IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. OLGA RUTTERSCHMIDT AND **HELEN L. GOLAY,** Defendants and Appellants.	S176213 2 CRIM. B209568 LASC BA306576

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE DAVID S. WESLEY, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF ON THE MERITS

on behalf of

HELEN L. GOLAY

JANYCE KEIKO IMATA BLAIR
State Bar No. 103600
Suite 3 Ocean Plaza
302 West Grand Avenue
El Segundo, California 90245
Telephone: (310) 606-9262
jkiblair@bleckmanblair.com
Attorney by Appointment of the
California Supreme Court for
Defendant and Appellant
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ISSUES TO BE BRIEFED

On December 2, 2009, this Court granted appellant's petition for review and identified the following issues to be briefed and argued:

1. Was defendant denied her right of confrontation under the Sixth Amendment when a supervising criminalist testified to the result of drug tests and the report prepared by another criminalist?

2. 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?

STATEMENT OF THE CASE

A jury found appellant Helen Golay and her codefendant Olga Rutterschmidt guilty of the first degree murders of Kenneth McDavid and Paul Vados. (Pen. Code, §§ 187 subd. (a), 190.2, subd. (a)(1)). Both defendants were also convicted of conspiring to commit the McDavid and Vados murders (Pen. Code, § 182, subd. (a)(1)). The jury made separate special circumstance findings that the defendants committed multiple murders (Pen. Code, § 190.2, subd. (a)(3)). (6CT 1505-1517; 20RT 6338-6349.) Appellant was sentenced to state prison for consecutive terms of life without the possibility of parole for the murders. The court imposed and stayed terms of 25 years to life as to each of the conspiracy counts. (Pen. Code, § 654; 7CT 1693; 21RT 7827-7828.)

The prosecution contended that Rutterschmidt and appellant cultivated seriatim relationships with Vados and McDavid, provided housing for them, purchased and maintained insurance policies naming Vados and McDavid as the insured and themselves as beneficiaries, and later killed the men for the insurance proceeds.

As part of its proof the defendants premeditated the killing of McDavid and Vados, the prosecution presented evidence that McDavid had enough alcohol and prescription sedatives in his system to render him either

very sleepy or asleep at the time he was killed.[1] The drug tests on blood taken during McDavid's autopsy were performed to determine whether drugs played a role in his death. (6RT 1213.) Four analysts in the coroner's laboratory performed the tests. (6RT 1221, 1235.) Following the laboratory's protocol, each analyst completed and signed a formal report that included the identification of the particular drug detected and the quantity of the drug found. The report was attached to instrument-generated analytical data produced during the testing process. (6RT 1218.) Dr. Joseph Muto, the laboratory's director, who neither performed nor observed the testing, reviewed the forensic laboratory reports and testified at trial to their contents. (6RT 1234-1235.) He relayed information from each of the reports to the jury, including the names and quantities of the drugs identified during the testing process. (6RT 1222-1229.) The four analysts who performed the toxicology screens were available to testify. There was no showing any of them had been subjected to prior cross-examination on the reports. (6RT 1234-1237.)

The trial court admitted the evidence as a business record over defense objection that the admission violated appellant's Confrontation Clause rights. (6RT 1213-1216.)

On appeal, appellant contended that the laboratory reports were testimonial evidence and the four analysts were witnesses against her. The trial court therefore violated her Sixth Amendment right to confront witnesses against her by admitting the results of the drug testing and report through the

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[1] Forensic pharmacologist and forensic toxicologist Dr. Vina Spiehler also testified for the prosecution regarding the expected effects of the combined alcohol and prescription drugs found in McDavid's system at the time of death, but that testimony is not in issue here. (14RT 3625-3635.)

in-court testimony of Dr. Muto. (*Crawford v. Washington* (2004) 541 U.S. 36, 54; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527, 174 L.Ed.2d 314].

The Court of Appeal found no violation of appellant's Confrontation Clause rights. The Court of Appeal determined there was no Confrontation Clause violation because the reports themselves had not been admitted into evidence. The court distinguished *Melendez-Diaz* on the ground that the forensic laboratory reports there were admitted in affidavit form, whereas no such equivalent admission occurred in appellant's case. The court found that *Crawford* does not preclude a prosecution scientific expert from testifying to an opinion in reliance upon another scientist's report. The court then held that the results of the laboratory tests and report were properly admitted under rules of evidence governing expert opinion testimony. (Slip opn., at pp. 31-33.)

ARGUMENT

I.

APPELLANT WAS DENIED HER RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN THE SUPERVISING CRIMINALIST TESTIFIED TO THE RESULTS OF DRUG TESTS AND REPORTS PREPARED BY OTHER CRIMINALISTS

A. INTRODUCTION

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The Confrontation Clause thus includes a premise – that when the prosecution offers as evidence a statement made for the purpose of establishing or proving some fact – and a promise – the Constitution guarantees the defendant the opportunity to confront the statement's maker. (*Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*); *Davis v. Washington* (2006) 547 U.S. 813, 830; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527; 174 L.Ed.2d 314] (*Melendez-Diaz*).)

As the discussion below will show, the results and reports of the drug testing prepared by the non-testifying analysts that are in issue here were made for the purpose of proving some fact and to be available for use in litigation. The statements are therefore testimonial pursuant to *Melendez-Diaz*. The United States Supreme Court made it clear in *Melendez-Diaz* that the Confrontation Clause guarantees the defendant the right to confront the forensic analyst. The Court has also made it clear in other expressions that the Confrontation Clause does not permit the testimonial statement of one witness

to enter into evidence through the in-court testimony of a second. Accordingly, appellant was denied her right of confrontation under the Sixth Amendment when the supervising criminalist testified to the results of drug tests and reports prepared by other criminalists.

California's rules of evidence allow a supervising criminalist to base his or her opinion testimony upon inadmissible evidence, e.g., the results and reports of forensic drug testing prepared by non-testifying analysts, and allow the supervising criminalist to relay to the jury the inadmissible materials upon which he or she relied. Subject to judicial discretion, the inadmissible material upon which the expert relies must be determined to be reliable. The material is not, however, admitted for the truth of the matter asserted and so is not available for the jury's use in proving the case. As explained below, given the United States Supreme Court's decision in *Melendez-Diaz* and the Court's expressions therein regarding the reliability of scientific testing, diligent defense counsel can be expected to object to the reliability of the forensic results upon which the expert is relying and to make related foundation and relevance objections to the expert's testimony when the necessary evidentiary nexus is not supplied by the forensic analyst's testimony. There are thus inherent limitations in relaying forensic information to the jury in this fashion.

