gas chromatography - mass spectrometry, breaks down substances into their individual components to determine their chemical composition. (4 RT 459-460; see *Dunn v. State* (2008) 292 Ga.App. 667, 669 [665 S.E.2d 377].

the procedures at the lab, and the results of the testing. Additionally, the GCMS printouts containing the raw data were admitted into evidence, along with the report initialed by the technician. The supervisor, who was qualified as an expert, also testified to his opinion that Lopez's blood-alcohol level was .09.

The Court of Appeal, relying on *Melendez-Diaz*, *supra*, 129 S.Ct. 2527, concluded that it was error under the Sixth Amendment to introduce the evidence because the prosecution had not produce the technician for cross-examination, and that the error required reversal because it was not harmless beyond a reasonable doubt. But *Melendez-Diaz* invalidated, as a violation of the Sixth Amendment confrontation clause, a Massachusetts procedure in which affidavits setting forth forensic test results, without any foundational information or live testimony, were admitted against the defendant at a criminal trial. *Melendez-Diaz* did not address situations like this one, common in California, where an expert witness is called to the stand and is available for cross-examination concerning the reliability of the test results, and where the documentary evidence consists, not of affidavits, but rather of the raw data generated by the testing apparatus.

In such a situation, as here, the confrontation clause is satisfied. First, the instrument's raw data was neither a witness statement nor "testimonial." Second, *Melendez-Diaz* does not invalidate Evidence Code section 801, subdivision (b), which provides that an expert witness may rely upon such test results in forming opinion testimony. Nothing in *Melendez-Diaz* changes this long-established rule. For both reasons, *Melendez-Diaz* does not conflict with the conclusion reached by this Court's in *Geier*, at least insofar as *Geier* applies to this instrument-generated test and a live expert offering an opinion on the test results. In any event, any error was harmless, because the crime of second degree murder was amply established without evidence of the blood-alcohol test results. Accordingly,

this Court should reverse the judgment of the Court of Appeal and reinstate the conviction against Lopez.

STATEMENT OF THE CASE

The San Diego County District Attorney filed an information charging Virginia Lopez with three felony offenses. In count 1, Lopez was charged with vehicular manslaughter while intoxicated, in violation of Penal Code section 191.5, subdivision (b). In count 2, Lopez was charged with driving under the influence of alcohol causing injury, in violation of Vehicle Code section 23153, subdivision (a). In count 3, Lopez was charged with driving a motor vehicle with a blood/alcohol percentage of .08 or above and causing bodily injury, in violation of Vehicle Code section 23153, subdivision (b). (1 CT 1-3.)

The jury convicted Lopez of count 1. Since counts 2 and 3 were lesser included offenses of count 1, no verdicts needed to be reached on those counts. (1 CT 53-54.) The trial court sentenced Lopez to state prison for a total of two years (the midterm for count 1). (1 CT 94, 140.)

Lopez appealed from the judgment. (1 CT 95.) In an unpublished opinion filed on May 11, 2009, the Court of Appeal, Fourth District, Division One, affirmed the judgment. Lopez petitioned for review. This Court granted the petition and transferred the matter with directions to vacate its judgment and reconsider the matter in light of *Melendez-Diaz*, *supra*, 129 S.Ct. 2527. On August 31, 2009, the Court of Appeal issued a published opinion reversing the judgment. The Court of Appeal held that Lopez's Sixth Amendment confrontation rights were violated by the admission of results of her blood-alcohol tests, a report memorializing those results, and testimony by a supervisor at the sheriff's department crime laboratory about the results. The Court of Appeal further found that

the error in was not harmless beyond a reasonable doubt. The Court of Appeal denied the People's petition for rehearing.

STATEMENT OF FACTS

A. Prosecution Case

1. Evidence Regarding Underlying Offense

On the night of August 18, 2007, Alan Wolowsky and his wife Sandra were following each other in separate cars, driving between 50 and 55 miles per hour in conformity with the posted speed limit, on Highway 78 west of Julian. (3 RT 257.) The weather was clear. (3 RT 265.) Ms. Wolowsky saw a white vehicle, traveling fast, make a left turn into the driver's side of her husband's Tacoma. (3 RT 257, 261.) The impact was "really hard." (3 RT 261.) When the Tacoma stopped, Ms. Wolowsky went to check on her husband. (3 RT 261.) She found him to be non-responsive. (3 RT 261-262.)

An EMT named Quentin Porter, who had heard the crash, arrived at the scene. (2 RT 82-83.) He saw a white Ford Expedition[2] in the middle of the road, and Mr. Wolowsky's truck on the right side of the road with heavy damage on driver's side. (2 RT 86.) Porter quickly examined Mr. Wolowsky, finding his pulse very weak and rapid. (2 RT 96, 325.)

Approaching the Expedition, Porter saw appellant Lopez lying in the front seat. (2 RT 96-99.) The passenger side door was jammed and could not be opened, and the driver's side door was smashed in. (2 RT 98, 100.) Lopez began turning the ignition key to start the engine. (2 RT 100.)

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[2] At some places in the record this vehicle is referred to as a Ford "Expedition" and at others it is referred to as a Ford "Explorer." (2 RT 96-99, 138, 208, 245.) Since it is referred to as an Expedition in the vast majority of the record, respondent refers to it as an Expedition.

Porter yelled at Lopez not to start the vehicle, for he smelled gasoline and he knew the vehicle's battery was still active. (2 RT 101.) Porter asked Lopez if she could speak English. Lopez said "no." (2 RT 101.) He then spoke to her in Spanish[3] and said, "Just don't try to start the car." (2 RT 101.)

Porter quickly inspected Lopez for injuries. (2 RT 102-103.) She had visible facial injuries and "an obvious fracture of the left tibia and fibula." (2 RT 103, 107.) Eventually, with the help of paramedics, Porter was able to extract Lopez from the Expedition. (2 RT 104.)

California Highway Patrol Officer Dean Stowers, the lead investigator at the scene (3 RT 316), smelled the odor of alcohol on appellant's person. (3 RT 321.) It was an odor he had smelled many times in his 28-year career. (3 RT 321.) Field sobriety tests could not be conducted due to Lopez's injuries (3 RT 322-323; 4 RT 414-415), so Officer Sowers put in a request that a blood sample be taken from her. (3 RT 322.)

Mr. Wolowsky was pronounced dead at the scene. (3 RT 249-250.) He died from multiple blunt force injuries and blood loss. (3 RT 298.)

Lopez was transported, by ambulance and then by helicopter, to a hospital. (2 RT 105, 121, 231.) During the ride, Lopez told Porter that she had been driving "really fast" down the hill, that she had lost control of her car, and that it had crossed over into the opposite lane and then "hit something." (2 RT 105, 109.) Lopez said she had just finished her work day at the Rong Branch Bar and that she had consumed "a couple of drinks [of an alcoholic nature] while she was up there." (2 RT 106.) While traveling in the ambulance Lopez began spitting up blood. (2 RT 121.) Porter noticed the slight smell of alcohol on Lopez's person. (2 RT 121.)

