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.

Case No. S176213

Second Appellate District, Division Five, Case No. B209568
Los Angeles County Superior Court, Case No. BA306576
The Honorable David S. Wesley, Judge

ANSWER BRIEF ON MERITS

EDMUND G. BROWN JR.
Attorney General of California
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
STEVEN D. MATTHEWS
Supervising Deputy Attorney General
DAVID E. MADEO
Deputy Attorney General
State Bar No. 180106
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-4925
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Plaintiff and Respondent

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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] (*Melendez-Diaz*) affect this Court's decision in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*)?

INTRODUCTION

In two separate incidents, appellant Helen Golay and codefendant Olga Rutterschmidt drugged and murdered two homeless men to collect their life insurance benefits. A toxicology analysis of the blood of one of the victims revealed the presence of alcohol and prescription sedative and pain-relief drugs. The laboratory director for the coroner's department testified about the procedure and accuracy of the results of these toxicology reports. The trial court admitted the testimony under the business-records exception to the hearsay rule.

The Court of Appeal upheld the trial court's ruling and affirmed Golay's conviction. Relying on *Melendez-Diaz*, the Court of Appeal held that there was no confrontation clause violation here because the written reports containing the testing results were not introduced into evidence. Rather, the prosecution witness, an expert who had personally reviewed the reports and was fully qualified to interpret and explain them, offered live testimony subject to cross-examination as to the results.

STATEMENT OF THE CASE

On November 8, 1999, Paul Vados was run over by a car and killed. On June 21, 2005, Kenneth McDavid was also run over by a car and killed. On May 18, 2006, following a joint LAPD-FBI task force investigation, Golay and Rutterschmidt were arrested for killing the victims to collect several million dollars in life insurance benefits. (See 7RT 1665-1666.) The Los Angeles County District Attorney charged Golay with conspiracy and two counts of special-circumstance murder. (Pen. Code, §§ 182(a)(1), 187(a), 190.2(a)(1), (a)(3).)[1] (6CT 1330-1346.)

During Golay's trial, the prosecution sought to prove that Golay and Rutterschmidt secured apartments for two destitute men, McDavid and Vados, took out several million dollars in fraudulent insurance policies on the victim's lives, and then murdered them to collect the policy benefits. McDavid and Vados were each killed by a car that ran over them in a deserted alley at night. The prosecution linked the car that killed McDavid to both Golay and Rutterschmidt.

Because the victims were struck as they lay down on the street, as opposed to being struck while standing upright, the prosecution sought to establish that McDavid had been drugged before he was murdered.[2] The prosecution sought to admit evidence, through the testimony of an expert, that blood samples taken from McDavid's body during an autopsy contained certain drugs. Joseph Muto, the laboratory director for the Department of the Coroner, testified that he supervised the work of the laboratory analysts and was familiar with their qualifications and training. He explained that blood samples collected by the coroner during an autopsy

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[1] Codefendant Rutterschmidt was also charged with murder and conspiracy to commit murder. (6CT 1330.)

[2] Blood samples from Vados's body were not available.

were booked into evidence and made available to analysts for testing. Several analysts typically worked on any particular case, and their work was supervised through administrative review and peer review, which consisted of a second evaluation of laboratory findings to determine whether there was enough information to reach the stated conclusion. (6RT 1210-1214.)

When the prosecutor asked about the toxicology screening that was conducted on McDavid's blood samples on July 13, 2005, and July 21, 2006, Golay's counsel objected. Defense counsel argued that Golay was entitled under the Sixth Amendment to have the person who actually conducted the analysis testify and be subject to cross-examination. (6RT 1214-1215.) The prosecutor argued that, as Muto was familiar with all criminalists in his laboratory and personally signed off on their reports, the supervisor's testimony was sufficient to admit the toxicology results as business records[3] and because Muto had personal knowledge of the toxicology analyses and results. (6RT 1215.) The trial court instructed the prosecutor to lay the proper foundation for the reports as business records and overruled the objection. (6RT 1215-1216.)

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[3] Evidence Code section 1271 sets out the business records exception to the hearsay rule:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or even if: (a) The writing was made in the regular course of a business; (b) The writing was made at or near the time of the act, condition, or event; (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Muto testified that the July 13, 2005, and July 21, 2006, reports reflected the work of four different analysts, who documented instrument-generated data as they reviewed the particular samples in the forensic laboratory. The toxicology results were peer-reviewed by other laboratory analysts and sent to clerical staff to prepare a final report. Muto then reviewed the final report to ensure that the proper procedures and peer-review had occurred. After his approval, Muto sent the final report to the deputy medical examiner. (6RT 1216-1219, 1234.) Muto found that the analysis contained in the July 13 report was completed in the normal course of business and that the proper reporting procedures had been followed. Also, the report was generated at or near the time of analysis. (6RT 1219-1220.) The trial court again overruled Golay's objection to Muto's testimony on the toxicology screening results. (6RT 1220-1221; see also 6RT 1238.)

