Case No. S177046

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VIRGINIA HERNANDEZ LOPEZ, Defendant and Appellant.	)	Court of Appeal Case No. D052885 Superior Court Case No. SCE274145

On Petition for Review from a Decision of the
Court of Appeal, Fourth Appellate District, Division One

ANSWER BRIEF ON THE MERITS

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CONTENTIONS

1. The appellant was 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 criminologist who did not testify at trial.

2. The error was prejudicial in light of the testimony of a supervising criminologist regarding the test results.

3. The decision of the United States Supreme Court in Melendez-Diaz v. Massachusetts 557 U.S. __, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) overruled this court's decision in People v. Geier (2007) 41 Cal.4th 555.

Procedural History[1]

Following a jury trial, defendant Virginia Lopez was convicted of one count of vehicular manslaughter while intoxicated (Pen. Code § 191.5, subdivision (b), a felony (CT 138, RT 1545-1546.) She was sentenced to the middle term of two years in prison. (CT 94, 140.)

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1 "CT" refers to the Clerk's Transcript. "RT" refers to the Reporter's Transcripts and "RBOM" refers to the "Respondent's Opening Brief on the Merits."

Lopez appealed from the conviction, asserting that the trial court had violated her rights under the Fifth, Sixth and Fourteenth amendments to the United States Constitution and the U.S. Supreme Court's decision in Crawford v. Washington 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) when it allowed testimonial evidence related to a purported blood draw to be admitted absent testimony by the analyst who tested the blood.

On May 11, 2009, Division One of the Fourth Appellate District affirmed the judgment citing this court's decision in People v. Geier (2007) 41 Cal.4th 555, 606-607 for the proposition that lab reports are non-testimonial business records not subject to Crawford's Confrontation Clause analysis. Lopez filed a Petition for Review to this court. The Petition was granted on July 22, 2009, with an order transferring the matter back to the Court of Appeal for reconsideration in light the U.S. Supreme Court's then-recent decision in Melendez-Diaz v. Massachusetts, supra, 557 U.S. ____, 129 S.Ct. 2527, 174 L.Ed.2d 314.)

On August 31, 2009, the Court of Appeal issued its published decision vacating its prior decision and reversing the judgment on the

grounds that Lopez's constitutional rights were violated by the admission of the blood-test evidence. The Court also found that the error was not harmless beyond a reasonable doubt. The People's Petition for Rehearing was denied, but its Petition for Review to this court was granted.

Statement of Facts

Facts related to the accident

Prosecution

On August 18, 2007, the defendant worked the evening shift bussing tables at the Rongbranch Restaurant in Julian. She worked from approximately 4:00 or 5:00 p.m. to 10:00 p.m. (RT 493-494.)

Defendant's co-worker Jorge Acosta also worked that evening. Bar manager Tamara McKay recalled that at around 5:30 p.m., Acosta was sitting at the end of the bar having a beer. She saw the defendant come into the bar area and lift Acosta's beer to her lips. She had just put the beer to her lips when McKay signaled her to stop, as she was working and there is a policy against employees drinking while they are working. (RT 504-505, 522.)

McKay also testified that, although it is against restaurant policy for employees to drink while working, at about 8:30 p.m., she (McKay), served two shots of tequila to Acosta (who was off-duty) and the defendant (who was on-duty). She saw the defendant drink the shot. (RT 506-509.) McKay saw the defendant have another shot and a sprite with Jorge at a few minutes after 10:00 p.m. (RT 511-513.) McKay, who is trained to look for signs of intoxication, noticed no signs of intoxication when the defendant left the restaurant. (RT 528, 532-535.)

Bartender Shawn Matheny testified that he served Jorge and the defendant two shots of tequila with sprite soda "backs" that night after her shift was completed, the first at around 9:45 and the second about a half hour later. The defendant drank both shots and soda "backs" and then left the restaurant shortly after drinking the second one. (RT 546, 549, 551-552, 553.)

Jorge Acosta testified that he bought the defendant two shots of tequila for himself and two for the defendant that night. The first set of shots was at around 10:40 and the second at around 10:45 p.m. They both drank the shots rapidly with sprite chasers. (RT 615-618.)

He did not order shots at around 8:30. (RT 608.) He did not buy any other alcohol for the defendant that night and he did not see her drink any other alcohol that night. (RT 619.)

At approximately 10:55 pm, Sandra Wolowsky was driving eastbound on SR 78 just west of Julian. The weather was clear and dry. SR 78 is a single lane in each direction, with the lanes separated by solid double lines. It is dark, with no streetlights in the area. This stretch of road curves slightly as it ascends toward Julian. Ms. Wolowsky was traveling about two car lengths behind her husband, Allan Wolowsky, who was diving a Toyota pickup. (RT 252, 254-256, 258, 304-305.)

Ms. Wolowsky watched as a vehicle (a white Ford Explorer), traveling west-bound approached them at what appeared to be a fast speed. The Explorer crossed over the double yellow lines into the east-bound lane, and struck her husband's pick-up, pushing it off the road and down an embankment. (RT 257-259, 261.) Ms. Wolowsky went to her husband's truck to try to see if he was alright but he was non-responsive and she could not get into the truck due to the damage. (RT 261-262.)

Local resident Quentin Porter, who happens to be a paramedic, heard the crash and responded. He found the defendant in the white Explorer. She appeared to have serious injuries, particularly to her face and left leg. After the defendant was removed from the vehicle, Porter, who is fluent in Spanish, accompanied her in the ambulance. He spoke to the defendant in Spanish. She told him she had been driving, she'd had a couple of drinks, she had been driving too fast, had lost control and has passed in the other lane and hit something. He smelled a slight smell of alcohol on her breathe. (RT 81-82, 97-99, 101-109.)