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[3] Porter had lived in Mexico for five years and had been Spanish-speaking since he was three years old. (2 RT 101-102.)

At one point, Lopez began yelling that she "wanted [them] to let [her] die." (2 RT 120.)

Thomas Carr, a paramedic who accompanied Lopez when she was transported from the scene, also thought he smelled alcohol. With Porter translating, he asked Lopez if she had been drinking alcohol. (3 RT 213, 221.) Lopez answered, "si." (3 RT 220-221.) Carr asked Lopez what happened. Lopez responded that she had been driving too fast and lost control of the vehicle. (3 RT 237.)

After Lopez was transported to Palomar Hospital, California Highway Patrol Officer Raymond Pirko attempted to administer a preliminary alcohol screening, but was unable to do so because of lacerations and injuries to Lopez's face and mouth. (4 RT 395, 415.) At 1:04 a.m. on August 19—about two hours after the collision—a technician drew two vials of blood from Lopez and Officer Pirko impounded the samples. (4 RT 417-418.)

California Highway Patrol Officer Michael Edwards diagrammed the area of the collision. (2 RT 141-142.) Based on skid marks and other physical evidence at the scene, he concluded that the "first area of impact" occurred in the eastbound lane, the lane in which Mr. Wolowsky's Tacoma had been traveling. (3 RT 169.) The collision caused the Tacoma to be pushed back, where it collided with a tree in an embankment. (3 RT 170.)

Officer Stowers, similarly, concluded that the collision had occurred when Lopez's Expedition crossed over the double yellow lines into Mr. Wolowsky's Tacoma traveling in the opposite direction. (3 RT 338-340.) Based on tire marks at the scene, Officer Stowers concluded that Lopez's vehicle, while traveling down the hill from Julian at a high rate of speed, had veered onto the shoulder area of the road and then had steered back to the left where a "head on" collision occurred. (3 RT 339, 344.)

Accident reconstruction expert Ernest Phillips opined that, at the time of the collision, Mr. Wolowsky's Tacoma was traveling at 38 to 44 miles per hour, and Lopez's Expedition was traveling between 68 and 75 miles per hour. (6 RT 824.) Phillips found evidence that Lopez had made an aggressive steer to the left, which could have been caused by either overcorrection of the steering wheel or by inattention. (6 RT 843.) Phillips opined that contributing factors to the collision were intoxication, inattention, and unsafe speed. (6 RT 827-828.) He testified that light beams coming from the Tacoma could not have affected the driver of the Expedition, because of the curvature of the road (the vehicles were not pointed at each other) as well as the grade separation (the Expedition was coming down the hill and the Tacoma was traveling uphill). (6 RT 829.)

Lopez had arrived for work, as a waitress in the restaurant section of the Rong Ranch Bar, between 4:00 and 5:00 p.m. on the day of the homicide. (4 RT 494, 545.) At approximately 5:30 p.m., manager Tamara McKay saw Lopez start to drink the beer of a fellow employee. (4 RT 491-494, 504, 506-507.) McKay signaled to Lopez to stop because Lopez was working and because the restaurant had a general policy against drinking while working. (4 RT 505.) Three hours later, at 8:30 p.m., McKay served a 1-to-1.2-oz. shot of 40-proof tequila to Lopez. (4 RT 508, 550, 607.) Lopez drank her entire shot and then drank a small cup of Sprite. (4 RT 508.) McKay did not see Lopez again until approximately 10:12 p.m., when Lopez again entered the bar and drank another shot of tequila (chased with a small cup of Sprite). (4 RT 512.) About a half hour later, bartender Shawn Matheny served Lopez yet another shot of tequila and a glass of soda. (4 RT 550-552.) Lopez did not consume any food while she was in the bar area. (4 RT 514.) In addition, an employee named Jorge Acosta purchased one shot of tequila for himself, and one for Lopez, at approximately 10:40 p.m., and another shot for each of them between 10:45

p.m. and 10:50 p.m. (5 RT 615-618.) Acosta did not personally see Lopez drink any other alcoholic beverages that night. (5 RT 619.)

2. Evidence Regarding Lopez's Blood-Alcohol Level

To establish Lopez's blood/alcohol level at the time of the offense, the prosecution produced evidence of a gas chromatograph (GCMS) test performed on the blood sample obtained from Lopez at the hospital after the crime. Over Lopez's confrontation clause objection, the prosecution introduced the computer print-out generated from the GCMS instrument; handwritten notes by the instrument's operator setting forth information about Lopez's sample, its collection, and recording the test results; and the in-court testimony of John Willey, a forensic alcohol supervisor at the San Diego County Sheriff's Crime Laboratory, where the blood-alcohol testing took place.

Willey detailed his scientific training and testified that, having worked at the lab for 17½ years, he was familiar with its procedures for analyzing blood samples. (4 RT 468-469.) He described the laboratory's chain-of-custody process, in which incoming samples in sealed envelopes are issued laboratory identification numbers and are then stored until tested. (4 RT 459.) Willey then explained the operation of the GCMS. (4 RT 459.) After samples are tested in the instrument, its computer generates a paper printout of the results. (4 RT 459-460.) The printout shows a graph that, by the widths and heights of the peaks depicted on it, corresponds to the chemical being tested in the sample. (4 RT 460.) Willey also testified about safeguards that the lab uses to ensure that the tests are run properly and that the GCMS remains calibrated and in working order. (4 RT 460-461.)

With respect to Lopez's sample, Willey testified that he had trained and was intimately familiar with the work performed by criminalist Jorge

Peña at the lab. (4 RT 461.) As Willey explained, Peña and all of the lab's other analysts were trained to process blood-alcohol tests in the same manner, one recognized in the scientific community as accurate and correct. (4 RT 462.) As part of the original review process, before the report was even issued to the investigating agency, Willey reviewed the blood-alcohol report prepared by Peña recording the alcohol level in Lopez's blood sample, as well as the printout from the GCMS and the before-and-after quality-control calibrations of the instrument. (4 RT 462-463; Exh. 18.) These records are maintained by the lab in the ordinary course of business. (4 RT 463-464, 466-467.)

The test performed by Peña reported that, at 1:04 a.m. on August 19, 2007, about two hours after the crash, Lopez's blood-alcohol level was ".09 grams percent." (4 RT 465-466.) Willey also testified to his conclusion, based on his separate abilities as a criminal analyst, that the blood-alcohol level in Lopez's sample was .09 percent. (4 RT 467.)

Defense counsel cross-examined Willey at length. (4 RT 467-484.) The written reports were admitted into evidence as People's Exhibit 18. (7 RT 1033.)

Finally, toxicologist John Treuing opined that a woman similar to Lopez who had consumed three shots of tequila at the times specified by the witnesses, and who then registered a blood-alcohol level of .09 at 1:04 a.m., would have had a blood-alcohol level of .12 at the time of the collision (approximately 11:00 p.m.). (5 RT 703-705.)