B. *MELENDEZ-DIAZ V. MASSACHUSETTS* ESTABLISHES THAT THE FORENSIC ANALYSTS' ASSERTIONS IN ISSUE HERE WERE TESTIMONIAL AND THAT APPELLANT WAS DENIED HER RIGHT OF CONFRONTATION WHEN THE SUPERVISING CRIMINALIST TESTIFIED TO THE FORENSIC RESULTS

The forensic laboratory reports in issue here were produced by the coroner's laboratory during the police investigation into the cause of Kenneth McDavid's death, leading reasonably to the objective belief the

assertions in the reports would be available for use in a later trial. Here, McDavid's body was subjected to autopsy proceedings during a police investigation into the cause of his death. A sample of blood was taken during the autopsy and subsequently screened to determine if drugs had a role in his death. Four forensic analysts in the coroner's laboratory performed the drug screens. Each stated his or her results in a report.

The prosecution presented the drug test results through the testimony of Dr. Joseph Muto, the director of the coroner's laboratory, who neither performed nor observed any of the four drug tests to which he testified. Dr. Muto testified that the four forensic analysts who performed the drug tests were available to testify. There was no showing any of them had been previously cross-examined about the drug test he or she performed.

In his testimony Dr. Muto repeated the name and quantity of the drug from each of the laboratory reports and acknowledged he was not the analyst who had conducted the drug testing.

The Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment (*Pointer v. Texas* (1965) 380 U.S. 400, 401, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In *Crawford*, the United States Supreme Court held that the Sixth Amendment guarantees a defendant's right to confront those who bear testimony against him. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.

In *Melendez-Diaz*, the Court held that forensic laboratory reports made for the purpose of producing evidence for litigation, such as an analyst's

assertion that a substance in the defendant's possession was cocaine of a certain weight, are testimonial evidence. (*Id.*, 129 S.Ct. at p. 2532.)

In *Melendez-Diaz*, the defendant objected to the admission of "certificates of analysis" showing the results of forensic analysis performed on substances in his possession to be cocaine of a certain weight. The United States Supreme Court found the certificates were "quite plainly affidavits," one of the core class of testimonial statements it had described in *Crawford.* (*Id.*, 129 S.Ct. at p. 2532; *Crawford*, *supra*, 541 U.S. at p. 51.) The certificates were declarations of facts made under oath, *viz.*, the composition, quality, and net weight of the analyzed substance; were "incontrovertibly" a declaration made for the purpose of proving some fact, *viz.*, that the substance found in the defendant's possession was cocaine; were "the precise testimony the analysts would be expected to provide if called at trial"; were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination'"; were made under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

Melendez-Diaz thus held that the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without affording the accused an opportunity to "'be confronted with' the analysts at trial." (*Id.*, at p. 2532, quoting *Crawford*, *supra*, 541 U.S. at p. 54.)

The forensic laboratory reports in appellant's case are testimonial statements for the same reasons the laboratory reports in *Melendez-Diaz* were held to be testimonial statements. McDavid's blood sample was taken during an autopsy performed as part of a police

investigation into the cause of McDavid's death. The blood sample was subjected to drug screen testing ancillary to the same police investigation in order to determine whether drugs played any part in causing McDavid's death. Each laboratory report was made for the purpose of establishing or proving some fact, *viz.*, the composition, name, and weight of the analyzed substance in McDavid's system at the time of death. Each contained the precise testimony the analyst was expected to make if called at trial. Each was made under circumstances, *viz.*, as part of a police investigation into the cause of McDavid's death, that would lead an objective witness reasonably to believe the assertions in the report would be available for use at a later trial. (*Crawford*, *supra*, 541 U.S. at pp. 51-52; *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

Dr. Muto relayed information from each laboratory report to the jury in his testimony. (See 6RT 1223-1229.)

The forensic laboratory reports at issue are unquestionably testimonial under *Melendez-Diaz*. The statements in the reports were unquestionably relayed to the jury by Dr. Muto.

Allowing the prosecution to introduce the testimonial statements of a nontestifying witness through the in-court testimony of another witness both invoked the premise of the Confrontation Clause and denied appellant its promise of a guarantee of the opportunity to cross-examine the statement's maker.

C. BY ITS DECISION IN *MELENDEZ-DIAZ* AND ITS CONSISTENT AND SYSTEMATIC REJECTION OF ALL CONTENTIONS THAT WOULD DILUTE OR COMPROMISE THE PREMISE AND PROMISE OF THE CONSTITUTIONAL TEXT, THE SUPREME COURT OF THE UNITED STATES HAS ESTABLISHED THAT THE CONFRONTATION CLAUSE DOES NOT PERMIT THE TESTIMONIAL STATEMENT OF ONE WITNESS TO ENTER INTO EVIDENCE THROUGH THE IN-COURT TESTIMONY OF A SECOND. ACCORDINGLY, APPELLANT WAS DENIED HER RIGHT OF CONFRONTATION WHEN THE SUPERVISING CRIMINALIST TESTIFIED TO THE RESULTS OF DRUG TESTS AND REPORTS PREPARED BY OTHER CRIMINALISTS

The Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses against him." (U.S. Const., amend. VI.) In *Crawford*, the United States Supreme Court held that if the prosecution decides to introduce testimonial evidence, the Confrontation Clause guarantees the defendant the right to confront the declarant. (*Crawford, supra*, 541 U.S. at p. 68.)

The Court explained that the "ultimate goal" of the Confrontation Clause "is to ensure reliability of evidence." (*Id.*, at p. 61.) The Court stated that the Confrontation Clause ensures reliability through a procedural rather than a substantive guarantee. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent) but about how reliability can best be determined." (*Ibid.*)

As the expressions of the Court set forth below will show, the United States Supreme Court has consistently adhered to *Crawford*'s articulation of this principle of Confrontation Clause jurisprudence – that when the premise of the Confrontation Clause is met by the prosecution's use of testimonial statements – then the Clause's promise must be met by guaranteeing that the reliability of that evidence is tested in the crucible of cross-examination. The Court has repeatedly held that the prosecution violates a defendant's Confrontation Clause rights when it introduces a witness' testimonial statement through the in-court testimony of someone other than the maker or creator of the testimonial statement.[2]

In *Crawford*, in *Davis*, and in *Melendez-Diaz*, for example, the Court found confrontation violations in allowing police officers to testify to the testimonial statements others made in response to police questioning and in the admission of certificates containing forensic analysts' assertions regarding drug test results of substances found by police during their investigation. (*Crawford*, *supra*, 541 U.S. at p. 68; *Davis*, *supra*, 547 U.S. at p. 826; *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