Muto then testified that the July 13 toxicology screening of McDavid's blood detected the presence of alcohol, the prescription sedative drug zolpidem, and the prescription pain-reliever hydrocodone. The amount of zolpidem, a potentially powerful sleep aid, in McDavid's blood was within therapeutic levels, and the level of hydrocodone was higher than the expected therapeutic level for the drug. (6RT 1221-1225, 1235.) Muto also testified that the July 21 report on McDavid's toxicology screen, which was generated in the regular course of business and at or near the time that the analysis was conducted, indicated the presence of the prescription anti-seizure drug topiramate. Muto testified that the toxic effects of topiramate include sedation and dizziness and that the drug levels found in McDavid's blood represented a "high therapeutic dose." (6RT 1226-1229, 1235.)

Forensic pharmacologist Dr. Vina Spiehler, who reviewed the toxicology reports, testified that several of the substances found in

McDavid's blood would cause confusion and drowsiness. In combination, these sedative effects would be additive. (14RT 3624-3632.)

Golay was found guilty as charged. (6CT 1375-1388, 1505-1517.) The trial court sentenced her to prison for two consecutive terms of life without the possibility of parole for the murder counts and imposed and stayed 25-year-to-life terms on the conspiracy counts.[4] (7CT 1691-1695.)

Golay appealed, contending that the admission of testimony by the laboratory director of the Department of the Coroner as to the presence and quantity of various prescription drugs and alcohol found in victim McDavid's blood samples violated her right to confront adverse witnesses under the Sixth Amendment. The Court of Appeal held that there was no confrontation clause violation and affirmed the judgment. (Opn. at 26-34.) Noting that the written reports containing the testing results were not introduced into evidence, the Court explained that the prosecution expert offered live testimony that was subject to cross-examination as to the results. (Opn. at 26-33.) The Court of Appeal further found that any error would have been harmless because, even without reference to the drugs, the prosecution established beyond a reasonable doubt that Golay murdered McDavid. (Opn. at 33-34.)

On December 2, 2009, this Court granted Golay's petition for review.[5]

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[4] Rutterschmidt was also convicted and received an identical sentence. (6CT 1492-1504; 7CT 1697.)

[5] This Court denied Rutterschmidt's petition for review on the same date.

SUMMARY OF ARGUMENT

The Court of Appeal correctly found that the trial court did not violate Golay's Sixth Amendment right to confrontation. The laboratory director of the coroner's department testified as an expert witness as to the results of the toxicology analysis conducted on the blood samples of one of the victims. The laboratory director properly relied on the raw data in the reports, whether or not that data was itself "testimonial" under the confrontation clause, in support of his expert opinion. The expert's live testimony was subject to cross-examination by the defense as to the testing results and procedures, thus satisfying the requirements of the confrontation clause. In any event, the raw data of the toxicology results was "non-testimonial," not subject to confrontation under the Sixth Amendment, because such data does not amount to testimony given by a witness.

Melendez-Diaz did not change or invalidate the long-standing rule, codified in Evidence Code section 801, subdivision (b), that an expert witness may rely upon such test results in forming opinion testimony. Thus, *Melendez-Diaz* does not conflict with the conclusion reached by this Court in *Geier*, at least insofar as *Geier* applies to a live expert offering an opinion on the test results. Where an expert witness testifies concerning the results and reliability of such forensic testing, and where the testing reports were not admitted into evidence, the confrontation clause is satisfied.

In any event, any error here was harmless beyond a reasonable doubt. Even without the evidence of the toxicology analysis of McDavid's blood, there was overwhelming evidence proving that Golay conspired to murder, and murdered, McDavid and Vados.

ARGUMENT

I. GOLAY'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS NOT VIOLATED BY THE EXPERT WITNESS'S TESTIMONY ON THE TOXICOLOGY ANALYSIS

Although the Sixth Amendment guarantees a criminal defendant the right to confrontation and cross-examination, it does not apply to all hearsay evidence. Rather, the confrontation right pertains only to "testimonial" statements of "witnesses." An expert witness may rely on hearsay evidence, such as scientific testing reports, to provide an opinion through testimony of the results of such testing. Accordingly, the admission into evidence of the laboratory director's expert opinion, which relied on the raw data of the toxicology analysis results, did not violate Golay's Sixth Amendment rights.