B. Defense Case

Lopez testified on her own behalf. (6 RT 850-892; 7 RT 911-938.) She denied consuming any alcohol before the end of her shift at the Rong Branch. (6 RT 853-857.) She specifically denied having been served a shot of tequila at 8:30 p.m. by McKay. (6 RT 856.) However, she admitted

having two shots of tequila after she finished working. (6 RT 856-859.) Lopez testified that, while she was at the restaurant, she consumed a few hot chicken wings. (6 RT 875.) When she drove away from the Rong Branch in her Expedition, she further stated, she did not feel the effects of the tequila. (6 RT 879.)

Lopez also testified that, at the time of the collision, her car was traveling at 50 to 55 miles per hour. (6 RT 881.) She said that, at one point as she was coming out of a curve, she had seen high-beam lights approaching her in her lane. (6 RT 881-882.) She said she did not have time to brake and could not get out of the way of the oncoming vehicle. (6 RT 883-888.)

Toxicologist Ian McIntyre testified that he had tested Alan Wolowsky's blood and that Mr. Wolowsky had a blood-alcohol level of .11 at the time of his death. (7 RT 944.) Accident reconstructionist Stephen Plourd opined that Lopez's Expedition was traveling 50 to 53 miles per hour at the time of the collision, and that Mr. Wolowsky's Tacoma was traveling 40 to 45 miles per hour. (7 RT 951.) He agreed with Phillips's conclusions about the collision in most respects, but disagreed regarding the speeds the vehicles were traveling. (7 RT 986-987.)

ARGUMENT

I. LOPEZ'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS NOT VIOLATED BY THE ADMISSION INTO EVIDENCE OF RESULTS OF BLOOD-ALCOHOL TESTS GENERATED BY A GAS CHROMATOGRAPH INSTRUMENT AND OF A REPORT CONTEMPORANEOUSLY RECORDING THE RESULTS OF THOSE TESTS

Although the Sixth Amendment confrontation clause guarantees a criminal defendant the right to confrontation and cross-examination, it does not preclude admission of all hearsay evidence. Rather, the confrontation

right pertains only to testimonial statements of a witness. Data generated by a GCMS instrument do not fall within this category. Accordingly, admission into evidence raw data and report containing the contemporaneous transcription of those data did not violate Lopez's Sixth Amendment rights.

A. Scope of Sixth Amendment Confrontation Right

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him[.]" (U.S. Const., Amend. VI.) Under prior Sixth Amendment jurisprudence, the admissibility of an out-of-court statement depended upon its reliability. (See *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597].) But in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 36, 158 L.Ed.2d 177], the United States Supreme Court abandoned the reliability analysis in favor of an inquiry into whether the witness's statement is "testimonial." Although the High Court declined to set out a comprehensive definition of "testimonial," it provided illustrations of statements that would fall into this category. Specifically, the Court stated, "testimonial" statements include "'ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"; "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'"; "'statements that 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 statements made in interrogations by law enforcement agents. (*Crawford, supra*, 541 U.S. at pp. 51-52.) At the very least, "'testimonial'" means

"testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." (*Id.* at p. 68.)

In *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224], involving two companion cases in which victims had reported domestic violence to law enforcement but did not testify at trial, the United States Supreme Court further clarified the distinction between testimonial and non-testimonial hearsay. In the first case, *Davis*, the victim telephoned 911 and reported that the defendant was attacking her as the attack was occurring. In response to questioning by the 911 operator, she named the defendant as her assailant. In the second case, *Hammon v. Indiana*, police responded to a report of a domestic disturbance at the victim's house. When they arrived, the victim told them that everything was all right but that, earlier in the evening, the defendant had pushed her, threatened her, and broken several items in her house. The officers had her sign a battery affidavit detailing her account of that evening's events. (*Davis*, *supra*, 547 U.S. at pp. 817-821.)

The Court held that statements are not "testimonial" if the circumstances objectively indicated that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency. By contrast, a statement is "testimonial" when the circumstances indicate that there is no such emergency but that, instead, the primary purpose of the interrogation is to establish or prove past events that are potentially relevant to later criminal prosecution. (*Davis*, *supra*, 547 U.S. at pp. 821-824.) Applying these rules to the facts before it, the Court noted that the victim in *Davis* was describing events as they occurred, rather than giving a description of past events. (*Id.* at p. 827.) As the Court explained, "[n]o 'witness' goes into court to proclaim an emergency and seek help." (*Id.* at p. 828.) In *Hammon,* the officer was not seeking to determine "what was happening" but rather "what happened." (*Id.* at p. 830.) The victim's

statements were taken some time after the events. "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." (*Ibid.*, footnote omitted.)

Next, in *Melendez-Diaz*, the United States Supreme Court considered whether testimonial evidence might include the results of some forensic testing. In that case, the defendants, arrested on suspicion of drug dealing, had tried to discard a plastic bag containing 19 smaller bags. The police submitted the bags to a state laboratory that was required, under Massachusetts law, to test samples upon police request. The analysis revealed that the substance was cocaine. (*Id.* at p. 2530.)

At trial, in lieu of live testimony, the state submitted three "certificates of analysis." The certificates set forth the weight of the seized bags and stated that the bags "have been examined with the following results: The substance was found to contain: Cocaine." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2531.) The certificates were sworn before a notary public and signed by analysts at the crime laboratory. The defendant, relying on *Crawford*, objected to introduction of the certificates. The trial court overruled the objection and admitted the statements as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed." (*Ibid.*, omission in original.)

The United States Supreme Court reversed the defendant's conviction. The Court held that the certificates, despite their label, were in fact affidavits, i.e., "'declarations of fact written down and sworn to by the declarant before an officer authorized to administer oaths' [citation]." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) The certificates, the Court continued, were the functional equivalent of live testimony, doing "'precisely what a witness does on direct examination.'" (*Ibid.*, citing *Davis, supra*, 547 U.S. at p. 830.) And, the sole purpose of the affidavits

was to provide evidence against the defendant. Thus, the Court held, "Absent a showing that the analysts were unavailable to testify at trial and that [defendant] had a prior opportunity to cross-examine them, [defendant] was entitled to 'be confronted with' the analysts at trial." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, footnote omitted, quoting *Crawford*, 541 U.S. at p. 54.) The *Melendez-Diaz* Court characterized its opinion as a "rather straightforward application of our holding in *Crawford*." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2533.)

Melendez-Diaz was a five-to-four decision, and Justice Thomas explained that he concurred in the majority opinion only because the certificates of analysis were "quite plainly affidavits" and thus fell "'within the core class of testimonial statements' governed by the Confrontation Clause [citation]." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543.) Justice Thomas stated that the Clause is limited to "extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions [citation]." (*Ibid.*, internal quotations omitted.) "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'[citation]." (*Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d 260], omission in original.) "When there is no majority opinion, the narrower holding controls [citation]." (*Panetti v. Quartermain* (2007) 551 U.S. 930, 949 [127 S.Ct. 2842, 168 L.Ed.2d 662].) Therefore, the concurrence of Justice Thomas provides the holding of the case in *Melendez-Diaz*, or at least provides a firm basis for distinguishing *Melendez-Diaz* from cases that do not involve formal affidavits.