The clear implication of these holdings is that, absent unavailability and the opportunity for prior cross-examination, the declarant must testify to his or her extrajudicial testimonial statements. (See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2546, Kennedy, J., dissenting, "The Court made it

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[2] See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2552, Kennedy, J., dissenting, "The Court today . . . [holds] that anyone who makes a formal statement for the purpose of later prosecution – no matter how removed from the crime – must be considered a 'witness against' the defendant."

clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second. . . .")[3]

Other expressions by the Court lend credence to this assertion. For example, the Court has adhered to a literal reading of the constitutional text in formulating the principle that the Constitution ensures reliability of the evidence only through the procedural safeguard of confrontation. In keeping with that principle, *Crawford* overruled *Ohio v. Roberts* (1980) 448 U.S. 56, in which it had previously held that the Confrontation Clause did not bar testimonial statements that either fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. The Court said: "Where testimonial statements are involved, we do not think the Framers meant to leave the *Sixth Amendment*'s protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" (*Crawford, supra*, 541 U.S. at p. 61.)

Crawford further observed that where reliability is concerned, "replacing categorical constitutional guarantees [*viz.*, the cross-examination of the declarant prescribed by the Confrontation Clause] with open-ended balancing tests [*viz.*, assessing reliability through surrogate testimony]" does

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[3] Justice Kennedy supported this observation by quoting, and by making the bracketed annotations included here, to the following excerpt from *Davis*: "[W]e do not think it conceivable that the protections of the *Confrontation Clause* can readily be evaded by having a note-taking policemen [here, the laboratory employee who signs the certificate] *recite* the unsworn hearsay testimony of the declarant [here, the analyst who performs the actual test], instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2546, Kennedy, J., dissenting, quoting from *Davis, supra*, 547 U.S. at p. 826.)

"violence" to the Framers' design because "[v]ague standards are manipulable." (*Crawford*, *supra*, 541 U.S. at pp. 67-68.)

Crawford continued:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether. **Where testimonial evidence is at issue, however, the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination.** (*Crawford*, *supra*, 541 U.S. at p. 68; boldface emphasis added.)

Crawford concluded: **"Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."** (*Id.*, at pp. 68-69; boldface emphasis added.)

In *Davis*, the Court adhered once more to the principle that the Confrontation Clause ensures the reliability of testimonial evidence only through the guarantee of confrontation, by stating that the requirement of confrontation is compelled even in circumstances where precluding testimonial evidence results in a "windfall" for the criminal defendant. The Court rejected contentions that the Confrontation Clause should be construed to allow "greater flexibility in the use of testimonial evidence" in domestic violence cases where the crime victims are more susceptible to coercion or intimidation and therefore more likely not to testify. The Court recognized that when the domestic violence victim does not testify the Confrontation Clause gives the criminal defendant a "windfall," but said: "We may not,

however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." (*Davis*, *supra*, 547 U.S. at p. 833.) Indeed, the Court explained it would only compromise the defendant's confrontation right, "on essentially equitable grounds" pursuant to the rule of forfeiture by wrongdoing, under the extraordinary circumstance when the defendant obtained the absence of a witness by wrongdoing. (*Ibid.*, quoting from *Crawford*, *supra*, 541 U.S. at p. 62.)

In *Melendez-Diaz*, the Court repeatedly explained that it is the maker or creator of the testimonial statement the defendant is entitled to confront. In circumstances analogous to those in appellant's case, the Court explained it is the analyst who made the assertions in the report who must testify. For example, the Court expressly and specifically said the Confrontation Clause required that the defendant be able to confront the forensic analysts who performed the drug tests and whose testimonial statements were in issue.

> In short, under our decision in *Crawford* the **analysts'** affidavits were testimonial statements, and the **analysts** were "witnesses" for the purposes of the *Sixth Amendment*. Absent a showing that the **analysts** were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the **analysts** at trial. [Citation.] (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532; boldface emphasis added.)

In yet another demonstration that Confrontation Clause jurisprudence must adhere to the literal language of the constitutional text by

compelling confrontation,[4] the Court rejected the contention that analysts are not subject to confrontation because they do not directly accuse the defendant of wrongdoing. The Court reasoned that the analysts provided testimony against the petitioner by proving one fact necessary for his conviction – that the substance he possessed was cocaine. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2533.)

As part of this discussion, the Court explained that the Sixth Amendment contemplates two classes of witnesses – those against a defendant and those in his favor. The Confrontation Clause of the Sixth Amendment guarantees a defendant the right to be confronted with witnesses "against him," and the Compulsory Process Clause guarantees a defendant the right to call witnesses "in his favor."

The Court then spoke directly to the question in issue here: "Contrary to respondent's assertion [that the defendant is not entitled to confront the analysts themselves], there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." (*Id.*, at p. 2534.)

Melendez-Diaz also rejected contentions that the analysts should not be subject to confrontation because forensic analysts are not "conventional" witnesses in that: (1) the analyst's report contains "near-contemporaneous observations," whereas a conventional witness recalls

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[4] See criticism by the *Melendez-Diaz* dissent, Kennedy J., that the Court's adherence to the literal language of the constitutional text is "wooden" and "formalistic." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2547 ["the Court is driven by nothing more than a wooden application of the *Crawford* and *Davis* definition of 'testimonial. . . ."]; ["the formalistic and pointless nature of the Court's reading of the *Clause*"].)

events observed in the past; (2) the analyst neither observed the crime nor any human action related to the crime; (3) the analyst's statements were not provided in response to interrogation. (*Id.*, at pp. 2534-2535.)

In rejecting the first of these points – the notion that contemporaneous observations are a requisite for testimonial statements – the Court pointed out that its decision in *Davis* disproved the contention that contemporaneity of the reporting determined whether a statement is testimonial and its maker a witness within the meaning of the Confrontation Clause. In *Davis*, the domestic battery victim's report was so fresh, the trial court admitted it as a present sense impression. (*Id.*, *supra*, 129 S.Ct at p. 2535, citing *Davis*, *supra*, 547 U.S. at p. 820.)

The Court rejected the second point – that the forensic analyst was not a conventional witness because the analyst had neither observed the crime nor any human action connected with it – because the contention was patently unsupported by authority. The Court also reasoned that if the Confrontation Clause were held to exempt those who did not observe the crime or human action connected with it, the anticipated result would be that all expert witnesses would conceivably be exempted from confrontation and a police crime scene report would be admissible without the authoring police officer being subjected to cross-examination. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.)