No field sobriety tests were done on the defendant due to her serious injuries. (RT 322.)

Allan Wolowsky was declared dead at the scene. (RT 249-250.) The cause of death was multiple blunt force injuries sustained in the crash. (RT 298.)

The defendant was air-lifted to Palomar Hospital where a blood draw was taken at 1:04 a.m., approximately two hours after the accident. (RT 395, 465, 562-566.) The sheriff's crime lab analyzed the blood and determined that the defendant's blood alcohol level was

.09 percent at the time it was drawn. (RT 465, 467.)

The prosecution's accident reconstructionist, Ernest Phillips, opined that, based on the physical evidence, the Toyota was traveling between 38 and 44 miles per hour and the Explorer was traveling between 68 and 75 miles per hour just before the collision. (RT 823-824.)

He also opined that the Ford Expedition, traveling west-bound on a curve, drifted slightly onto the right shoulder, and then the driver steered to the left into the oncoming lane, where it collided with the Toyota pickup which was traveling westbound in its own lane. (RT 808-809, 844-845.) Factors which likely contributed to the accident were unsafe speed for the conditions, intoxication and inattention. (RT 828, 842-843.)

Mr. Phillips also opined that because the vehicles were on a curve and a hill, if one or both vehicles had their high beams on, it would not have effected or contributed to the accident. (RT 828-829.)

It is sometimes possible to determine whether a vehicles headlights or high beams were on at the time of the collision by

examining the filaments. However, in this case Toyota truck was not impounded and so the lights could not be inspected. (RT 378-379.)

The prosecution's toxicologist, Dr. Treuting, opined that, given alcohol absorption and burn-off rates, and assuming that the defendant had had three shots of tequila, one at 8:30, one between 9:45 and 10:00 and another between 10:12 and 10:15, the defendant's blood alcohol level at the time of the crash was .12 percent. (RT 703-704.) Dr. Treuting also opined that given this figure, the defendant was under the influence of alcohol and impaired for purposes of driving, at the time of the accident. (RT 707-708.)[2]

Defense

The defendant is the mother of six children. (RT 859.) She has worked at the Rongbranch restaurant for twenty years and had driven the road between Julian and Santa Ysabel many times. (RT 859, 869).

She testified that on the day of the accident, she had worked two jobs: She got up at about 5:30 a.m. and worked at the Santa Ysabel Casino until about 3:00 p.m., then she went to work at the

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2 The evidence related to the blood draw will be set forth in detail in the argument section of this brief.

Rongbranch Restaurant from about 4:00 p.m. until about 10:15. (RT 852-855.) She did not eat between her two shifts. (RT 854.) She had a few chicken wings during her shift. (RT 875.)

She did not have a shot or any alcohol at about 8:30 p.m. Employees are not allowed to drink while they are working. (RT 855-856.) After she finished her shift at about 10:15, she had a shot of tequila which Jorge bought. (RT 855-857.) Later he bought and she drank a second shot. (RT 858.) She did not have any more alcohol. (RT 858.) She did not feel any effects from the alcohol when she left the restaurant. (RT 879.)

Right after the second shot, she left and got in her white Ford Expedition to drive home. (RT 858.) As she was driving home, she was just coming out of the curve and was close to the straight-away and driving at about 50 to 55 miles per hour when she saw headlights coming toward her. It looked as those the lights were coming into her lane. Then, the high beams of the oncoming vehicle came on. The oncoming car appeared to be half in her lane. She became scared and started to put on her brakes, then steered a little to the right. After that, she does not know what happened. She next remembers sitting

in her vehicle and she was in a great deal of pain. (RT 859-861, 881, 914-919 .)

Defense accident reconstructionist Stephen Plourd testified that the speed of the Ford Expedition just prior to the collision was between 50-53 miles per hour, and the speed of the Toyota was 40-45 miles per hour. (RT 951.)

The defense toxicologist testified that the victim, Allan Wolowsky, had a blood alcohol level of .11 percent at the time of the accident. (RT 944.)

LEGAL ARGUMENT

I.

LOPEZ WAS DENIED HER RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN THE TRIAL COURT ADMITTED INTO EVIDENCE A BLOOD-ALCOHOL REPORT PREPARED BY A CRIMINOLOGIST WHO DID NOT TESTIFY AT TRIAL

A. The Sixth Amendment guarantees a defendant the right to confront all witnesses against her

The Sixth Amendment of the United States Constitution, which is applicable to the states pursuant to the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." ". . . [T]his bedrock procedural guarantee applies to both federal and state prosecutions." (Crawford v. Washington, supra, 541 U.S. at 42.)

In Crawford, the United States Supreme Court traced the historical basis for the Confrontation Clause and noted that the Sixth Amendment must be interpreted consistently with its historical roots:

> . . . the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against he accused. (Crawford, supra 541 U.S at 50.)

The court noted that:

> [t]he text of the Confrontation Clause reflects this focus. It applies to 'witnesses' against the accused–in other words, those who 'bear testimony.' [citation]'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or providing some fact.' [citation] An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a causal remark to an acquaintance does not. ***The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.*** (Ibid. [emph. added]).

Crawford held that the Sixth Amendment does not permit the admission of "testimonial" statements of a witness who does not appear at trial unless he or she is unavailable to testify and the defendant has had a prior opportunity for cross-examination. (Id., at 53-54.) In rendering its decision in Crawford, the United States Supreme Court expressly overruled the rule previously set forth in

Ohio v. Roberts 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980) which conditioned the admissibility of all hearsay evidence on whether it falls under a hearsay exception or bears guarantees of trustworthiness. (Crawford, supra, 541 U.S. at 60-70; see also In Re Moore (2005) 133 Cal.App.4th 68, 75; People v. Taulton (2005) 129 Cal.App.4th 1218, 1222.)