B. Instrument-Generated Raw Data Are Not Testimonial Evidence

The GCMS-generated written evidence introduced against Lopez was not testimony by an witness. Rather, it was a printout of data from a pre-programmed instrument. Such evidence is not witness testimony within the meaning of the Sixth Amendment and *Crawford*. Likewise, technician Pena's handwritten report was not testimonial because it was merely a contemporaneous recordation of the non-testimonial data contained in the printout.

The Sixth Amendment gives the defendant the right "to be confronted with the **witnesses** against him." (U.S. Const., Amend. VI, emphasis added.) Thus, for the confrontation clause to apply, the evidence must consist of a testimonial statement by a witness. Instrument-generated data do not fall within this category, because the instrument is not a witness and does not bear testimony. (See *United States v. Hamilton* (10th Cir. 2005) 413 F.3d 1138, 1142-1143 [header information generated by computer program placed before each pornographic image uploaded by defendant]; *United States v. Khorozian* (3d Cir. 2003) 333 F.3d 498, 506 [header information automatically generated by a fax machine].) "Evidence that is not a statement from a human witness or declarant is not hearsay" and is therefore not subject to the confrontation clause. (*Luginbyhl v. Commonwealth* (2005) 46 Va.App. 460, 466-467 [618 S.E.2d 347]; accord, e.g., *State v. Weber* (2001) 172 Or.App. 704, 708-709 [19 P.3d 378]; *Caldwell v. State* (1997) 230 Ga.App. 46, 47 [495 S.E.2d 308]; *Stevenson v. State* (Tex.App.1996) 920 S.W.2d 342, 343-344; *State v. Van Sickle* (1991) 120 Idaho 99, 102-103 [813 P.2d 910].)

United States v. Washington (4th Cir. 2007) 498 F.3d 225, illustrates the point. There, the defendant was arrested for being under the influence of PCP and, as in the present case, technicians placed the defendant's blood

into a GCMS for testing. The GCMS generated raw data, which the lab director used in testifying to his conclusion about the results of the tests. The defendant argued that his confrontation rights were violated because "the machine-generated data amounted to testimonial hearsay statements of the machine operators[.]" (*Id.* at p. 228.) The Fourth Circuit rejected the contention, finding that the data was neither a statement by a witness nor testimonial. The court noted that the 'statements' at issue—that the defendant's blood contained PCP and alcohol—were not made by a person but rather by an instrument. "The machine printout was the source of the statement, no *person* viewed a blood sample and concluded that it contained PCP and alcohol." (*Id.* at p. 230, emphasis in original.) The inculpating data were on the printouts themselves, the only source of the "statement." The technicians could not independently confirm the test results, they could simply look at the printout. The statements, that is, did not come from the technicians but from the printout itself. And, "statements made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause." (*Id.* at p. 230.) Thus, "[a]ny concerns about the reliability of such machine-generated information is addressed through the process of authentication not by hearsay or Confrontation Clause analysis." (*Id.* at p. 231.)

The *Washington* court, relying on *Davis*, *supra*, 574 U.S. 813, also concluded that the instrument-generated data were not "testimonial." The court noted that the data "did not involve the relation of a past fact of history as would be done by a witness [citation]." (*United States v. Washington*, *supra*, 498 F.3d at p. 232.) The instrument-generated data were not relating past events, but rather, "the current condition of the blood in the machines." (*Ibid.*) While there was testimony linking the blood with past behavior, it was supplied by a witness—the laboratory director—who was subject to cross examination as required by the confrontation clause.

(*Washington*, *supra*, 498 F.3d at p. 232.) Because "the machine's output did not 'establish or prove past events' and did not look forward to 'later criminal prosecution'—the machine could tell no difference between blood analyzed for health care purposes and blood analyzed for law enforcement purposes—the output could not be 'testimonial.'" (*Ibid.*, citing *Davis*, *supra*, 547 U.S. at p. 821.)

A similar situation was presented in *United States v. Lamons* (11th Cir. 2008) 532 F.3d 1251. There, an airline employee was charged with conveying a false bomb threat. At trial, the prosecution introduced raw billing data generated by CTI Group, a company that prepared billing CD's for Sprint. To make the CD's, CTI used an automated processing system. A senior technical representative for CTI identified an exhibit as a spreadsheet representing the data on the CD. The spreadsheet showed calls made by the defendant to the airline on the dates and times in question. (*Id.* at p. 1262.) The defendant claimed that admission of the spreadsheet violated his Sixth Amendment rights. The Eleventh Circuit disagreed. The court noted that the confrontation clause applies only to "'witnesses' against the accused—in other words, those who 'bear testimony.'" (*Id.* at p. 1263, quoting *Crawford*, 541 U.S. at p. 51.) Furthermore, the purpose of the confrontation clause was protection from "'ex parte examinations as evidence against the accused.'" (*United States v. Lamons*, *supra*, 532 F.3d at p. 1263, quoting *Crawford*, 541 U.S. at p. 51.) Thus, concluded the court:

> In light of the constitutional text and the historical focus of the Confrontation Clause, we are persuaded that the witnesses with whom the Confrontation Clause is concerned are *human* witnesses, and that the evidence challenged in this appeal does not contain the statements of human witnesses.

(*United States v. Lamons*, *supra*, 532 F.3d at p. 1263, emphasis in original.)

The *Lamons* court further noted that the Federal Rules of Evidence defined a "statement" in terms of a declaration of action by a person,[4] and that this definition was helpful in determining the scope of the confrontation clause. (*Ibid.*) Finally, the court acknowledged that *Melendez-Diaz* was pending before the United States Supreme Court but found it unnecessary to await that decision because "the nature of the evidence in *Melendez-Diaz* is so different" from the instrument-generated evidence in the case before it. (*Id.* at p. 1264, fn. 25.)

Similarly, in *United States v. Moon* (7th Cir. 2008) 512 F.3d 359, a chemist employed by the Drug Enforcement Agency testified, based on the readouts of two instruments—an infrared spectrometer and a gas chromatograph—that the substance seized from the defendant was cocaine. The Seventh Circuit Court of Appeals held that the readings from the instruments did not constitute a "statement" and were therefore not testimonial hearsay barred by the confrontation clause. (*Id.* at p. 362.) The court explained:

> 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. . . . The

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[4] Rule 801 of the Federal Rules of Evidence provides in part:

> The following definitions apply under this article:
>
> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> (b) Declarant. A "declarant" is a person who makes a statement.

> vital questions—was the lab work done properly? what do the readings mean?—can be put to the expert on the stand.

(*United States v. Moon, supra*, 512 F.3d at p. 362.)

Two out-of-state cases decided since *Melendez-Diaz* are also instructive: *People v. Brown* (2009) 13 N.Y.3d 332 [__ N.E.2d __]; and *State v. Appleby* (Kan. 2009) __ P.3d __ [2009 WL 3930461]. In *Brown*, New York's highest court held that a DNA report, introduced through a non-testing forensic biologist, was not "testimonial" as that term is used in *Crawford*, *Davis*, and *Melendez-Diaz*. The court stated that the report "consisted of merely machine-generated graphs, charts and numerical data" that on its own contained no subjective analysis. (*People v. Brown*, *supra*, 13 N.Y.3d at p. 340.) The technicians themselves would merely have explained how they performed certain procedures. (*Ibid.*) But, "[a]s the Court made clear in *Melendez-Diaz*, not everyone 'whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must be called in the prosecution's case.'" (*Ibid.*, quoting *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1.) Instead, a witness qualified to interpret the results had to—and did—testify at trial. (*People v. Brown*, *supra*, 13 N.Y.3d at p. 340.)