A. The Admission of Expert Testimony in Reliance on Scientific Evidence Does Not Violate the Sixth Amendment Confrontation Right

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him[.]" (U.S. Const., Amend. VI.) Under prior Sixth Amendment jurisprudence, the admissibility of an out-of-court statement depended upon its reliability. (See *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597].) But, in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 36, 158 L.Ed.2d 177] (*Crawford*), the United States Supreme Court abandoned the reliability analysis in favor of an inquiry into whether the witness's statement is "testimonial." Although the high court declined to set out a comprehensive definition of "testimonial," it provided illustrations of statements that would fall into this category. The Court explained that "testimonial" statements include "'ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits,

custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"; "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'"; "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'"; and statements made in interrogations by law enforcement agents. (*Crawford*, *supra*, at pp. 51-52.) At the very least, "'testimonial'" means "testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." (*Id.* at p. 68.)

In *Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*), the United States Supreme Court provided additional guidance narrowing the scope of what qualified as "testimonial":

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In *Davis*, the Court held that a statement made by a domestic violence victim to a 911 operator did not fall within the definition of "testimony," in that it was not made to detail some past event. (547 U.S. at p. 826.) Rather, the victim described the events as they were occurring in an ongoing emergency, and the 911 operator's questions were asked in an effort to resolve the emergency. (*Ibid.*) Therefore, the Court held that the victim was not testifying, but rather was announcing an emergency and seeking help.

In *Hammon v. Indiana*, a case consolidated with *Davis*, the Court concluded that the victim's statement was testimonial. (*Davis*, *supra*, 547 U.S. at pp. 829-830.) In that case, the police responded to the scene of a reported domestic disturbance and found the victim alone and appearing frightened. The victim told the officer that her husband attacked her. The officer had the victim fill out and sign an affidavit. (*Id.* at pp. 819-820.)

The Court found that the interrogation was clearly part of an investigation into possibly criminal past conduct, which the testifying officer expressly acknowledged. There was no emergency in progress; the officer "was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.'" Thus, the primary, if not the sole, purpose of the interrogation was to investigate a possible crime, rendering the statements testimonial. (*Davis*, *supra*, 547 U.S. at pp. 829-832.)

In *People v. Cage* (2007) 40 Cal.4th 967, this Court summarized *Davis*'s principles:

> First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out of court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the purpose ascribed to testimony–to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined "objectively," considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency,

> rather than to produce evidence about past events for possible use at a criminal trial.

(*People v. Cage*, *supra*, 40 Cal.4th at p. 984, fns. omitted, italics in original.)

Next, in *Melendez-Diaz*, the United States Supreme Court considered whether testimonial evidence might include the results of some forensic testing. In that case, the defendants were arrested on suspicion of drug dealing, and the police submitted suspected drug samples to a state laboratory that was required, under Massachusetts law, to test samples upon police request. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2530.) At trial, in lieu of live testimony, the prosecution submitted three "certificates of analysis," sworn to before a notary public and signed by the crime laboratory analysts, stating that material seized by police and connected to the defendant was cocaine. (*Id.* at p. 2531.)

The Supreme Court held that the admission of the certificates violated the defendant's Sixth Amendment right to confront the witnesses against him. The Court held that the certificates, despite their label, were in fact affidavits, i.e., "'declarations of fact written down and sworn to by the declarant before an officer authorized to administer oaths' [citation]." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.) The certificates, the Court continued, were the functional equivalent of live testimony because they asserted "the precise testimony the analysts would be expected to provide if called at trial." The documents were "functionally identical to live, in-court testimony," and their sole purpose was to provide evidence against the defendant. (*Ibid.*) The *Melendez-Diaz* Court characterized its opinion as a "rather straightforward application of our holding in *Crawford*." (*Id.* at p. 2533.)

Melendez-Diaz, however, was a five-to-four decision, in which Justice Thomas explained that he concurred in the majority opinion only

because the certificates of analysis were "quite plainly affidavits" and thus fell '"within the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).) Justice Thomas explained that the confrontation clause is limited to "extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions." (*Ibid.*, internal quotations and citation omitted.)

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' [Citation.]" (*Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d 260], omission in original.) "When there is no majority opinion, the narrower holding controls. [Citation.]" (*Panetti v. Quartermain* (2007) 551 U.S. 930, 949 [127 S.Ct. 2842, 168 L.Ed.2d 662].) Therefore, the concurrence of Justice Thomas provides the holding of the case in *Melendez-Diaz*. At the very least, it provides a firm basis for distinguishing *Melendez-Diaz* from cases that do not involve formal affidavits.

B. The Laboratory Director's Testimony Satisfied the Requirements of the Confrontation Clause

The testimony of the laboratory director as the prosecution expert satisfied the requirements of the confrontation clause. Evidence may be admitted through expert testimony, and an expert may base his opinion on hearsay whether it is "testimonial" or not. The availability of an expert for cross-examination satisfies the requirements of the right to confrontation. Unlike in *Melendez-Diaz*, where no witness was called to testify in connection with the sworn certificates, Muto testified here as the supervising director for the laboratory where the analysts recorded the data

in the toxicology reports. Further, Muto was cross-examined by Golay's counsel, as well as by codefendant Rutterschmidt's counsel. (6RT 1230-1236.)