Since the issuance of Crawford, both the federal and California Courts have recognized that Crawford announced a new rule of procedural constitutional law regarding the admission of testimonial evidence. (See, for example, People v. Cage (2007) 40 Cal.4th 965, 974, fn 4; Bockting v. Bayer (9th cir., 2005) 399 F.3d 1010, 1015.)

Although the Crawford court declined to provide a "precise articulation" or definition of "testimonial," it did acknowledge three formulations of this "core class of 'testimonial' statements: (1) *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," (2) "extrajudicial statements contained in formalized testimonial

materials, such as affidavits, depositions, prior testimony, or confessions," and (3) "***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.***" (Id, at 51-52.)

The Crawford court noted:

> "***[involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse–a*** fact borne out time and again through a history with which the Framers were keenly familiar. . . (Id., at 56, fn. 7 [emph. added].)

Since Crawford the Supreme Court has attempted to further clarify the definition of "testimonial". Its most recent pronouncement was in Melendez-Diaz v. Massachusetts, supra, 129 S.Ct. 2527, 174 L.Ed.2d 314, in which the court held that certificates of analysis attesting that the substance seized from the defendant was cocaine, which were admitted without live testimony, were "the functional equivalent" of live testimony and "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (Id. at 2532.)

Accordingly, the certificates were "testimonial" and admitted in violation of the defendant's right to confrontation.

B. The blood draw reports are testimonial

The People characterize the written evidence at issue here (Plaintiff's Trial Exhibit 18) as "a printout of data from a pre-programmed instrument" and contend that, as such, it is not "witness testimony" and therefore not "testimonial" within the meaning of Crawford. (RBOM, p. 15.) They further contend that the handwritten portion of the report, which is plainly not "instrument-generated", is nonetheless non-testimonial because it is merely a contemporaneous recordation of data. They are mistaken on both counts. As will be shown, the evidence is testimonial within the meaning of Crawford and Melendez-Diaz.[3]

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[3] Plaintiff's Exhibit 18 consists of six pages which collectively make up the "blood-alcohol report". The pages consist of one page of hand-written notes apparently prepared by the analyst, Jorge Peña, (who did not testify), a one-page "Forensic Alcohol Summary Report" which is signed by Jorge Peña, "Analyst" on September 4, 2007 and "Technically and Administratively Reviewed by M. Ochoa" (who also did not testify), on September 6, 2007; and four pages of printouts identified as "Forensic Alcohol Report" which include graphs and other numeric data. (Ex. 18.)

1. The hand-written first page of the report is indisputably testimonial

Preliminarily, the People's assertion that the "raw data" is non-testimonial because it is produced by a machine, rather than a human witness, disregards the obvious: the first page of the blood alcohol report was not produced by a machine at all; rather, it is a hand-written form, purportedly completed by an analyst named Jorge Peña.[4] The People do not dispute that Mr. Peña is a human.

There can also be no serious dispute that Mr. Peña was a "witness against" the defendant within the meaning of the Confrontation Clause. Specifically, the form apparently completed by Mr. Peña includes hand-written entries pertaining to tested specimens taken from multiple subjects. One line identifies "Lab Number 7737" as pertaining to the subject "Hernandez, Virginia".[5] The handwritten

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4 Peña's name does not appear anywhere on the hand-written form. The form does include initials which appear to be "JRP". Mr. Willey, a supervisor with the San Diego Sheriff's Crime Laboratory where Peña also words, testified that he is familiar with Mr. Peña's initials and that these are his. (RT 455, 466.)

5 Since the defendant's name is "Virginia Hernandez Lopez" the

entries indicate the type of specimen was blood, which was collected on August 19, 2007 at 1:04 a.m. (Ex 18, RT 464-465) and further indicates "0.090" in three different columns entitled "ETOH A grams %", "ETOH B grams %" and "Report ETOH grams %" respectively. The next column has initials followed by a date "8/31/07". (Ex 18.) Thus, taking the form at face value, it presents evidence that the defendant's blood alcohol was 0.09 percent at the time of the draw. Indeed, this is exactly what Mr. Willey, the supervisor, testified to. (RT 464-466.) Thus, Mr. Peña's handwritten conclusions, like the affidavits at issue in Melendez-Diaz, were plainly accusatory in that they provided evidence of an essential element of the crime–a blood alcohol level of .09 which, when coupled with the testimony of the toxicologist, provided prima facie evidence that the defendant was under the influence at the time of the accident.[6]

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identification of the sample as belonging to "Hernandez, Virginia" itself raises questions as to the accuracy of the analyst's notes.

6 The defendant was convicted of a single count of Vehicular Manslaughter while Intoxicated. One of the essential elements of that crime is that the defendant violated Vehicle Code section 23152 by driving under the influence of alcohol or by driving with a .08 percent or more alcohol in her blood. (CT 49.) The toxicologist testified that assuming a blood alcohol level of .09 at the time of the blood draw

The People's assertion that the purpose of the handwritten report was "to record the data; not to offer testimony against Lopez" (RBOM, p. 22) is meritless. The report was prepared by the Sheriff's crime lab specifically for use in the later prosecution of the defendant. The only reason to record the data was for use against Lopez.

Clearly, then, Peña, like the analyst in Melendez-Diaz, was a "witness against" the defendant who did not testify and was not shown to be unavailable.