Similarly, in *Appleby*, two individuals employed by a forensic laboratory testified that, by using computer software, they determined that the chance of blood on one evidence item being from someone other than the defendant was 1 in 14.44 billion and that, on the other item, the chance was 1 in 2 quadrillion. (*State v. Appleby*, *supra*, 2009 WL 3930461 at * 26.) The defendant moved to exclude the testimony on the grounds that, because the testifying witnesses did not place the samples in the instrument and did not know how the data bases were compiled, admission of the data violated his Sixth Amendment rights. The trial court denied the motion. The Kansas Supreme Court upheld the ruling. Applying *Melendez-Diaz* to

the facts before it, the court held that the evidence at issue was not testimonial. The court noted that DNA itself was physical evidence and non-testimonial. The comparisons were generated by placing it in a data base with other physical evidence. Further, the act of writing the computer programs to make the comparisons were non-testimonial actions. "In other words, neither the database nor the statistical program are functionally identical to live, in-court testimony, doing what a witness does on direct examination." (*Id.* at * 28.) The only "testimonial" evidence, concluded the court, was elicited from the experts, who were on the stand and subject to cross-examination. (*Ibid.*)

Like its federal counterpart, the California Evidence Code defines a "statement" as oral, written, or non-verbal conduct by a "person." (Evid. Code, § 225.)[5] The GCMS results are precisely the type of raw data that are neither a "statement" by a witness nor "testimonial." In this case, Willey explained that gas chromatography is a technique that separates materials by molecule size. The instrument has a column packed like a sieve, and smaller molecules move down the column faster than the larger ones. The molecules exit the columns at specified times, and the computer analyzes the results. (4 RT 459.) The instrument generates a paper printout, showing spikes corresponding to certain chemicals, for each sample placed in the instrument. (4 RT 459-460.)

Thus, the instrument itself does the work; the forensic technician merely places the blood vial into the instrument. Likewise, the handwritten report merely sets forth, in summary form, the data recorded by the

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[5] Evidence Code section 225 provides:
"Statement" means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.

instrument. Although the data requires an analyst familiar with or involved in the process to interpret it, the testimony of such a witness at trial satisfies the defendant's confrontation rights. (See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1 ["We do not hold 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 . . . but what testimony is introduced must . . . be introduced live]."") Here, Willey satisfied that role.[6]

In *Melendez-Diaz*, the prosecution did not introduce the raw data but instead affidavits by witnesses attesting that a substance was examined and was found to contain cocaine. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2531, 2537.) The Supreme Court noted that the affidavits did not indicate what type of tests were performed, whether those tests were routine, and whether the results were subject to interpretation. (*Id.* at p. 2537.) Thus, it was impossible to determine whether the analysis was done according to proper scientific protocol or whether there was human error in the testing process. (*Id.* at pp. 2537-2538.) Here, by contrast, Willey gave detailed testimony about the GCMS, about how it worked, and about procedures used by the lab to ensure integrity and accuracy of the instrument and the test results. (4 RT 459-461.) In fact, he played a key role in ensuring that the instrument and the protocols in the laboratory functioned as they were designed to do.

None of the reasons advanced in *Melendez-Diaz* suggests that the confrontation clause applies to the raw data, as opposed to the interpretation of that data. Specifically, the Court stated that the certificates were "quite

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[6] In other forensic science disciplines where the original analyst performed more subjective comparisons or interpretations of data, the testifying witness can and should independently repeat those functions and provide corresponding evidence at trial.

plainly affidavits," i.e., statements of fact sworn by a declarant before an officer qualified to administer oaths. Thus, they were the functional equivalent of live testimony. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) But raw data is neither sworn nor certified, and the instrument has no ability to testify in court.

Also important in *Melendez-Diaz* was the fact that the analysts' "sole purpose" in preparing the affidavits was for their use in court as evidence against the accused. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) An instrument, in contrast, has no purpose whatsoever; it is an inanimate object which objectively records the data according to its programming. It has no interest in whether a substance is sugar or cocaine. The printout is merely raw data that require an expert to explain. Indeed, absent a stipulation, the printout would not be admitted without accompanying testimony. It is thus offered as an adjunct to that testimony, rather than "in lieu" of the testimony, as was the case in *Melendez-Diaz*. (See *Pendergrass v. State* (Ind. 2009) 913 N.Ed.2d 703, 709 [*Melendez-Diaz* did not preclude admission of sources, including DNA test results, relied upon by analyst's supervisor in forming opinion].) Likewise, the purpose of the handwritten report was to record the data; not to offer testimony against Lopez.

Accordingly, Lopez's "protection against the admission of unreliable evidence lies in the normal state evidence rules requiring an adequate foundation for the admission of the [data]." (*State v. Van Sickle, supra*, 120 Idaho at p. 103.) Admission of the instrument data and handwritten report into evidence did not implicate the confrontation clause. (*United States v. Washington, supra*, 498 F.3d at p. 231.)

II. EVEN IF THE REPORT AND RAW DATA WERE INADMISSIBLE, THE TRIAL COURT PROPERLY PERMITTED TESTIMONY BY THE SUPERVISOR ABOUT LOPEZ'S BLOOD-ALCOHOL LEVEL BASED ON THE TEST RESULTS

Regardless of the admissibility of the writings themselves, Willey was allowed to rely on them in forming his opinion pursuant to Evidence Code section 801, subdivision (b). The presence of Willey on the stand for cross-examination satisfied Lopez's confrontation rights.

A. The Supervisor, Testifying As An Expert, Properly Could Rely On Testimonial or Non-Testimonial Hearsay In Forming His Opinion

Lopez's jury, of course, also received evidence of the blood-alcohol content in connection with the expert opinion testimony of John Willey. *Melendez-Diaz* did not overrule statutes like Evidence Code section 801, subdivision (b), which provides for this type of evidence. (*United States v. Turner* (7th Cir. 2010) __ F.3d __ [2010 WL 92489 at *5 ["*Melendez-Diaz* did not do away with Federal Rule of Evidence 703"].) An expert may base his opinion on any material, "whether or not admissible," reasonably relied upon by experts in the field in forming their opinions; and, if questioned, the expert may relate the basis on which he formed his opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; Evid. Code, § 801.[7]) Such expert-opinion testimony is permissible because the expert is present and available for cross-

[7] Section 801, in pertinent part, provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (b) Based on matter . . . perceived by or personally known to the witness or made known to him at or before the hearing, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

examination. (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 154; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*People v. Sisneros*, *supra*, 174 Cal.App.4th at pp. 153-154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; accord., e.g. *State v. Bethea* (2005) 173 N.C. App. 43, 54-58 [617 S.E.2d 687].)