1. The Laboratory Director, Testifying as an Expert, Properly Could Rely on Testimonial or Non-Testimonial Hearsay in Forming His Opinion

Because forensic evidence "is not uniquely immune from the risk of manipulation," *Melendez-Diaz* holds that confrontation is required for evidence involving scientific testing. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.) Confrontation "is one means of assuring accurate forensic analysis." (*Id.* at p. 2536.)

But *Melendez-Diaz* did not invalidate statutes like Evidence Code section 801, subdivision (b), which provides for the admission of evidence through expert testimony. (*United States v. Turner* (7th Cir. 2010) 591 F.3d 928, 934 ["*Melendez-Diaz* did not do away with Federal Rule of Evidence 703"].) An expert may base his opinion on any material, "whether or not admissible," reasonably relied upon by experts in the field in forming their opinions; and, if questioned, the expert may relate the basis on which he formed his opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; Evid. Code, § 801.) Such expert-opinion testimony is permissible because the expert is present and available for cross-examination. (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 154; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*People v. Sisneros*, *supra*, at pp. 153-154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; accord, *State v. Bethea* (2005) 173 N.C. App. 43, 54-58 [617 S.E.2d 687].)

California courts have long held that experts may testify based on hearsay that may itself be testimonial in nature. (E.g., *People v. Thomas*, *supra*, 130 Cal.App.4th at pp. 1208-1210.) Even after *Melendez-Diaz*, courts continue to reach the same conclusion. (E.g., *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 634-637; *Haywood v. State* (2009) 301 Ga.App. 317 [2009 WL 4827842 at * 5]; *State v. Lui* (2009) 153 Wash.App. 304, 318-325 [221 P.3d 948]; *People v. Johnson* (Ill. App. 2009) 915 N.E.2d 845, 851-854.) As the court explained in *United States v. Johnson*:

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

(*United States v. Johnson*, *supra*, at p. 636, quoting *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538.)

A situation analogous to the instant case was presented to the Washington Court of Appeals in *State v. Lui*. There, the appellate court held that testimony by a pathologist's supervisor, and by the director of the DNA lab who reviewed the work of technicians who performed the tests, was not rendered inadmissible by *Melendez-Diaz*. (*State v. Lui*, *supra*, 221 P.3d at pp. 955-959.) The court noted that, in *Melendez-Diaz*, certificates were used in lieu of live testimony whereas, in the case before it, the jury heard testimony from two experts. (*Id.* at pp. 955-956.) Further, the court observed that the disputed evidence in *Melendez-Diaz* was a "bare bones" affidavit that said nothing about the testing methods or the tests conducted. In *Lui*, by contrast, the experts testified extensively about their experience and training, as well as about the tests performed in the defendant's case. Thus, "the very live testimony absent in *Melendez-Diaz* was present." (*Ibid.*) Additionally, the court observed that nothing in *Melendez-Diaz*

changed the general rule that an expert may rely on otherwise inadmissible facts, including testimonial statements, as a basis for the expert's opinion. (*Id.* at pp. 956-957.) Finally, the defendant had the "full opportunity to test the basis and reliability of the experts' opinions and conclusions 'in the crucible of cross-examination.'" (*Id.* at p. 959, quoting, *Crawford*, 541 U.S. at p. 60; accord, *People v. Johnson*, *supra*, 915 N.E.2d at p. 854 [the experts "each testified in person as to their opinions based on the DNA testing and were subject to cross-examination"].)

Nothing in *Melendez-Diaz* conflicts with this analysis. *Melendez-Diaz* did not hold that a defendant's confrontation rights are satisfied only if every person who provides a link in the chain of information relied upon by a testifying expert is available for cross-examination. Nor does it require that the prosecution call every person who can offer information about a forensic analysis. Rather, the United States Supreme Court stated that the defendant must be able to challenge the "honesty, proficiency and methodology" of the analyst who did the laboratory work in order to "weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2537-2538.) There is no logical reason why the confrontation clause is not satisfied in this regard where the testifying witness possesses sufficient qualifications and knowledge about the forensic testing process and test results, about the sufficiency of the training received by the original analyst, about what tests were performed, whether those tests were routine, and the skill and judgment exercised by the testing criminalist. (*Ibid.*)

This reading of *Melendez-Diaz* is consistent with *Crawford*'s observation that the purpose of the confrontation clause is "to ensure reliability of evidence" by exposing it to the "crucible of cross-examination." (*Crawford*, *supra*, 541 U.S. at p. 61.) The confrontation clause is satisfied if a defendant can adequately test the reliability of a

scientific conclusion or result by engaging in cross-examination. The identity of the expert cross-examined is and should be beyond the purview of the Constitution. (See *United States v. Turner*, *supra*, 591 F.3d at p. 933 ["'the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself'"], quoting *United States v. Moon* (7th Cir. 2008) 512 F.3d 359, 362.)