The People attempt to circumvent the Confrontation Clause by arguing that the handwritten report is not testimonial because it was "merely a contemporaneous recordation of non-testimonial data contained in the printout" (RBOM, p. 15). This argument was expressly rejected by the Supreme Court in Melendez-Diaz. There, the majority dismissed the dissent's contention that an analyst's report which included "near-contemporaneous" observations of a test were somehow not subject to the Confrontation Clause. The majority

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(1:04 a.m.), the defendant would have had a blood alcohol level of .12 at 11:00 p.m., the time of the crash. He further opined that a person with a blood alcohol level of .12 is impaired for purposes of driving. (RT 704-709.)

disagreed on both the facts and the law. The court first noted that it was doubtful that the affidavits at issue could be considered "near contemporaneous observations" since the affidavits were not completed for nearly a week after the tests were performed. (Id., at 2535). The same is true here.

In this case, according to the hand-written report, the blood was drawn on August 19, 2007 and the analysis of the blood done twelve days later on August 31st. However the results of the blood draw were not entered on the hand-written log until five days later, on "9/5/07". These results were not "reviewed" until "9/6/07." (See top, left-side notation on hand-written report). Further, at the bottom center of the hand-written log, there is a stamped entry which states "Checked Sep 25, 2007". It is unclear what this entry relates to. Further, the second page of the report, identified as an "Alcohol Summary Report" was not signed by Mr. Peña until September 4, 2007, and it was not reviewed by M. Ochoa (whoever that is), until September 6, 2007. (Ex. 18.) Thus, like the reports in Melendez-Diaz, the report here was hardly "near contemporaneous".

That being said, even if it was contemporaneous, that fact would not exempt the report from the Confrontation Clause. The Melendez-Diaz majority notes that in Davis v. Washington 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the court had held that although a witness's statements regarding an alleged assault were "near contemporaneous" to the events she reported, such that they had been admitted by the trial court as a "present sense impression", "***we nevertheless held that they could not be admitted absent an opportunity to confront the witness***." (Melendez-Diaz, supra, 129 S.Ct. at 2535, citing Davis, supra, 547 U.S. at 830.)

This conclusion has been recently confirmed by Division Three of the Fourth Appellate District. In People v. Benitez (2010) 182. Cal.App.4th 194, the appellate court reversed a conviction for possession of methamphetamine, finding that the defendant had been denied his constitutional right to confrontation when the acting supervisor of the county's crime lab was permitted to testify, using another's analysis of the substance in the defendant's possession. There, as here, the non-testifying analyst's report was admitted at trial because it was a contemporaneous recordation of observable events.

But the Court of Appeal reversed, finding that Melendez-Diaz had found that even if an analysts' notes are contemporaneous with the testing, that fact would not alter the statements' testimonial character. "Thus, the contemporaneous nature of a laboratory report does not eliminate its testimonial nature." (Id., at 201.)

Here, then, the hand-written report, which is not "instrument generated", is plainly accusatory. On its face, the document shows that the information was not recorded contemporaneously with the testing, but even if it had been, contemporaneousness is not sufficient to defeat the Confrontation Clause. Accordingly, the hand-written log is testimonial and its admission violated defendant's right to confront witnesses against her in violation of the Confrontation Clause as interpreted by Crawford and Melendez-Diaz.

2. The "instrument generated raw data" is also testimonial

The People cite a number of pre-Melendez-Diaz cases in support of their assertion that "instrument generated raw data" is not testimonial because it is not testimony by a "witness". (RBOM, pp. 15-18) Again, they are mistaken.

In Melendez-Diaz, the court expressly rejected the proposition, championed by the respondent and the dissent, suggesting that the Confrontation Clause does not apply to testimony which is the "resul[t] of neutral, scientific testing" The majority characterized the argument as "little more than an invitation to return to our overruled decision in Ohio v. Roberts, supra, 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed.2d 597, which had held that evidence with 'particularized guarantees of trustworthiness" was admissible notwithstanding the Confrontation Clause.'" The high court noted that although there may be other ways to challenge or verify the results of forensic tests, "***the Constitution guarantees one way: confrontation***. We do not have licenses to suspend the Confrontation Clause when a preferable trial strategy is available". (Id., p. 2536.)

The court then reiterated its observation in Crawford:

> 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 2536, citing Crawford v. Washington, supra, 541 U.S. at 61-62 [emph. added].)

The Melendez-Diaz court went on to note that so-called "neutral scientific testing" is not necessarily neutral or reliable and is certainly "not uniquely immune from the risk of manipulation." (Melendez-Diaz, supra, 129 S.Ct. at 2536.) Indeed, the court spoke at length about serious and numerous problems with forensic evidence. Specifically, the court cited to a recent study by the National Academy of Sciences which found that forensic laboratories are often administered by law enforcement agencies and "forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, [and] ***they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency***." (Id., at 2536 [emph. added].) The Court concluded that:

> A forensic analyst responding to a request for a law enforcement official may feel pressure–or have an ***incentive–to alter the evidence in a manner favorable to the prosecution. Confrontation is one means of assuring accurate forensic analysis.*** . . . Like the eyewitness who has fabricated his account to the police, the analyst who provides ***false results*** may, under oath in open court, reconsider his false testimony. . . . And of course, ***the prospect of confrontation will deter fraudulent analysis in the first place. Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials.*** . . . One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concludes that invalid forensic testimony contributed to the convictions in 60% of the cases. (citing Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va.L.Rev. 1, 14 (2009.) (Id., at 2536-2537 [emph. added].)[7]