California courts have long held that experts may testify based on hearsay which may itself by testimonial in nature. (E.g., *People v. Thomas*, *supra*, 130 Cal.App.4th at pp. 1208-1210.) And, even after *Melendez-Diaz*, courts have continued to reach the same conclusion. (E.g., *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 634-637; *Haywood v. State* (Ga. App. 2009) __ S.Ed.2d __ [2009 WL 4827842 at * 5]; *State v. Lui* (Wash. App. 2009) __ P.3d __ [2009 WL 4160609 at * 3-9]; *People v. Johnson* (Ill. App. 2009) 915 N.E.2d 845, 851-854.) As the court explained in *United States v. Johnson*:

> Here . . . [the] experts [who relied on information provided by others] took the stand. Therefore, [defendant] and his co-defendants, unlike the defendant in *Melendez-Diaz*, had the opportunity to test the experts' "honesty, proficiency, and methodology" through cross-examination.

(*United States v. Johnson*, *supra*, 587 F.3d at p. 636, quoting *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538.)[8]

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[8] Like section 801 of the Evidence Code, the Federal Rules of Evidence allow experts to rely upon otherwise inadmissible evidence in forming their opinions. Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise

(continued...)

A situation analogous to the present case was before the Washington court of appeals in *State v. Lui*, *supra*, 2009 WL 4160609. In *Lui*, the appellate court held that testimony by a pathologist's supervisor, and by the director of the DNA lab who reviewed the work of technicians who performed the tests, was not rendered inadmissible by *Melendez-Diaz*. (*Id.* at * 6.) The court noted that, in *Melendez-Diaz*, certificates were used in lieu of live testimony whereas, in the case before it, the jury heard testimony from two experts. (*Ibid.*) Further, the court observed, the disputed evidence in *Melendez-Diaz* was a "bare bones" affidavit that said nothing about the testing methods or the tests conducted. In *Lui*, by contrast, the experts testified extensively about their experience and training, as well as the tests performed in the defendant's case. Thus, "the very live testimony absent in *Melendez-Diaz* was present." (*Ibid.*) Additionally, the court stated, nothing in *Melendez-Diaz* changed the general rule that an expert may rely on otherwise inadmissible facts, including testimonial statements, as a basis for the expert's opinion. (*Id.* at * 7.) Finally, the defendant had the "full opportunity to test the basis and reliability of the experts' opinions and conclusions 'in the crucible of cross-examination.'" (*Id.* at * 9, quoting, *Crawford*, 541 U.S. at p. 60; accord, e.g., *People v. Johnson*, *supra*, 915 N.E.2d at p. 854 [the experts "each testified in person as to their opinions based on the DNA testing and were subject to cross-examination"].)

Nothing in *Melendez-Diaz* conflicts with this analysis. *Melendez-Diaz* did not hold that a defendant's confrontation rights are satisfied only if

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(...continued)

> inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

every person who provides a link in the chain of information relied upon by a testifying expert is available for cross-examination. Nor does it require that the prosecution call every person who can offer information about a forensic analysis. Rather, the Supreme Court stated that the defendant must be able to challenge the "honesty, proficiency and methodology" of the analyst(s) who did the laboratory work in order to "weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2537, 2538.) There is no logical reason why the confrontation clause is not satisfied in this regard if the witness on the witness stand possesses sufficient qualifications and knowledge about the forensic testing process and test results, about the sufficiency of the training received by the original analyst, about what tests were performed, whether those tests were routine, and the skill and judgment exercised by the testing criminalist. (*Id.* at pp. 2537-2538.)

This reading of *Melendez-Diaz* is consistent with *Crawford*'s observation that the purpose of the confrontation clause is "to ensure reliability of evidence" by exposing it to the "crucible of cross-examination." (*Crawford*, *supra*, 541 U.S. at p. 61.) The confrontation clause is satisfied if a defendant can adequately test the reliability of a scientific conclusion or result by engaging in cross-examination. The identity of the expert cross-examined is and should be beyond the purview of the Constitution. (See *United States v. Turner*, *supra*, 2010 WL 92489 at * 4 ["the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself"].)

Willey was able to testify to these core issues underlying the reliability of the test. Willey testified that he was a criminalist and forensic alcohol supervisor with the San Diego County Sheriff's Department crime laboratory. (4 RT 455.) This was a state-certified position that allowed him to supervise criminalists for purposes of alcohol analysis. (4 RT 455-

456.) He was also a criminalist who had worked at the laboratory, in the field of alcohol analysis, for 17½ years. (4 RT 455.) Before he started at the crime lab, he had been employed as a technologist at two hospitals and at a few private laboratories. (4 RT 456.) To qualify for his position, he held a bachelor of science degree in general biology, undertook graduate work in the same field, and was required to take several proficiency exams. (4 RT 457.) He had testified as an expert on over 700 occasions, and had performed his own analysis on samples tens of thousands of times. (4 RT 458.) He was familiar with the crime lab's procedures for processing blood samples for alcohol analysis. (4 RT 458-459.)

Willey described the lab's procedures to the jury. He explained that, when blood samples are brought into the laboratory, they are contained in a sealed envelope and then are checked and taken to the alcohol department. The lab ensures that the name on the envelope matches the name on the log sheet. The sample is given a laboratory number, and is refrigerated until it is analyzed by a GCMS. (4 RT 459.)

Willey further testified about how the GCMS worked, as detailed in Argument I(B), *supra.* (4 RT 459-460.) He explained that the instrument has safeguards for ensuring its accuracy, specifically, quality control checks, calibrations, standards, and line averages. (4 RT 460-461.) Moreover, and most importantly, Willey directly participated in the laboratory testing in this case by reviewing the raw data and Peña's blood-alcohol report at the time they were generated at the lab. (4 RT 462-463.)

Then, after discussing the work done by Peña (4 RT 461-467), Willey testified that, based upon his separate abilities as a criminal analyst, he also concluded that the blood alcohol level of Lopez's sample was .09 percent. (4 RT 467.) This testimony was Willey's independent opinion as an expert. It was a far cry from the "bare bones" written affidavits, found inadmissible in *Melendez-Diaz,* which merely set forth the ultimate conclusion, under

oath, that the tested substance contained cocaine. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2531.)

B. The Requirements of the Confrontation Clause Were Satisfied By Allowing Lopez to Cross-Examine the Supervisor

Furthermore, Lopez had ample opportunity to cross-examine Willey about the test results, the general procedures for performing the tests, the documentation of those results, the functioning of the GCMS, the collection and preservation of samples, and any other issue she deemed appropriate. Indeed, defense counsel cross-examined Willey at length about all of these issues. (4 RT 467-484, 488-489.) Willey, as the supervisor and reviewer of the test results, was equally, if not more, capable of addressing Lopez's concerns than the technician, Peña, whose testimony presumably would have been based entirely on the written report. (*Geier*, *supra*, 4 Cal.4th at p. 602.) Nothing in *Melendez-Diaz* precluded Willey from relying upon Peña's test results in forming his opinion. And, "[b]ecause [Willey] was a highly qualified expert employed by the lab who was familiar with the particular lab procedures and performed the peer review in this particular case, then gave an independent expert opinion, h[is] presence was sufficient to satisfy [Lopez's] right to confrontation." (*State v. Williams* (2002) 253 Wis. 99, 116 [644 N.W.2d 919].)