The Court rejected the third contention – that the forensic analysts should not be subjected to confrontation because their statements were not provided in response to interrogation – again on the ground the contention was unsupported by authority, but also because the analysts' affidavits before it were in fact, as were the analysts' reports in appellant's

case, prepared in response to a police request. The Court referred once more to its holding in *Davis* and pointed out that there it was the wife's affidavit regarding a domestic battery that was prepared in response to a police officer's request that triggered the Sixth Amendment's protection (*Davis*, *supra*, 547 U.S. at pp. 819-820). The Court analogized that circumstance to the circumstance in the case before it – where the analysts' affidavits were also prepared pursuant to a police request – and concluded that the analogous circumstances required that "the analysts' testimony should be subject to confrontation as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.) In appellant's circumstance, uncontradicted evidence at trial established that a sample of McDavid's blood was taken and tested for the purpose of determining whether drugs played a role in his death. The analogy to the circumstances in *Davis* and *Melendez-Diaz* are apparent.

The United States Supreme Court also demonstrated its adherence to the literal language of the constitutional text in rejecting contentions that essentially sought to guarantee the reliability of testimonial evidence produced by forensic laboratory analysts by means other than confrontation. *Melendez-Diaz* considered and systematically rejected arguments claiming that the scientific nature of the work of forensic analysts should cause them to be exempt from the requirements of the Confrontation Clause.

In this way, the Court rejected the contention that the Confrontation Clause should be construed to exempt "neutral, scientific testing," which, unlike testimony recounting historical events, is not "prone to distortion or manipulation," and the related contention that confrontation of forensic analysts would be of little value because the analyst is not likely to

feel differently about the results of his testing when looking at the defendant. In the Court's view, these contentions harkened back to the rationale of *Roberts*, which the Court had overruled, and *Roberts*' reliance on indicia of trustworthiness. The Court reiterated the language it had set forth in *Crawford* – stating that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536, quoting *Crawford*, *supra*, 541 U.S. at pp. 61-62.)

Again demonstrating its adherence to the constitutional text, the Court stated that while there may be better or more effective ways to challenge the results of forensic testing, the Confrontation Clause guaranteed only one way: confrontation. The Court then echoed its statement in *Davis* when it rejected arguments that domestic violence victims should be exempted from the confrontation requirement of the Confrontation Clause[5]: "We do not have license to suspend the *Confrontation Clause* when a preferable trial strategy is available." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536.)

The Court explained that confrontation is required because "[f]orensic evidence is not uniquely immune from the risk of manipulation," and pointed to publications citing examples of convictions based on discredited forensic evidence. The Court noted that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one

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[5] In *Davis*, the Court acknowledged that when the Confrontation Clause operates to bar testimonial statements of domestic violence victims who do not testify the Confrontation Clause gives criminal defendants a "windfall." As appellant discussed above, the Court adhered to the literal guarantee of the Confrontation Clause and explained: "We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." (*Davis*, *supra*, 547 U.S. at p. 833.)

as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537.) As part of this discussion, the Court dispensed with a dissent suggestion that the majority had relied on the published data in resolving the constitutional question before it with this simply stated, straightforward comment: "The analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation. . . ." (*Id.*, *supra*, 129 S.Ct. at p. 2537 fn. 6.)

The Court also demonstrated its adherence to the literal language of the constitutional text by rejecting the following contentions intended to admit the analysts' testimonial statements through substituted or surrogate means.

Melendez-Diaz rejected the contention that the analysts' affidavits satisfied the confrontation requirement because they were the equivalent of "official and business records admissible at common law." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538.) The Court found that the forensic analysts' affidavits did not qualify as traditional official or business records because the regular course of the business was the production of evidence for use at trial, but also said that even if the affidavits did qualify for admission as a business record, their authors would still be subject to confrontation. (*Ibid.*) The Court made it clear in the following elaboration that it was the analysts' role as creators of the testimonial evidence that subjected them to confrontation:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here – prepared

> specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the *Sixth Amendment*. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2539-2540.)

As part of this discussion concerning business and official records, the Court considered the dissent's reliance on a class of evidence – a clerk's certificate authenticating an official record – that was both produced for use at trial and traditionally admissible. The Court noted that the clerk could by affidavit authenticate a copy of an otherwise admissible record, but the clerk "could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." (*Id.*, at pp. 2538-2539, fn. omitted.)

This distinction drawn by the Court is particularly illuminating with regard to the issue of surrogate testimony discussed in this argument. The clerk in the illustration above was by way of affidavit able to authenticate an otherwise admissible document, but the clerk was not able to create it. In much the same way, a supervising forensic analyst may be able to authenticate the procedures followed in the forensic protocol, but he can never be the creator of the testimonial evidence prepared by another.

Melendez-Diaz also rejected the contention that a defendant's ability to subpoena the analysts is a substitute for the right of confrontation. In addition to shifting the burden of adverse witnesses who do not appear to the defense, the Court reiterated once more the premise and promise of the Confrontation Clause:

> More fundamentally, the *Confrontation Clause* imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value

> to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2540.)

Finally, the Court rejected a request that the requirements of the Confrontation Clause be relaxed to accommodate the needs of the judicial process. "The *Confrontation Clause* – like ["the right to trial by jury and the privilege against self-incrimination"] – is binding, and we may not disregard it at our convenience." (*Id.*, at pp. 2541; see similar judicial declarations discussed above, from *Davis*, *supra*, 547 U.S. at p. 833; and from *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536.)

Where the Confrontation Clause is concerned, the foregoing discussion shows that the United States Supreme Court has consistently rejected any and all contentions that would compromise or dilute either the basic premise of the constitutional text or its guarantee that reliability of the evidence is assessed only through confrontation.

The Court's express statement in *Melendez-Diaz* that the Confrontation Clause required that the forensic analysts testify[6] and the Court's consistent adherence to the principle that confrontation is the only method of assessing reliability of the evidence lead inescapably to the conclusion that appellant was denied her right of confrontation under the Sixth

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[6] The Court stated: "In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the *Sixth Amendment*. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be ""be confronted with"" the analysts at trial. (*Crawford*, *supra*, 541 U.S. at p. 54.)" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

Amendment when the supervising criminalist testified to the results of drug tests and reports prepared by other criminalists.