2. The Requirements of the Confrontation Clause Were Satisfied by Allowing Golay to Cross-Examine the Laboratory Director

The availability of Muto, essentially the internal reviewer of each of the toxicology reports, for cross-examination addressed each of the confrontation clause concerns posed by the United States Supreme Court. Golay had ample opportunity to cross-examine Muto about the test results, the general procedures for performing the tests, the documentation of those results, the collection and preservation of samples, and any other issue she deemed appropriate. Indeed, defense counsel cross-examined Muto at length about all of these issues. (6RT 1230-1236.)

Muto was clearly qualified to testify as to the nature of the laboratory testing both generally and as was specifically done in McDavid's case. As the laboratory director for the Department of Coroner, he supervised the work of the laboratory analysts through peer and administrative review. Muto was familiar with qualifications, background, and training of each analyst who performed work in this case. Before becoming the chief forensic analyst, Muto was a chemist for 17 years. He had 33 years experience in the field of analytical toxicology, including 23 years with the Department of Coroner. Muto was a diplomate with both the American Board of Criminalistics and the American Board of Forensic Toxicology, and he was certified by the state as a forensic blood alcohol analyst. (6RT 1210-1214.)

Since Muto was responsible for ensuring that the proper procedures and peer-review had occurred during the preparation of each of the toxicology reports, he was arguably the best witness to cross-examine to determine if there was an issue of experience, training, or judgment. Indeed, Muto testified that the documentation on these reports consisted largely of "instrument generated analytical data." (6RT 1217.) In context, it seems clear that the analysts' role was to read data from a recording instrument and transfer it to a report. Thus, there would be little gained from cross-examining the analysts who physically recorded this data.

As the laboratory director and reviewer of the test results, Muto was equally capable, if not more capable, of addressing Golay's concerns than analysts whose testimony presumably would have been based entirely on the written report. (See *Geier*, *supra*, 41 Cal.4th at p. 602.) Nothing in *Melendez-Diaz* precluded Muto from relying upon the analysts' test results in forming his opinion. And, "[b]ecause [Muto] was a highly qualified expert employed by the lab who was familiar with the particular lab procedures and performed the peer review in this particular case, then gave an independent expert opinion, h[is] presence was sufficient to satisfy [Golay's] right to confrontation." (*State v. Williams* (2002) 253 Wis. 99, 116 [644 N.W.2d 919].)

Muto explained that several analysts conducted testing on the samples. In performing each toxicology test, the testing instrument itself would generate the analytical data. The analyst who performed each test was responsible for noting the results corresponded to the sample received from a particular coroner's case. In McDavid's case, the four analysts who tested the coroner's samples prepared a contemporaneous preliminary report with the testing results, which were then subject to peer review. After review and approval, the laboratory's clerical staff entered the data

into a computer program and generated two final reports, dated July 13, 2005, and July 21, 2006. (6RT 1216-1219.)

Muto verified that the analysis in the July 13 report had been peer reviewed. He then verified that the testing had been performed according to laboratory procedures and standards before checking the reports for accuracy. Muto testified that the July 13 report showed that McDavid's blood sample tested positive for alcohol, zolpidem (a prescription sedative drug), and hydrocodone (a prescription pain reliever). (6RT 1217-1225, 1235.) A different supervising criminalist performed the administrative review of the July 21 report, which showed that McDavid's blood contained the prescription drug topiramate. (6RT 1227-1229, 1235.)

Muto's testimony constituted his independent opinion as an expert. It was a far cry from the "bare bones" written affidavits, found inadmissible in *Melendez-Diaz*, which merely set forth the ultimate conclusion, under oath, that the tested substance contained cocaine. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2531.)

A defendant's Sixth Amendment right to cross-examination is satisfied as long as the opportunity for cross-examination is adequate – that is, as long as the "defense is given a full and fair opportunity to probe and expose. . . infirmities [in testimony] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness's testimony." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 22 [106 S.Ct. 292, 88 L.Ed.2d 15].) Although "the main and essential purpose of confrontation is to secure for the [defendant] the opportunity for cross-examination" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 89 L.Ed.2d 674]), a defendant has no right to "cross-examination that is effective in whatever way, and to whatever extent, the defense may wish" (*Delaware v. Fensterer*, *supra*, at p. 20).