While a defendant has a Sixth Amendment right to cross-examination, that right is satisfied as long as the opportunity for cross-examination is an adequate one. The defendant has no right to cross-examination that is perfect or ideal. As the United States Supreme Court has explained, as long as the "defense is given a full and fair opportunity to probe and expose. . . infirmities [in testimony] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the

witness's testimony" (*Delaware v. Fensterer* (1985) 474 U.S. 15, 22 [106 S.Ct. 292, 88 L.Ed.2d 15]), "the Confrontation Clause is generally satisfied." (*Ibid.*) Although "the main and essential purpose of confrontation is to secure for the [defendant] the opportunity for cross-examination" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 89 L.Ed.2d 674], a defendant has no right to "cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." (*Delaware v. Fensterer, supra*, 474 U.S. at p. 20 [106 S.Ct. 292, 88 L.Ed.2d 15].)

Pendergrass v. State, supra, 913 N.E.2d 703, illustrates this concept in the context of testimony by a forensic analyst who did not perform the actual test. In *Pendergrass*, a supervisor at the Indiana State Police Laboratory testified that another analyst had performed a DNA analysis and reached certain results. The supervisor had supervised the analyst and checked her work for accuracy. (*Id.* at p. 705.) The prosecution also called an expert witness who interpreted the results for the jury. (*Ibid.*) The defendant claimed that the Sixth Amendment guaranteed him the right to confront the analyst who performed the testing. (*Id.* at p. 708.) The Indiana Supreme Court disagreed. The court noted that in essence, the defendant was complaining that the prosecution "did not call the right—or enough—witnesses." (*Pendergrass v. State, supra*, 913 N.E.2d at p. 708.) The court stated that, while *Melendez-Diaz* did not address this question, its language was useful in analyzing the claim. Specifically, the *Melendez-Diaz* dissent expressed concern that the opinion required "in-court testimony from each human link in the chain of custody." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2546 (Kennedy, J., dissenting).) The *Melendez-Diaz* plurality rejected this assertion, making it clear that it would be up to prosecutors to decide which witnesses to call, as long as their testimony was presented live. (*Pendergrass v. State, supra*, 913 N.Ed.2d at p. 708,

citing *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1.) The court further noted that the supervisor provided the information found lacking in *Melendez-Diaz*, i.e., which tests were performed, whether those tests were routine, and whether the analysts possessed the skill and experience necessary to perform them. (*Pendergrass v. State*, *supra*, 913 N.E.2d at p. 708, citing *Melendez-Diaz*, 129 S.Ct. at p. 708.)

Where, as here, a supervisor who is familiar with the analysis testifies at trial, the purpose behind the confrontation clause has been fulfilled. To the extent the witness did not personally participate in the testing process and bases his information on work performed by others, such areas can be probed through cross-examination. (*Delaware v. Fensterer*, *supra*, 474 U.S. at p. 22.) The presence of the witness on the stand satisfies the Sixth Amendment by preventing a trial by affidavit found objectionable in *Melendez-Diaz*. Once the defendant's Sixth Amendment right to confrontation has been satisfied, the question of which witnesses to call is a matter of state law. (See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1; see also *People v. Black* (2007) 41 Cal.4th 799, 813 [so long as defendant is eligible for upper term sentence consistent with Sixth Amendment principles, selection of actual sentence is state law question left to discretion of trial court].)

C. Decisions Suggesting a Different Conclusion Are Not Persuasive

Appellate opinions suggesting a different conclusion are not persuasive, as they fail to address the key distinctions between the affidavits in *Melendez-Diaz* and circumstances involving expert testimony presented from the witness stand. For instance, in *State v. Locklear* (2009) 363 N.C. 438 [681 S.Ed.2d 293], the North Carolina Supreme Court found harmless error in the admission of testimony by a forensic pathologist about

the results reached by another forensic pathologist and a forensic dentist. The court stated that, under *Melendez-Diaz*, "forensic analyses" are "testimonial statements," analysts are witnesses, and the state did not show the non-testifying witnesses were unavailable or that the defendant had a prior opportunity to cross-examine them. (*State v. Locklear*, *supra*, 363 N.C. at p. 452.) In *People v. Payne* (2009) 285 Mich. App. 181 [774 N.W.2d 714], documents described in the opinion only as "laboratory reports containing the results of DNA testing" (*People v. Payne*, *supra*, 774 N.W.2d at p. 724) prepared by a non-testifying analyst were admitted into evidence as business records. A witness testified that the reports concerned the basics of DNA testing and the methods used to prepare the reports. However, the witness had not personally conducted the testing, had not examined any of the evidence in the case, and had not reached any of his own scientific conclusions. (*Id.* at p. 726.) A Michigan appellate court held that under *Melendez-Diaz*, admission of the reports violated the defendant's Sixth Amendment rights because he was not afforded his opportunity to be confronted with "the analyst" at trial. (*Ibid.*)

Neither of these cases contains any discussion about an expert's ability to rely on outside material as a basis for his or her opinions, nor does it appear that any such issue was raised in either case. Moreover, the decisions fail to recognize that *Melendez-Diaz* did not deal with forensic analyses per se, but rather with affidavits attesting to the results of those analyses. Further, the courts in *Locklear* and *Payne* assumed, without explanation, that the confrontation clause would be satisfied only by the production of the technician who actually performed the forensic test. *Melendez-Diaz*, however, espouses no such requirement. Finally, the cases ignore the fact that there was live testimony presented at trial, by a forensic analyst available for cross-examination. Accordingly, this Court should decline to follow these decisions.

III. *MELENDEZ-DIAZ* DOES NOT OVERRULE THIS COURT'S DECISION IN *PEOPLE V. GEIER*

Melendez-Diaz does not overrule this Court's decision in *Geier*. In *Geier*, *supra*, 41 Cal.4th 555, a DNA laboratory director testified to work done by her subordinate. At trial, the defendant objected her testimony, arguing that the results were inadmissible absent testimony from the analyst who conducted the testing. The trial court overruled the objection. (*Geier*, *supra*, 41 Cal.4th at p. 596.) On his direct appeal from a judgment imposing the death penalty, the defendant renewed his claim, arguing that under *Crawford*, admission of the supervisor's testimony violated his Sixth Amendment right to confrontation. (*Id.* at p. 587.) Specifically, he contended that the DNA report forming the basis of the supervisor's testimony was "testimonial" because objectively, it would be understood that the report would be used at a later trial. (*Id.* at p. 598.)

This Court rejected the claim. This Court held, based on its own interpretation of *Crawford* and *Davis*, that scientific evidence, like the report at issue before it, was non-testimonial. In so doing, this Court concluded that a statement is not testimonial unless: "(1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." (*Geier*, *supra*, 41 Cal.4th at p. 605.) This Court found that in the case before it, the second factor was dispositive. This Court stated, "[the analyst's] observations. . . constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events." (*Id.* at p. 605.) Specifically, the analyst recorded her observations regarding the samples, her preparation of the samples for analysis, and the results of the analysis, as she was performing those tasks. (*Id.* at pp. 605-606.) Furthermore, scientific testing is neutral, i.e., the tests were done as part of the analyst's job, and not to incriminate the defendant. (*Id.* at p. 607.)