D. THE INHERENT LIMITATIONS UNDER CALIFORNIA'S RULES OF EVIDENCE IN ATTEMPTING TO ADMIT THE RESULTS AND REPORTS OF FORENSIC DRUG TESTS PREPARED BY A NON-TESTIFYING ANALYST AS THE BASIS FOR EXPERT OPINION TESTIMONY

This Court asks whether the Confrontation Clause allows a forensic analyst's laboratory supervisor to testify in a substituted or surrogate fashion, but also, presumably, in an expert capacity, to the analyst's results and report, which are not then admitted into evidence.

This is, of course, the manner in which the results and reports of drug testing prepared in appellant's case, and in *Geier*, were presented. In *Geier*, which appellant discusses in the context of the decision in *Melendez-Diaz* in the next argument, this Court noted that a laboratory director testifying as an expert may rely on the opinions of forensic analysts in forming his or her opinion, may state the reasons for the opinion, and may testify that reports prepared by other experts were the basis for that opinion. (*Geier*, *supra*, 41 Cal.4th at p. 608 fn. 13.)

There are limitations inherent in such a method of bringing in testimonial evidence, which appellant discusses below. But, first, for the record, appellant re-asserts that, for all the reasons set forth in the briefing, the Confrontation Clause requires that she have the opportunity to confront the analyst who obtained the drug screen results offered against her.

1. The Confrontation Clause Does Not Permit the Testimonial Statements of One Witness to Enter into Evidence through the In-Court Testimony of a Second

Appellant first reiterates *Melendez-Diaz* controls. The United States Supreme Court has made it very clear in *Melendez-Diaz* and by its statements in other cases that allowing a supervising criminalist to testify to the results and reports of drug tests prepared by other criminalists violates the Confrontation Clause. The Confrontation Clause does not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second. In *Melendez-Diaz*, the Court specifically held: "Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the analysts at trial." [Citation.] (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

Thus, the United States Supreme Court has consistently rejected all contentions that would curtail the defendant's right to confront the forensic laboratory analyst who bears testimony against him or her.

2. The Limitations Inherent in Attempting to Admit the Results and Reports of Forensic Drug Tests Prepared by a Non-Testifying Analyst through the Procedural Vehicle of an Expert's Opinion Testimony

In addressing appellant's claim on this issue below, the Court of Appeal reasoned that the forensic results and reports in issue were properly relayed to the jury as the material upon which the laboratory director based his expert opinion and further reasoned there was no violation of appellant's confrontation rights because the analysts' reports were not themselves

admitted. (Slip opn., pp. 32-33.) The issue appellant has been asked to brief embraces such a scenario.

This Court summarized the relevant and settled law in this area in *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*). There, this Court explained that in California an expert may testify to an opinion based on material that is not admitted into evidence so long as the material is determined to be reliable. Subject to the trial court's discretion, the expert may also testify to the specific facts upon which his or her opinion is based, but that information is not relayed to the jury for the truth of the matter asserted.

Gardeley explained that expert testimony may "be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*Gardeley* (1996) 14 Cal.4th 605, 618, citing Evid. Code, § 801, subd. (b)[7].)

Gardeley, however, also emphasized that reliability of the material upon which the expert relies is a prerequisite: "Of course, any material that forms the basis of an expert's opinion testimony must be reliable. (1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 477, p. 448.) For

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[7] Evidence Code section 801, subdivision (b) states: "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 (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, 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."

'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' (*Kennemur v. State of California* [(1982) 133 Cal.App.3d 907], 923.)" (*People v. Gardeley*, *supra*, 14 Cal. 4th at p. 618.)

Gardeley explained further that so long as it is deemed to be reliable, the expert may rely on ordinarily inadmissible material to form the basis of his opinion testimony and to describe the material forming the basis of his opinion. *Gardeley* stated:

> So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to "state on direct examination the reasons for his opinion and the matter . . . upon which it is based," an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.] (*People v. Gardeley*, *supra*, 14 Cal. 4th at pp. 618-619.)

Gardeley also explained that the trial court has the discretion to weigh the probative value of the inadmissible evidence against the risk that the jury might consider that the inadmissible evidence was admitted for the truth of the matter asserted. In this regard, the trial court also has discretion to control the questioning of the expert witness.

> A trial court, however, "has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay." (*People v. Price* (1991) 1 Cal. 4th 324, 416.) A trial court also has discretion "to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might

> improperly consider it as independent proof of the facts recited therein." (*People v. Coleman* (1985) 38 Cal. 3d 69, 91.) This is because a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into "independent proof" of any fact. (*Korsak v. Atlas Hotels, Inc.* [(1992) 2 Cal. App. 4th 1516], 1524-1525, citing *Whitfield v. Roth* (1974) 10 Cal. 3d 874, 893-896; Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness (1986) U. Ill. L.Rev. 43, 66 ["evidence admitted solely to form the basis of an expert's opinion under [Federal Rules of Evidence] Rule 703 will not support a prima facie case"]; 2 McCormick on Evidence [(4th ed. 1992)] § 324.3, p. 373 and fn. 8 [same].) (*People v. Gardeley*, *supra*, 14 Cal. 4th at p. 619.)

These rules of evidence then allow supervising criminalists, such as Dr. Muto, to testify to facts in the forensic analysts' results and reports, subject to the trial court's discretion, but only as the source of his or her expert opinion and not for the truth of the matter asserted in them. Accordingly, the forensic analysts' results and reports are never transformed as the result of expert testimony into evidence of the truth of the matter asserted. The properly instructed jury therefore would never be able to use the information regarding the results of the forensic testing to prove the existence of the necessary nexus between the expert's opinion evidence and, e.g., the victim's condition at the time of death because the forensic laboratory results were never admitted into evidence for the matter asserted. Using the facts of this case as an example, in the absence of evidence that McDavid's blood contained alcohol and prescription drugs, where is the relevance of the expert's opinion that the amounts of each in his system comprised therapeutic dosages and that as the result of the cumulative effect of these drugs McDavid was either asleep or very sleepy when he was killed.

Given the decision in *Melendez-Diaz* and the Court's multiple expressions that reliability may only be assessed through cross-examination and that scientific testing is neither necessarily neutral nor reliable nor uniquely immune from risk of manipulation (see discussion preceding section), diligent defense counsel engaged in the effective representation of their client may be expected to object, citing *Melendez-Diaz*, to the reliability of the forensic analyst's results and reports forming the basis of the expert's opinion and then, when the analyst does not testify, in a related challenge object on the basis of lack of foundation and relevance to the expert's opinion testimony.