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[7] Indeed, during the pendency of this proceeding, serious problems were found to exist in a forensic crime lab utilized by the San Diego Sheriff's Crime Lab, the very agency which conducted the tests in this case. By separate motion, defendant requests this court to take judicial notice of an official Memorandum issued by Bonnie M. Dumanis, District Attorney for the County of San Diego on December 18, 2009, and directed to all "Defense Counsel, San Diego Deputy District Attorneys, and San Diego Deputy City Attorneys" advising that "It has recently come to the attention of the District Attorney and

It is apparent from this discussion that the high court did not intend for the constitutionally guaranteed right of confrontation to be narrowly construed to apply only to a forensic scientist's ultimate conclusion. Rather, the high court expressly included in its discussion the possibility that forensic methodology might be "sacrificed" in the interest of expedience, that forensic tests might be manipulated to reach a desired end, and that incompetence in the testing process might create invalid results. It follows that if the testing itself is improperly conducted for any reason, then the "instrument generated data" which is generated as a result of that

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the City Attorney that Pacific Toxicology Laboratories (hereinafter "Pac Tox"), ***the crime lab utilized by law enforcement to test blood and urine, has issues concerning reliability***. The San Diego Sheriff's Crime Lab who serves all of the law enforcement agencies within San Diego County (with the exception of the San Diego Police Department) ***has decided to no longer utilize Pac Tox for drug analysis of blood and urine samples***." The memorandum went on to disclose that over a period of several months in 2009, Pac Tox had reported incorrect results in a number of blood samples. (Req. Jud. Notice, Ex. A.) Although PacTox was apparently not involved in the testing in this case, it is significant that one of the crime labs utilized extensively by the agencies involved in this case suffered such serious reliability lapses, lapses which might have been (and might still be) revealed by cross-examination of the analysts.

faulty testing may itself be incorrect or invalid.[8] Melendez-Diaz holds that a defendant has a constitutionally guaranteed right to challenge not only the ultimate conclusions of the forensic scientist, but also to weed out fraud, incompetence and otherwise invalid forensic results (including the accuracy of instrument-generated data) in "the crucible of cross-examination."

As noted, the People rely on a number of pre-Melendez-Diaz cases for the proposition that instrument-generated data does not fall within the Confrontation Clause because the instrument is not a "witness" and does not "bear testimony against the defendant". But many of these cases are plainly irrelevant to the issue here for the very reason cited by the People: they involve evidence which does not "bear witness" against the defendant. In other words, they are not

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[8] It is not difficult to conceive of many different circumstances which might cause test results which are seemingly "neutral" on their face, to be invalid or dubious: for example, a sloppy, distracted, tired, lazy or ill analyst might improperly mix or measure ingredients, contaminate a sample or work area, mix up samples, transpose identifying numbers, miscalibrate an instrument or otherwise fail to follow procedures. As the Supreme Court acknowledged, more sinister circumstances might also result in invalid data: an analyst might, for example, manipulate results due to pressure from superiors, personal bias, vendetta, bribery or a desire for power.

"testimonial". The Confrontation Clause relates to evidence which was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (Crawford, supra, 541 U.S. at 51-52.) Therefore, instrument-generated data such as headers on computer images (U.S. v. Hamilton (10th Cir. 2005) 413 F.3d 1138, 1142-1143), fax banners (U.S. v. Khorozian (3rd Cir. 2003) 333 F.3d 498, 506), and phone billing or call records (U.S. v. Lamons (11th Cir. 2008) 532 F.3d 1251) are ordinary business records which are not created for use at a later trial, and would not be anticipated to be used in that manner. Accordingly, they are not "testimonial" and do not fall within the scope of the Confrontation Clause. This type of data is entirely distinguishable from the data at issue here, which is generated by a law-enforcement agency solely for the purpose of later use in the criminal prosecution of the defendant.

In an admirably creative attempt to avoid this critical distinction, the People assert that the instrument which generated the data here is an inanimate object that can have no "purpose." (RBOM, p. 22.) The fatal flaw in this argument is apparent: the "sole purpose"

of obtaining the data in the first place is for use in court as evidence against the accused. Although the machine has no consciousness regarding the future use of the data it generates, the person who runs the machine to obtain that data surely does. As Crawford and Melendez-Diaz held, evidence is testimonial when it supplies proof of a fact and is made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (Id., at 2532.)

Other cases cited by the People which support the notion that instrument-generated data which is created by law enforcement agencies for the purpose of aiding prosecution is not subject to the Confrontation Clause are simply wrong in that they conflict with the Supreme Court's subsequent holding in Melendez-Diaz. (For example, U.S. v. Washington (4th Cir. 2007) 498 F.3d 225, 232 concludes that machine-generated data regarding the defendant's blood draw is not subject to the Confrontation Clause because that data "did not involve the relation of a past fact of history as would be done by a witness." As is discussed at length above, Melendez-Diaz expressly rejected this notion that "contemporaneous" reports are

exempted from the Confrontation Clause. United States v. Moon (7th Cir. 2008) 512 F.3d 359 conflicts with Melendez-Diaz because it holds that the instrument-generated data is not testimonial and thus not subject to the Confrontation Clause. Melendez-Diaz reached the opposite conclusion, discussing at length the fact that even facially "neutral" data can be manipulated, and thus, is subject to the "crucible of cross-examination."

Finally, the People pin their hopes of evading the holding of Melendez-Diaz on Justice Thomas' concurring opinion, which they assert effectively narrows the scope of the holding to extrajudicial statements contained in "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." But they misconstrue the concurrence. Although Justice Thomas indicates that he joins the majority because the certificates are "quite plainly affidavits", he also joined (and does not withdraw from) the majority decision in Crawford, which expressly included in its formulation of the "core class of testimonial statements" any "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." (Crawford, supra, 541 U.S. at 51-52.) The forensic report here is clearly such a statement. Thus, though Justice Thomas restricts his concurrence to the facts before him in Melendez-Diaz, he has not disavowed his previous joinder in the broader inclusion of other types of testimonial statements.