This concept was illustrated in *Pendergrass v. State* (Ind. 2009) 913 N.E.2d 703 (cert. petition pending, filed Jan. 19, 2010, No. 09-866, 78 USLW 3447), in the context of testimony by a forensic analyst who did not perform the actual test. In *Pendergrass*, a supervisor at the Indiana State Police Laboratory testified that another analyst had performed a DNA analysis and reached certain results. The supervisor had supervised the analyst and checked her work for accuracy. (*Id.* at p. 705.) The prosecution also called an expert witness who interpreted the results for the jury. (*Ibid.*) The defendant claimed that the Sixth Amendment guaranteed him the right to confront the analyst who performed the testing. (*Id.* at p. 708.) The Indiana Supreme Court disagreed. The court noted that in essence, the defendant was complaining that the prosecution "did not call the right—or enough—witnesses." (*Ibid.*) The court stated that, while *Melendez-Diaz* did not address this question, its language was useful in analyzing the claim. Specifically, the *Melendez-Diaz* dissent expressed concern that the opinion required "in-court testimony from each human link in the chain of custody." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2546 (dis. opn. of Kennedy, J.).) The *Melendez-Diaz* plurality rejected this assertion, making it clear that it would be up to prosecutors to decide which witnesses to call, as long as their testimony was presented live. (*Pendergrass v. State*, *supra*, at p. 708, citing *Melendez-Diaz*, *supra*, at p. 2532, fn. 1.) The court further noted that the supervisor provided the information found lacking in *Melendez-Diaz*, i.e., which tests were performed, whether those tests were routine, and whether the analysts possessed the skill and experience necessary to perform them. (*Pendergrass v. State*, *supra*, at p. 708, citing *Melendez-Diaz*, *supra*, at p. 2532.)

Where, as here, a supervisor who is familiar with the analysis testifies at trial, the purpose behind the confrontation clause has been fulfilled. To the extent the witness did not personally participate in the

testing process and bases his information on work performed by others, such areas can be probed through cross-examination. (*Delaware v. Fensterer*, *supra*, 474 U.S. at p. 22.) The presence of the witness on the stand satisfies the Sixth Amendment by preventing a trial by affidavit found objectionable in *Melendez-Diaz*. Once the defendant's Sixth Amendment right to confrontation has been satisfied, the question of which witnesses to call is a matter of state law. (See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1; see also *People v. Black* (2007) 41 Cal.4th 799, 813 [so long as defendant is eligible for upper term sentence consistent with Sixth Amendment principles, selection of actual sentence is state law question left to discretion of trial court].)

3. Decisions Suggesting a Different Conclusion Are Not Persuasive

Appellate opinions suggesting a different conclusion are not persuasive, as they fail to address the key distinctions between the affidavits in *Melendez-Diaz* and circumstances involving expert testimony presented from the witness stand. For instance, in *State v. Locklear* (2009) 363 N.C. 438 [681 S.Ed.2d 293], the North Carolina Supreme Court found error–albeit harmless error–in the admission of testimony by a forensic pathologist about the results reached by another forensic pathologist and a forensic dentist, and in the admission of the autopsy report itself. The court stated that, under *Melendez-Diaz*, "forensic analyses" are "testimonial statements," analysts are witnesses, and the state did not show the non-testifying witnesses were unavailable or that the defendant had a prior opportunity to cross-examine them. (*State v. Locklear*, *supra*, 681 S.Ed.2d at pp. 304-305.)

In *People v. Payne* (2009) 285 Mich. App. 181, 194 [774 N.W.2d 714], documents described in the opinion only as "laboratory reports containing the results of DNA testing" and prepared by a non-testifying

analyst were admitted into evidence as business records. A witness testified that the reports concerned the basics of DNA testing and the methods used to prepare the reports. But the witness had not personally conducted the testing, had not examined any of the evidence in the case, and had not reached any of his own scientific conclusions. (*Id.* at p. 726.) A Michigan appellate court held that under *Melendez-Diaz*, admission of the reports violated the defendant's Sixth Amendment rights because he was not afforded his opportunity to be confronted with "the analyst" at trial. (*Ibid.*)

Neither of these opinions contains any discussion about an expert's province of relying on outside material as a basis for his or her opinions. Nor does it appear that any such issue was raised in either case.[6] Moreover, the decisions fail to recognize that *Melendez-Diaz* did not deal with forensic analyses per se, but rather with affidavits attesting to the results of those analyses. Further, the courts in *Locklear* and *Payne* assumed, without explanation, that the confrontation clause would be satisfied only by the production of the technician who actually performed the forensic test. *Melendez-Diaz*, however, espouses no such requirement. Finally, the cases ignore the fact that there was live testimony presented at trial, by a forensic analyst available for cross-examination. This Court should decline to follow these decisions.