The expert's opinion may be based on inadmissible hearsay, but the inadmissible material must be demonstrably reliable. Given that the United States Supreme Court has expressly stated that the forensic laboratory results and report are testimonial and that reliability may only be assessed through confrontation, the trial court is faced with a conundrum in exercising its discretion. Does the trial court violate the Constitution by finding the forensic materials are reliable because the laboratory director can attest, e.g., that the results were produced in compliance with the laboratory's protocol or that the laboratory itself is certified when the United States Supreme Court has consistently rejected all attempts to establish evidentiary reliability through other indicia of trustworthiness in lieu of confrontation?

In *Crawford*, the Court spoke against the admission of testimonial statements conditioned on a rule of evidence or upon a judicial determination of reliability.

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to

> amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. (*Crawford*, 541 U.S. at pp. 61-62.)

Thus, in this area, there is a symmetry between Confrontation Clause jurisprudence and California's rules of evidence in restricting the jury's use of the forensic materials when they are inadmissible because their reliability is in issue. Under *Melendez-Diaz*, *Davis*, and *Crawford*, the forensic analysts' laboratory results and reports are not available to be used by the jury unless the prosecution produces the forensic analysts as witnesses or demonstrates their unavailability and that the defendant had a prior opportunity to confront them. Under California law, the supervising criminalist may testify to the results and report of the forensic analyst, but only if their reliability has been satisfactorily established. *Melendez-Diaz* states that reliability can only be assessed through cross-examination. In any event, the inadmissible materials are not available to be used by the jury to prove its case against the defendant. These restrictions on the use of the inadmissible material for the truth of the matter asserted reflect the law's regard for the integrity of the evidence made available for the jury's use in deciding a defendant's guilt or innocence and should be accorded due regard.

E. CONCLUSION

For the reasons set forth above, appellant respectfully submits she was denied her right of confrontation under the Sixth Amendment when the director of the coroner's laboratory testified to the results of drug test and reports prepared by four other criminalists.

II.

THE DECISION OF THE UNITED STATES SUPREME COURT IN *MELENDEZ-DIAZ V. MASSACHUSETTS* (2009) 557 U.S. ___ HAS RENDERED THE CONFRONTATION CLAUSE ANALYSIS IN *PEOPLE V. GEIER* (2007) 41 CAL.4TH 555 INVALID

This Court has asked appellant to comment on the effect, if any, upon *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*) of the decision of the Supreme Court of the United States in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527; 174 L.Ed.2d 314] (*Melendez-Diaz*). A review of the analyses in both cases establishes that *Melendez-Diaz* has removed the analytical cogency from *Geier*'s argument.

A. THE CONFRONTATION CLAUSE ANALYSIS FOLLOWED IN *PEOPLE V. GEIER*

In *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), the prosecution's DNA[8] expert Dr. Robin Cotton, the laboratory director for Cellmark, testified to her opinion that DNA taken from the victim matched a sample of the defendant's DNA. Dr. Cotton's opinion was based in part on testing that she did not personally conduct. Instead, a biologist in Cellmark's laboratory (Ms. Yates) performed the laboratory work required for completing the first of the three discrete steps in RFLP analyis.[9] On appeal, as relevant

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[8] DNA is deoxyribonucleic acid.

[9] The first step in RFLP (restriction fragment length polymorphism) involves the """(1) *processing* of DNA from the suspect and the crime scene to produce X-ray films [autorads] which indicate the lengths of the polymorphic fragments; (2) examination of the [autorads] to determine whether any sets of fragments *match*; and (3) if there is a match, determination of the match's *statistical significance*."" (*Geier*, *supra*, 41 Cal.4th at p. 594

here, the defendant claimed that Dr. Cotton's testimony violated his confrontation right within the meaning of *Crawford*. (*Geier*, *supra*, 41 Cal.4th at pp. 593-595.)

Geier held that scientific evidence contained in forensic reports, such as a DNA report, was not testimonial for purposes of *Crawford* and *Davis*. This Court reached this conclusion by finding that the reports comprised a contemporaneous recordation of observable events performed by the analyst within the scope of her employment; that the analyst's notes and reports were neutral and were not accusatory; and that they were made during a routine, non-adversarial process and were not intended to be incriminating. (*Id.*, at p. 607.)

This Court reasoned that a statement is testimonial if it contains these three characteristics: "if (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. Conversely, a statement that does not meet all three criteria is not testimonial." (*Id.*, at p. 605.)

Geier found the first and third prongs had been met because the Cellmark analyst who performed the tests was in an agency relationship with law enforcement and the testing was done for possible use at a later trial. The second prong – the description of a past fact related to criminal activity – however, had not been met. In *Geier*'s view, the DNA analyst's contemporaneous recordation of the observable events of the test she was conducting was analogous to the 9-1-1 caller's contemporaneous description

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fn. 11, quoting *People v. Venegas* (1998) 18 Cal.4th 47, 60, quoting *People v. Barney* (1992) 8 Cal.App.4th 798, 806.)

of an unfolding event in *Davis*, and so was not testimonial. (*Id.*, at pp. 605-606.)

In reaching this conclusion, *Geier* reviewed and found unpersuasive post-*Davis* cases holding that forensic laboratory reports were testimonial because their primary purpose was to establish a fact at trial regarding the defendant's guilt of the charged crime. Instead, *Geier* reasoned that the "crucial point" in *Davis* in discerning whether a statement is testimonial "is whether the statement represents the contemporaneous recordation of observable events." (*Id.*, at pp. 606-607.) "*Davis* confirms that the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made. We conclude therefore that the DNA report was not testimonial for purposes of *Crawford* and *Davis*." (*Id.*, at p. 607.)

In its analysis, *Geier* specified the following circumstances to be significant in concluding the forensic laboratory reports were nontestimonial:

> For example, Yates's [the biologist] report and notes were generated as part of a standardized scientific protocol that she conducted pursuant to her employment at Cellmark. While the prosecutor undoubtedly hired Cellmark in the hope of obtaining evidence against defendant, Yates conducted her analysis, and made her notes and report, as part of her job, not in order to incriminate defendant. Moreover, to the extent Yates's notes, forms and report merely recount the procedures she used to analyze the DNA samples, they are not themselves accusatory, as DNA analysis can lead to either incriminatory or exculpatory results. Finally, the accusatory opinions in this case – that defendant's DNA matched that taken from the victim's vagina and that such a result was very unlikely unless defendant was the donor – were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the

testifying witness, Dr. Cotton. (*Geier*, *supra*, 41 Cal.4th at p. 607.)