II.

THE TRIAL COURT ERRED IN PERMITTING TESTIMONY BY THE SUPERVISOR BASED ON THE TEST RESULTS

A. The supervisor, testifying as an expert, could not testify to an opinion based on inadmissible testimonial reports

The People rely on Evidence Code section 801 to support the contention that it was permissible for Mr. Willey to testify as to the defendant's blood alcohol level based on the inadmissible testimonial blood test report. They are mistaken.

Evidence Code section 801 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:
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

> (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. [emph. added.]

As will be shown, in this context, the expert is precluded by law from using inadmissible, testimonial test results as a basis for an opinion as to the defendant's blood alcohol level.

The People cite several cases for the proposition that an expert is permitted to rely on hearsay evidence in support of his opinion. While it is generally true that experts are permitted to state opinions which are based, in part, on otherwise inadmissable hearsay evidence, the rule is limited and simply does not provide an all-encompassing "get out of the Confrontation Clause free card." As will be shown, it was error to allow Mr. Willey to testify to the results of the blood alcohol test under guise of "expert" testimony.

In People v. Thomas (2005) 130 Cal.App.4th 1202, 1210, relied upon by the People, the court stated:

> Crawford does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, ***the materials on which the expert bases his or her opinion are not elicited for the truth of their contents***; they are examined to assess the weight of the expert's opinion. ***Crawford itself states that the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted***." (Crawford, supra, 541 U.S. at p. 59 [124 S. Ct. at p. 1369, fn. 9], citing Tennessee v. Street (1985) 471 U.S. 409, 414 [85 L. Ed. 2d 425, 105 S. Ct. 2078].)

In Thomas, a detective who testified as a gang expert offered the opinion that the crime had been committed for the benefit of the E.Y.C. gang, (a necessary element to establish the alleged gang enhancement). The expert relied upon hearsay evidence that he had learned through casual, undocumented conversations with gang members, that the defendant was a member of E.Y.C., and his gang moniker was "Little Casper" or "Villain." Thomas held that the statements at issue were not offered to establish the truth of the matter asserted, but merely as one of the bases for the expert witness's opinion that the crime was committed for the benefit of the gang.

Because the statements were not used to prove the truth of the matter asserted, the Thomas court concluded, the confrontation clause, as interpreted in Crawford, did not apply and there was no error in the use of the hearsay statements.

Similarly, in People v. Sisneros (2009) 174 Cal.App.4th 142, 153-154, the court reached the same conclusion, specifically citing the same passage from Thomas cited above: that is, an expert may rely upon hearsay without offending the Confrontation Clause, so long as the ***use of testimonial statements is for purposes other than establishing the truth of the matter asserted.***

In Garibay v. Hemmat (2008) 161 Cal. App. 4th 735, a medical expert witness for the defense based his opinion on facts derived from his review of hospital and medical records. He had no personal knowledge of the information contained in the records. Summary judgment was granted in favor of the defendant. However, on appeal, the judgment was reversed. The appellate court noted that although medical records are hearsay, they can be admissible under the business records exception to the hearsay rule given proper authentication, but in this case the records had never been

authenticated or admitted. Therefore, they did not provide a proper basis for expert opinion:

> . . . 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.***" (People v. Gardeley (1996) 14 Cal.4th 605, 619) "Although experts may properly rely on hearsay in forming their opinions, ***they may not relate the out-of-court statements of another as independent proof of the fact.***" (Korsak v. Atlas Hotels, Inc. (1992) 2 Cal.App.4th 1516, 1524–1525.) Physicians can testify as to the basis of their opinion, but ***this is not intended to be a channel by which testifying physicians can place the opinion of out-of-court physicians before the trier of fact.*** (Whitfield v. Roth (1974) 10 Cal.3d 874, 895.) Through his declaration, Dr. Frumovitz attempted to testify to the truth of the facts stated in the declaration for an improper hearsay purpose, as independent proof of the facts. (Garibay v. Hemmat, supra, 161 Cal. App. 4th at 720-721 [emph. added; parallel citations omitted].)

Similarly, in U.S. v. Johnson (4th Cir. 2009) 587 F.3d 625, cited by the People in support of the proposition that experts may testify based on hearsay which is itself testimonial in nature, the court warned against admission of the very type of evidence that the People endorse here. In Johnson, gang experts opined that seemingly innocuous terms such as "tickets" and "tee shirts" which had been

used by informants in taped conversations which the experts listened to, were actually code words for narcotics. The experts testified that, based on their long experience in the field of drug communication, they were able to "decode" the conversations and reach the conclusion that the conversations were actually about drug transactions. The defense objected to the testimony on the ground that it violated the Confrontation Clause. The trial court allowed the testimony, concluding that the opinions expressed were based on a combination of the experts' own experience and the overheard discussions. However, the court also stated that it would not allow the expert to "come in here and testify to the things that would be classic hearsay testimony about what someone else in this case told him." The appellate court agreed and affirmed the judgment, finding that "where . . . expert witnesses present their own independent judgments, rather than merely transmitting testimonial hearsay, and are then subject to cross-examination, there is no Confrontation Clause violation." However, the Johnson court warned, trial courts must "***recognize the risk that a particular expert might become nothing more than a transmitter of testimonial hearsay and***

exercise their discretion in a manner to avoid such abuses" (Id, at 635 [emph. added].) In the case before it, the experts

> . . . never made direct reference to the content of those interviews or even stated with any particularity what they learned from those interviewed. Instead, each expert presented his independent judgment and specialized understanding to the jury. That understanding was not surprisingly the product of the accumulation of experience over many years of investigation of narcotics organizations . . . The fact that their expertise was in some way shaped by their exposure to testimonial hearsay does not mean that the Confrontation Clause was violated when they presented their independent assessments to the jury. because they did not become mere conduits for that hearsay, their consideration of it poses no Crawford problem." (Id, at 635-636.)