C. The Evidence of the Toxicology Analysis Results Does Not Fall Within the *Melendez-Diaz* Majority's Holding Because Such Raw Data Is Not Testimonial Evidence

Whether or not an expert witness may rely on testimonial evidence, here, Muto's opinion properly relied on non-testimonial evidence contained

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[6] Perhaps this is because, in *Locklear* and *Payne*, the forensic or laboratory reports themselves were admitted into evidence, unlike in this case, where the toxicology reports were not admitted into evidence.

in the toxicology reports. The instrument-generated data introduced as evidence against Golay was not testimony by a witness. Rather, the raw data contained in the toxicology reports was gathered from a pre-programmed instrument. Such evidence is not witness testimony, and hence is not testimonial within the meaning of *Melendez-Diaz*, *Crawford*, or the Sixth Amendment.

Here, again in contrast to *Melendez-Diaz*, the toxicology reports were not introduced at trial. Rather, the results of the toxicology analysis were introduced into evidence through the expert opinion testimony of the laboratory director. As discussed previously, this testimony did not constitute inadmissible testimonial evidence under *Crawford*. Regardless, unlike the certificates in *Melendez-Diaz*, the records here were not prepared for the sole or even primary purpose of providing prima facie evidence of the charged offense at trial. They were instead prepared in the regular course of business for the toxicology laboratory in the coroner's department during a routine medical examination following a death. (6RT 1216-1217.) The toxicology reports consisted of data recorded by an analyst that was generated by a scientific instrument. They detailed the contemporaneous observations of McDavid's blood levels at the time the report was generated and offered no insight into any past events. This raw data did not constitute testimonial evidence under *Melendez-Diaz*.

The Sixth Amendment gives the defendant the right "to be confronted with the *witnesses* against him." (U.S. Const., Amend. VI, emphasis added.) Thus, for the confrontation clause to apply, the evidence must consist of a testimonial statement by a witness. Instrument-generated data does not fall within this category, because the instrument is not a witness and does not bear testimony. (See *United States v. Hamilton* (10th Cir. 2005) 413 F.3d 1138, 1142-1143 [header information generated by computer program placed before each pornographic image uploaded by

defendant]; *United States v. Khorozian* (3d Cir. 2003) 333 F.3d 498, 506 [header information automatically generated by a fax machine].)

"Evidence that is not a statement from a human witness or declarant is not hearsay" and is therefore not subject to the confrontation clause. (*Luginbyhl v. Commonwealth* (2005) 46 Va.App. 460, 466-467 [618 S.E.2d 347]; accord, e.g., *State v. Weber* (2001) 172 Or.App. 704, 708-709 [19 P.3d 378]; *Caldwell v. State* (1997) 230 Ga.App. 46, 47 [495 S.E.2d 308]; *Stevenson v. State* (Tex.App.1996) 920 S.W.2d 342, 343-344; *State v. Van Sickle* (1991) 120 Idaho 99, 102-103 [813 P.2d 910].)

United States v. Washington (4th Cir. 2007) 498 F.3d 225, illustrates the point. There, the defendant was arrested for being under the influence of PCP, and technicians placed the defendant's blood into a gas chromatograph (GCMS) for testing. The GCMS generated raw data, which the lab director used in testifying to his conclusion about the results of the tests. The defendant argued that his confrontation rights were violated because "the machine-generated data amounted to testimonial hearsay statements of the machine operators[.]" (*Id.* at p. 228.) The Fourth Circuit rejected the contention, finding that the data was neither a statement by a witness nor testimonial. The court noted that the 'statements' at issue—that the defendant's blood contained PCP and alcohol—were not made by a person but rather by an instrument. "The machine printout was the source of the statement, no *person* viewed a blood sample and concluded that it contained PCP and alcohol." (*Id.* at p. 230, emphasis in original.) The inculpating data were on the printouts themselves, the only source of the "statement." The technicians could not independently confirm the test results; rather, they simply viewed the printout. In other words, the statements did not come from the technicians but from the printout itself. And "statements made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause." (*Id.* at p. 230.)

Thus, "[a]ny concerns about the reliability of such machine-generated information is addressed through the process of authentication not by hearsay or Confrontation Clause analysis." (*Id.* at p. 231.)

Relying on *Davis*, *supra*, 574 U.S. 813, the Fourth Circuit also concluded that the instrument-generated data were not "testimonial." The court noted that the data "did not involve the relation of a past fact of history as would be done by a witness [citation]." (*United States v. Washington*, *supra*, 498 F.3d at p. 232.) The instrument-generated data were not relating past events but, rather, "the current condition of the blood in the machines." (*Ibid.*) While there was testimony linking the blood with past behavior, it was supplied by a witness—the laboratory director—who was subject to cross examination as required by the confrontation clause. (*Ibid.*) Because "the machine's output did not 'establish or prove past events' and did not look forward to 'later criminal prosecution'—the machine could tell no difference between blood analyzed for health care purposes and blood analyzed for law enforcement purposes—the output could not be 'testimonial.'" (*Ibid.*, citing *Davis*, *supra*, at p. 821.)