Geier found that the forensic analyst's notes were made "'during a routine, non-adversarial process meant to ensure accurate analysis," in which the analyst followed the laboratory protocol of recording each step of the DNA analysis. As a result, *Geier* reasoned that the forensic analyst's notes were neutral and not accusatory. (*Ibid.*, quoting *People v. Brown* (N.Y. Sup.Ct. 2005) 9 Misc.3d 420 [801 N.Y.S.2d 709, 712].) The analyst therefore did not "bear witness" against the defendant.

Based on these distinctions, *Geier* concluded that [r]ecords of laboratory protocols followed and the resulting raw data acquired are not accusatory" and that the forensic analyst's report was not testimonial for purposes of *Crawford* and *Davis*. (*Id.*, at pp. 607-608.)

Thus, under force of *Geier*'s reasoning, at least where forensic laboratory reports are concerned, the analysis as to whether a statement is testimonial or not is focused on the circumstances under which the statement is made. As this Court explained: "In our view, under *Davis*, determining whether a statement is testimonial requires us to consider the circumstances under which the statement was made. As we read *Davis*, the crucial point is whether the statement represents the contemporaneous recordation of observable events." (*Id.*, at p. 607.)

B. THE CONFRONTATION CLAUSE ANALYSIS FOLLOWED IN *MELENDEZ-DIAZ V. MASSACHUSETTS*

In *Melendez-Diaz*, which was decided after *Geier*, the United States Supreme Court held that forensic laboratory reports made for the

purpose of producing evidence for litigation – such as an analyst's assertion that a substance in the defendant's possession was cocaine of a certain weight – are testimonial evidence. (*Id.*, 129 S.Ct. at p. 2532.)

In *Melendez-Diaz*, the Massachusetts courts admitted into evidence affidavits reporting the results of forensic laboratory testing showing that the material linked to the defendant and seized by police was cocaine. In *Geier* and in appellant's case, the forensic laboratory reports were admitted through the testimony of the laboratory director. In the same way and to the same extent that the affidavits in *Melendez-Diaz* were accepted in that state's court as a surrogate for the forensic analyst's live testimony, the laboratory directors' testimonies in *Geier* and in appellant's case analogously functioned as surrogates for the testimonies of the forensic analysts.

Melendez-Diaz concluded the forensic analyst's reports were testimonial because they were made for the purpose of establishing or proving some fact, *viz.*, that the substance found in the defendant's possession was cocaine, which the Court characterized as "the precise testimony the analysts would be expected to provide if called at trial." *Melendez-Diaz*, *supra*, 129 S.Ct. at p 2532.) The Court also found that the forensic analysts were aware of the affidavits' evidentiary purpose under state law since the notice of same was reprinted on the affidavits themselves and further noted that the affidavits were made in circumstances that would lead any objective observer to reasonably believe they would be available for use at a later trial. (*Ibid.*)

Melendez-Diaz specifically held that the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without affording the accused an opportunity to "'be confronted

with' the analysts at trial." (*Id.*, at p. 2532, quoting *Crawford, supra*, 541 U.S. at p. 54.)

The Court said:

> In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the *Sixth Amendment*. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be "'be confronted'" with the analysts at trial. (*Crawford, supra*, at p. 54, 124 S.Ct.1354, 158 L.Ed.2d 177.) (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.)

C. A Comparative Review of Both Cases Shows That *Melendez-Diaz* Considered and Systematically Rejected All of the Bases *Geier* Relied Upon to Support Its Confrontation Clause Analysis

In deciding *Melendez-Diaz*, the Court quickly concluded the "certificates" (affidavits) of the forensic analysts were testimonial under *Crawford* and then turned its attention to explaining why a number of contentions raised by the parties and by the dissent had no proper place in Confrontation Clause jurisprudence. (See, *Melendez-Diaz, supra*, 129 S. Ct. at pp. 2531-2532.) Among the contentions considered and rejected by the Court are the very legal bases upon which *Geier* relied in reaching an outcome contrary to that reached by *Melendez-Diaz*. As a result, *Melendez-Diaz* has effectively removed all cogency from *Geier*'s analysis.

The most obvious difference of course is in the outcomes reached in the two cases. Where *Geier* concluded that forensic analysts' laboratory reports are not testimonial, *Melendez-Diaz* concluded the analysts

reports were testimonial statements and the analysts were witnesses for purposes of the Sixth Amendment. (*Geier*, *supra*, 41 Cal.4th at p. 607; *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

But of even more significance than these differing outcomes to this discussion on *Geier*'s continued viability are the following demonstrations that the analysis applied in *Melendez-Diaz* has not just undercut but has removed virtually all, if not all, cogency from the analysis followed in *Geier*.

First among these is *Melendez-Diaz*'s reliance in finding the forensic reports to be testimonial because they were made for the purpose of establishing or proving some fact, a factor the Court had identified in *Crawford*. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

In contrast, *Geier* considered and then expressly rejected an analysis that relied upon this analytical underpinning. *Geier* said: "[W]e find unpersuasive those cases, cited above, holding that under *Davis* various types of forensic evidence in the form of laboratory reports were testimonial because their primary purpose was to establish a fact at trial regarding the defendant's guilt of the charged crime." (*Geier*, *supra*, 41 Cal.4th at p. 606.)

Next, the mainstay of *Geier*'s analysis is that the forensic analyst's report is not testimonial because "the statement represents the contemporaneous recordation of observable events." (*Id.*, at p. 607.)

This precise contention was raised by the dissent in *Melendez-Diaz*[10] and expressly rejected by the majority of the Court, which observed

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[10] See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2551, dissent, Kennedy J. ["an analyst making a contemporaneous observation need not rely

that the dissent "misunderstands the role that 'near-contemporaneity' has played in our case law." The majority elaborated that the facts of *Davis* themselves disproved the dissent's position because in *Davis* the statements the Court determined were testimonial and therefore subject to the Confrontation Clause were so "near-contemporaneous" to the events the witness reported that the trial court admitted them in affidavit form as a "present sense impression." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.)

Geier also found the analyst's report was not testimonial because the Cellmark biologist generated her report and notes during a neutral, scientific process, by following a standardized scientific protocol she carried out as part of her job and not for the purpose of incriminating the defendant. (*Geier*, *supra*, 41 Cal.4th at p. 607.)

Once more, this precise contention was raised by the dissent[11] and expressly rejected by the majority in *Melendez-Diaz*: "This argument is little more than an invitation to return to our overruled decision in *Roberts* [citation], which held that evidence with 'particularized guarantees of trustworthiness' was admissible notwithstanding the *Confrontation Clause* [citation]." *Melendez-Diaz* elaborated upon its rejection of this contention with the reminder that the guarantee promised by the Confrontation Clause is reliability of evidence achieved through cross-examination alone. "What we

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on memory; he or she instead reports the observations at the time they are made. We gave this consideration substantial weight in *Davis*"].)