Here, in contrast, the testimonial statements (including the machine generated data) relied upon by Mr. Willey in expressing his opinion as to the defendant's blood alcohol level were utilized solely for purposes of establishing the truth of the matter asserted and Mr. Willey became a "mere conduit" for the conclusion contained in those hearsay reports. Mr. Willey's "opinion" that the defendant's blood

alcohol level was .09 was based solely on the report which had been created by another analyst. Absent those inadmissible reports, Mr. Willey would have been unable to express any opinion whatsoever about Ms. Lopez's blood alcohol level. As it was, his opinion was only as good as the tests themselves, but since the defendant was unable to cross-examine the person who conducted the tests, and that person did not testify, Willey's opinion was offered without affording the defendant any opportunity for meaningful cross-examination as to the accuracy of the test results. Thus here, unlike the scenario presented in Thomas, Sisneros and Johnson, the testimonial statements relied upon by the expert were directly used to establish the truth of the matter asserted: to wit, that the defendant's blood alcohol level was .09 percent, and the "expert" testimony, which was based solely on untested, unchallenged test results, was merely a conduit to admit otherwise inadmissible evidence. This case is thus very similar to Garibay, in which the expert opinion was found to be improper because it was dependent solely upon facts asserted in inadmissible hearsay reports.

Here, as in Garibay, the expert testimony was nothing more than an improper, back-door conduit to admit evidence precluded by both the hearsay rule and the Confrontation Clause. As such, it was itself inadmissible.

B. The requirements of the Confrontation Clause were not satisfied by the cross-examination of Willey

The People contend that the cross-examination of Willey was sufficient to satisfy the Confrontation Clause. It was not.

During his examination, Willey admitted that he "didn't have anything to do with this sample other than testify about it." (RT 469.) Although he testified that he is familiar with Jorge Peña, and indicated that he had trained him "most of the time", (RT 461), Willey did not testify as to how long Peña had been working at his job or how proficient he is at it. (RT 461-462.) Although Mr. Willey said that he is familiar with Peña's procedures and how he tests alcohol (RT 462), he had no personal knowledge relating to the procedures used to test this particular sample. In fact, he could not even say if Mr. Peña had been present at the time the actual testing was being completed and the results were being generated. (RT 468-

469.) Since Mr. Peña did not testify and Mr. Willey had no personal knowledge whatsoever about the testing of this particular sample, the defendant was utterly deprived of the opportunity to explore the types of concerns highlighted by the Melendez-Diaz court, such as possible manipulation of results or incompetence in the procedures used to obtain those results. As the Melendez-Diaz court emphasized, "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination . . . Cross-examination is designed to weed out not only the fraudulent analyst, but the incompetent one as well." (Id., at 2537). Cross-examination of Willey as to how the procedures are supposed to be conducted is simply no substitute for cross-examination of the analyst who conducted the tests as to how the procedures were actually conducted.

The People's reliance on Pendergrass v. State of Indiana 913 N.E. 2d 703 (2009) is misplaced. In that case, although the analyst who actually performed the tests did not testify, Ms. Black, the supervisor who did testify, had personally supervised and reviewed the work of the analysis who did the tests. Indeed, Ms. Black's own

initials appear next to the profiles of all three DNA samples at issue. Here, in contrast, Mr. Willey had no involvement whatsoever with the defendant's blood sample, and had no personal knowledge whatsoever about the quality or accuracy of Mr. Peña's results.

The People also look to footnote 1 of Melendez-Diaz, supra, 129 S.Ct. at 2532, which states: "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." The People assert that the testimony of the Supervisor, Mr. Willey, who did not participate in the testing of the defendant's blood, was sufficient to satisfy this "live testimony" requirement. (RBOM, p. 20-21.) But the People interpret these comments too broadly. Footnote 1 was made in response to a very narrow proposition raised by the dissent concerning the chain of custody. The issue here is not the "chain of custody, [gaps in which go to the weight of the evidence (Id,., p. 2532, fn. 1], authenticity of the sample or accuracy of the testing device." Rather, the issue here is the accuracy of the results of the

blood draw–an essential element of the charged crime--whether the analyst properly conducted the test, followed established procedures, and properly recorded and interpreted the results. These are questions that only the analyst can answer. And indeed, immediately preceding the footnote the Melendez-Diaz court stated, unequivocally, "***Absent a showing that the analysts were unavailable to testify at trial and that the petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial.***" (Id. at 2532 [underlined emph. in original; bond and italic emph. added].)

III.

MELENDEZ-DIAZ OVERRULED THIS COURT'S DECISION IN PEOPLE V. GEIER

The Supreme Court's decision in Melendez-Diaz implicitly overruled this Court's prior decision in People v. Geier (2007) 41 Cal.4th 555.

In Geier, this court held that scientific recordation made at the time the analysis is conducted is non-testimonial because "the crucial

point is whether the statement represents the contemporaneous recordation of observable events. (Id., at 607.) Accordingly, this court held that an in-court witness may rely on contemporaneous laboratory notes and reports prepared by a different analyst to support the witness's expert opinion. This court further held that scientific testing is "neutral" and is not necessarily incriminating to the defendant. (Id, at 607.) Melendez-Diaz rejects, and thus implicitly overrules Geier on both grounds.