Finally, the accusatory statements were made not through the analyst's notes but rather, through the supervisor, who testified at the defendant's trial. (*Geier*, *supra*, 41 Cal.4th at p. 607.)[9]

Melendez-Diaz did not undercut this Court's reasoning in *Geier*. California does not follow the procedure outlawed in *Melendez-Diaz*, i.e., introducing witness affidavits instead of live testimony. Furthermore, raw test results are not "formalized testimonial materials." Thus, *Melendez-Diaz* has no impact on *Geier* or on California's practices. Although improper introduction of forensic evidence will violate a defendant's Sixth Amendment rights, proper introduction of such evidence will not. As explained throughout this brief, *Melendez-Diaz* was concerned with a particular type of evidentiary practice, i.e., introduction of a bare-bones, after-the-fact declaration as prima facie evidence against the accused, without supporting testimony. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2531, 2537.) *Geier*, like the present case, involved raw data, contemporaneous recordation of observable events, an expert relying on work by others, and live testimony by a witness subject to cross-examination. None of these circumstances was present in *Melendez-Diaz*; thus the High Court had no occasion to consider them.[10]

Furthermore, the Court in *Melendez-Diaz* once again passed up the opportunity to provide a comprehensive definition of "testimonial" or a framework for determining whether a statement is testimonial in a particular case. In the absence of further guidance from the High Court, the

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[9] This Court also noted that, as a matter of state law, the supervisor, as an expert witness, was allowed to rely upon the analyst's report in forming her opinions. (*Geier*, *supra*, 41 Cal.4th at p. 608, fn. 13.) This Court did not address the issue insofar as it relates to the confrontation clause.

[10] Four days after deciding *Melendez-Diaz*, the High Court denied certiorari in *Geier*. (*Geier v. California* (2009) 129 S.Ct. 2856.)

Geier three-part test remains a valid formula for evaluating the "testimonial" nature of an out-of-court statement. As can be readily seen, all three *Geier* criteria were met in this case. First, there was no statement made to a law enforcement agency. Instead, data were generated by an instrument and transcribed by a scientist into a report. Second, the scientific data did not describe a past fact relating to criminal activity. The printouts generated by the GCMS were contemporaneous readings of the blood-alcohol level as the blood was placed into the instrument. The report was a contemporaneous observation of the results of the blood-alcohol tests. The supporting documentation "merely recount[ed] the procedures [used] to analyze the samples." (*Geier*, *supra*, 41 Cal.4th at p. 607.) Third, the purpose of the test was not necessarily for use at a later trial. The GCMS instrument had no purpose. Moreover, the test itself "[was] not [itself] accusatory, as [such] analysis can lead to either incriminatory or exculpatory results." (*Ibid.*) For instance, if the blood-alcohol level had measured below .08, the prosecutor would likely not have filed charges against Lopez.

Finally, and in any event, even when a statement is found to be testimonial, neither *Geier* nor *Melendez-Diaz* abrogated the longstanding rule that an expert may rely on hearsay in forming his or her opinion. (See *United States v. Floyd* (11th Cir. 2002) 281 F.3d 1346, 1349-1350.)

IV. ANY ERROR IN ADMITTING THE REPORT, OR IN ADMITTING THE REPORT AND THE SUPERVISOR'S TESTIMONY, WAS HARMLESS BEYOND A REASONABLE DOUBT

The Court of Appeal held that the alleged error in admitting the evidence of the GCMS results was not harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 1065, 17 L.Ed.2d 705] and therefore required reversal of the judgment. (Slip opn. at

pp. 7-8.) However, the opinion failed to explain why the error was prejudicial, or what analysis was used to reach that conclusion. When properly evaluated under the criteria laid down by the United States Supreme Court in *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, any error was harmless.

In *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, the United States Supreme Court set forth the factors to be used in determining whether erroneous restriction on or denial of cross-examination would be deemed harmless. The High Court held that a reviewing court should "tak[e] into consideration the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Id.* at p. 684.)

Here, the prosecution had an overwhelming case against Lopez. Quentin Porter testified that Lopez admitted to him that she had "a couple of drinks" before she got behind the wheel of her car. (2 RT 106.) He also testified that Lopez smelled of alcohol. (2 RT 121.) Thomas Carr, one of the paramedics, testified that he asked Lopez if she had been drinking alcohol and that Lopez responded that she had. (2 RT 213, 220-221.) California Highway Patrol Officer Dean Stowers testified that Lopez had the odor of alcohol on her person. (3 RT 321.) Tamara McKay, manager of the Rong Ranch Bar, testified that Lopez had been drinking beer and tequila. (4 RT 491-494, 504, 512, 506-508, 550-551, 607.) Lopez herself admitted, during her own testimony, that she had two shots of tequila after she finished work. (6 RT 856-859.) The accident reconstruction expert opined that the crash was due to intoxication, inattention and driving at an unsafe speed. (6 RT 827-828.)

Moreover, the crime of which Lopez was convicted, gross vehicular manslaughter while intoxicated, did not require the prosecution to prove that Lopez had a certain blood alcohol level (i.e., .08 or above). It simply required proof that: (1) Lopez drove a vehicle while under the influence of an alcoholic beverage; (2) when so driving, Lopez committed some act which violated the law or failed to perform some duty required by law; and (3) as a proximate result of such violation of law or failure to perform a duty, another person was injured. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1159-1160.) Intoxication, the element addressed by Peña's testimony and the GCMS results, was amply proven without this evidence.

In addition, even if the GCMS report itself were erroneously admitted, the raw data was properly allowed because it was not testimony by a witness. (See Argument I, *supra*.) Furthermore, Willey's testimony remained admissible because, since he testified and was subject to cross-examination, it did not violate Lopez's confrontation rights. (See Argument II, *supra.)* Very little could have been uncovered through cross-examination of Peña that was not otherwise explored through the probing cross-examination of Willey.

Accordingly, any error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: February 2, 2010

Respectfully submitted,

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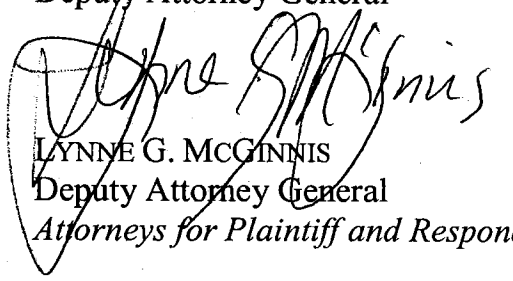

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,513 words.

Dated: February 2, 2010

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Virginia Hernandez Lopez** No.: **S177046**

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 that same day in the ordinary course of business.

On February 3, 2010, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** 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 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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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on February 3, 2010 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

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 February 3, 2010, at San Diego, California.

M. Seda
Declarant

M. Seda
Signature

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