[11] See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2552, dissent, Kennedy J. ["But laboratory tests are conducted according to scientific protocols; they are not dependent upon or controlled by interrogation of any sort. . . . There is no indication that the analysts here – who work for the State Laboratory Institute, a division of the Massachusetts Department of Public Health – were adversarial to petitioner."]

said in *Crawford* in response to that argument remains true: 'To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the *Sixth Amendment* prescribes.'" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536, quoting *Crawford*, *supra*, 541 U.S. at pp. 61-62.)

Geier also reasoned that the forensic analyst's report was not testimonial but neutral because "DNA analysis can lead to either incriminatory or exculpatory results" and because the analyst's notes and reports were made during a routine, nonadversarial process that was not intended to incriminate. (*Geier*, *supra*, 41 Cal.4th at p. 608.)

Again, this particular factor and various permutations of it were considered and expressly rejected by *Melendez-Diaz*, which observed: "Nor is it evident that what respondent calls 'neutral scientific testing' is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536.) The Court further observed while there may very well be more effective ways of assessing the reliability of forensic testing, the Constitution guaranteed only one way – confrontation – which the Court lacked license to suspend. (*Ibid.*) The Court also offered the following explanation: "Contrary to respondent's and the dissent's suggestion, there is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology –

the features that are commonly the focus in the cross-examination of experts." (*Id.*, at p. 2538.)

To the extent, if any, that *Geier*'s analysis might be read to include contentions that the analysts were not witnesses and their statements not testimonial because they were not "conventional witnesses" because they conducted the testing by following a standardized scientific protocol in a nonadversarial setting in the course of their employment, or because they witnessed no crime nor human action related to the crime, or because their statements were not provided in response to police interrogation, these contentions also have been expressly rejected by *Melendez-Diaz*. (*Id.*, at p. 2535.)

With regard to another aspect of *Geier*'s analysis, *Geier* observed that RFLP analysis comprised three discrete steps – processing, matching, and statistical significance of the match – and then drew a distinction between the statements of the forensic biologist who performed the processing step and the testimony by Dr. Cotton who testified about the match between the DNA sample obtained from the sexual assault victim and the defendant's DNA and further testified such a result was unlikely unless the defendant was the donor. *Geier* reasoned for the reasons set forth above that the biologist's laboratory report from the processing step was nonaccusatory and therefore nontestimonial and that Dr. Cotton's testimony regarding the second and third steps – regarding the match and the statistical significance of the match was accusatory and testimonial and correctly presented by the testifying witness. (*Grier*, *supra*, 41 Cal.4th at pp. 594 fn. 11, 607.)

As appellant has explained above, *Melendez-Diaz* has expressly and specifically stated that forensic laboratory results are testimonial

statements and the analyst who creates them witnesses subject to the requirements of the Confrontation Clause. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.) Accordingly, the distinction perceived by *Geier* between nonaccusatory and accusatory stages of forensic laboratory testing and reporting does not exist.

Appellant here points out that to the extent, if any, that *Geier*'s parsing of the these laboratory steps into nonaccusatory and accusatory stages might somehow be construed to mean that *Geier*'s analysis sanctioned the admission of the evidence of the processing step through surrogate expert testimony,[12] as the court below did in appellant's case, *Melendez-Diaz*'s determination that the forensic analyst's report is testimonial and its creator a witness subject to the Confrontation Clause fully refutes such reasoning. (Appellant also respectfully refers the reader to Argument I in this opening brief where appellant explains why Confrontation Clause jurisprudence prevents the testimonial statements of one witness from entering into evidence through the in-court testimony of a second.)

Thus, those matters upon which *Geier* relied in concluding the forensic analyst's findings and report were not testimonial have been considered and rejected in *Melendez-Diaz*.

D. CONCLUSION

Appellant respectfully submits that the foregoing review of the analyses relied upon in both cases leads inescapably to the conclusion that the decision of the Supreme Court of the United States in *Melendez-Diaz v. Massachusetts* has rendered *Geier*'s Confrontation Clause analysis invalid.

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[12] See, e.g., *Geier*, *supra*, 41 Cal.4th at p. 608, fn. 13.)

CONCLUSION

For the reasons set forth above, appellant HELEN L. GOLAY respectfully submits that the trial court violated her right of confrontation under the Sixth Amendment when a supervising criminalist testified to the results and reports of drug tests prepared by other criminalists. Appellant further respectfully submits that the decision of the Supreme Court of the United States in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527, 174 L.Ed.2d 314], was decided in a manner that has removed all cogency from the analysis relied upon in *People v. Geier* (2007) 41 Cal.4th 555 with the result that *Geier*'s Confrontation Clause analysis has been rendered invalid.

DATED: 9 February 2010

Respectfully submitted,

JANYCE KEIKO IMATA BLAIR
Attorney by Appointment of the
Supreme Court for
Defendant and Appellant
HELEN L. GOLAY

CERTIFICATE OF WORD COUNT

Rule 8.520, subdivision (c)(1), California Rules of Court, states that a brief on the merits in the Supreme Court produced on a computer must not exceed 14,000 words including footnotes, but excluding the tables, the certificate of word count required by the rule, and any permitted attachment.

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DATED: 9 February 2010

JANYCE KEIKO IMATA BLAIR
Attorney by Appointment of the
Supreme Court for
Defendant and Appellant
HELEN L. GOLAY

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within entitled action. I am an employee of Bleckman & Blair, Attorneys at Law, and my business address is Suite 3 Ocean Plaza, 302 West Grand Avenue, El Segundo, California 90245.

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Executed on 11 February 2010, at El Segundo, California.

Janyce K. Blair

JANYCE KEIKO IMATA BLAIR
ATTORNEY AT LAW
State Bar No. 103600
Suite 3 Ocean Plaza
302 West Grand Avenue
El Segundo, CA 90245
Telephone: (310) 606-9262

Re: *People v. Rutterschmidt and Golay*
(S176213; B209568; LASC BA306576)

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MAILING LIST

VIA UNITED PARCEL SERVICE

1. Attorney General's Office
300 South Spring Street
Los Angeles, CA 90013

2. Helen Golay, Appellant
(Address omitted)

3. Court of Appeal
Second Appellate District
300 South Spring Street
Floor Two North Tower
Los Angeles, CA 90013