As is discussed at length above, in Melendez-Diaz, the dissent relied on Davis, supra, 547 U.S. 813, (as did this court in Geier), for the proposition that "near-contemporaneous observations" were not "testimonial." After noting that it was doubtful whether the certificates at issue could be characterized as "near-contemporaneous" at all, the majority went on to reject the concept, finding that Davis actually *disproves* the dissent's position. The majority noted that in Davis, although the victim's statements to police regarding an alleged assault were "near contemporaneous" to the events she reported such that they had been admitted by the trial court as "present sense impression", "we nevertheless held that they

could *not* be admitted absent an opportunity to confront the witness." (Melendez-Diaz, supra, 129 S.Ct. at 2535, citing Davis, supra, 547 U.S. at 830.) Therefore, Melendez-Diaz expressly considered and rejected the contention that "near-contemporaneousness" renders a statement "non-testimonial". This holding undermines and implicitly overrules Geier, which was based on the same rational as was urged by the Melendez-Diaz dissent.[9]

As is also discussed above, Melendez-Diaz soundly rejected the notion that scientific testing of the type at issue here is "neutral", finding instead that it is prepared by law enforcement labs specifically for purpose of prosecution, that it is not "uniquely immune from the risk of manipulation", and that in fact, forensic scientists may be pressured to "sacrifice appropriate methodology for the sake of expediency" or to even "alter evidence in a manner favorable to the prosecution." (Melendez-Diaz, supra, 129 S.Ct. at 2536-2538.) Accordingly, to the extent that Geier concluded that forensic tests are

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[9] Moreover, as is discussed above, here, as in Melendez-Diaz, it is doubtful that the reports can even be characterized as "near contemporaneous" to the testing, since the results were not recorded until five days after the testing. (Ex. 18.)

"neutral" and thus non-testimonial, this rational has also been rejected by Melendez-Diaz.

IV.

THE ERROR IN ADMITTING THE BLOOD EVIDENCE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

Crawford error is subject to reversal unless it is harmless beyond a reasonable doubt. (People v. Cage (2007) 40 Cal.4th 965, 991, Chapman v. California 386 U.S. 18 [17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).) Here, it certainly was not. As is noted, one of the key issues in the case was whether or not the defendant was intoxicated at the time of the accident. Indeed, intoxication is an essential element of the only charge for which she was convicted.

The evidence as to how much alcohol the defendant had consumed the night of the accident was heavily disputed. Moreover, no field sobriety tests had been completed due to her serious injuries. (RT 322). Although there was evidence that there was an odor of alcohol on the defendant's breath, that fact establishes only that she

had drunk some alcohol; it does not establish how much alcohol she had consumed or whether she was under the influence of alcohol. No one who came into contact with the defendant that night testified that she appeared to be intoxicated. To the contrary, several witnesses at the restaurant, including the defendant's manager who is trained to look for signs of intoxication, testified that the defendant did not display any signs of intoxication. (RT 582, 528, 534-535, 556-557.) The defendant herself testified that she had had two shots of tequila before leaving work but that she did not feel any effects from the alcohol. (RT 855-858, 879) Therefore, the only evidence that she was intoxicated at the time of the accident was the blood draw evidence.

The prosecution's accident reconstruction expert opined that the crash was due to intoxication, inattention and driving at an unsafe speed. (RT 827-828.) But his conclusion that the defendant was intoxicated was based on his assessment that the failure to maintain a normal travel path is consistent with impairment. (RT 828.) He did not suggest that the other factors he mentioned, driving at an unsafe speed and/or driving inattentively, could not result in the same type of accident even with no impairment. (RT 828.)

Although the prosecution's toxicologist opined that the defendant's blood alcohol level at the time of the crash was .12 percent, this opinion was based on the blood draw evidence which was inadmissible, and on the assumption that the defendant had three shots of tequila, one at 8:30, one between 9:45 and 10:00 and another between 10:12 and 10:15, an assumption which was strongly disputed. (RT 703-704.)

The defendant testified that as she was driving home, she was just coming out of the curve and was close to the straight-away and driving at about 50 to 55 miles per hour when she saw headlights coming toward her. It looked as if those the lights were coming into her lane. Then, the high beams of the oncoming vehicle came on. The oncoming car appeared to be half in her lane. She became scared and started to put on her brakes, then steered a little to the right. After that, she does not know what happened. (RT 859-861, 881, 914-919.)

The defense toxicologist testified that the blood alcohol level of the victim, Allan Wolowsky at the time of the accident was .11 percent. (RT 944.)

In short, although expert testimony concluded that the accident occurred because the defendant lost control while driving at a fast speed and crossed the center line, additional evidence suggested that the victim, whose undisputed blood alcohol level was well over the legal limit, may have crossed over the center line prior to the defendant doing so, causing her to panic and lose control. Accordingly, although it is clear that at the time of the collision, the defendant's vehicle was out of its lane, it is not entirely clear which vehicle initially crossed the center line. More importantly, however, is the fact that, regardless of who crossed the line first, absent the blood draw evidence, the case was quite weak with respect to the critical question of whether the defendant was driving while intoxicated. Accordingly, the error in admitting the blood draw evidence was plainly not harmless beyond a reasonable doubt. Reversal is required.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the conviction be reversed.

Respectfully submitted,

DATED: 5/15/11

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By: _____

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CERTIFICATE OF WORD COUNT

The undersigned certifies that this Brief contains 9,042 words, as counted by the WordPerfect word processing program used to generate this brief.

DATED: 5/5/10

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Whitefish, Montana on this 5th day of May, 2010.

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