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

quoting *Crawford, supra*, 541 U.S. at p. 51.) Furthermore, the purpose of the confrontation clause was protection from "'ex parte examinations as evidence against the accused.'" (*United States v. Lamons, supra*, at p. 1263, quoting *Crawford, supra*, at p. 51.) The Court concluded:

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

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

The *Lamons* court further noted that the Federal Rules of Evidence defined a "statement" in terms of a declaration of action by a person,[7] and that this definition was helpful in determining the scope of the confrontation clause. (*United States v. Lamons, supra*, 532 F.3d at p. 1263.) Finally, the court acknowledged that *Melendez-Diaz* was pending before the United States Supreme Court but found it unnecessary to await that decision because "the nature of the evidence in *Melendez-Diaz* is so different" from the instrument-generated evidence in the case before it. (*Id.* at p. 1264, fn. 25.)

Similarly, in *United States v. Moon, supra*, 512 F.3d at p. 362, a Drug Enforcement Agency chemist testified, based on the readouts of two instruments (an infrared spectrometer and a gas chromatograph), that the substance seized from the defendant was cocaine. The Seventh Circuit held

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

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

that the readings from the instruments did not constitute a "statement" and were therefore not testimonial hearsay barred by the confrontation clause. (*Ibid.*) The court explained:

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

(*United States v. Moon*, *supra*, at p. 362.)

Two out-of-state cases decided since *Melendez-Diaz* are also instructive: *People v. Brown* (2009) 13 N.Y.3d 332 [918 N.E.2d 927]; and *State v. Appleby* (2009) 289 Kan. 1017 [221 P.3d 525]. In *Brown*, New York's highest court held that a DNA report, introduced through a non-testing forensic biologist, was not "testimonial" as that term is used in *Crawford*, *Davis*, and *Melendez-Diaz*. The court stated that the report "consisted of merely machine-generated graphs, charts and numerical data" that on its own contained no subjective analysis. (*People v. Brown*, *supra*, at p. 931.) The technicians themselves would merely have explained how they performed certain procedures. (*Id.* at p. 932.) But, "[a]s the Court made clear in *Melendez-Diaz*, not everyone 'whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must be called in the prosecution's case.'" (*Ibid.*, quoting *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1.) Instead, a witness qualified to interpret the results had to—and did—testify at trial. (*People v. Brown*, *supra*, at p. 932.)

Similarly, in *Appleby*, two individuals employed by a forensic laboratory testified that, by using computer software, they determined that the chance of blood on one evidence item being from someone other than the defendant was one in 14.44 billion and that, on the other item, the chance was one in 2 quadrillion. (*State v. Appleby*, *supra*, 221 P.3d at p. 549.) The trial court denied the defendant's motion to exclude the testimony on the grounds that, because the testifying witnesses did not place the samples in the instrument and did not know how the data bases were compiled, admission of the data violated his Sixth Amendment rights. Applying *Melendez-Diaz*, the Kansas Supreme Court held that the evidence at issue was not testimonial, noting that DNA itself was physical evidence and non-testimonial. The comparisons were generated by placing it in a data base with other physical evidence. Further, the act of writing the computer programs to make the comparisons was a non-testimonial action. "[N]either the database nor the statistical program are functionally identical to live, in-court testimony, doing what a witness does on direct examination." (*Id.* at p. 551.) The only "testimonial" evidence, concluded the court, was elicited from the experts, who were on the stand and subject to cross-examination. (*Id.* at p. 552.)

Like its federal counterpart, the California Evidence Code defines a "statement" as oral, written, or non-verbal conduct by a "person." (Evid. Code, § 225.)[8] Results generated by a toxicology screening instrument are precisely the type of raw data that are neither a "statement" by a witness nor "testimonial." In this case, Muto explained that the testing instrument generated the data from the blood sample, and the analyst recorded the

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

results. (6RT 1216-1219.) Thus, the instrument itself does the work; the forensic technician merely places the blood vial into the instrument and records the result. Although the data requires an analyst familiar with or involved in the process to interpret it, the testimony of such a witness at trial satisfies the defendant's confrontation rights. (See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1 ["We do not hold that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case . . . but what testimony is introduced must . . . be introduced live]."") Here, Muto satisfied that role.

In *Melendez-Diaz*, the prosecution did not introduce the raw data but instead affidavits by witnesses attesting that a substance was examined and was found to contain cocaine. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2531, 2537.) The Supreme Court noted that the affidavits did not indicate what type of tests were performed, whether those tests were routine, and whether the results were subject to interpretation. (*Id.* at p. 2537.) It was therefore impossible to determine whether the analysis was done according to proper scientific protocol or whether there was human error in the testing process. (*Id.* at pp. 2537-2538.) Here, by contrast, Muto gave detailed testimony about the toxicology screening process and about procedures used by the lab to ensure integrity and accuracy of the instrument and the test results. (6RT 1216-1229.)

None of the reasons advanced in *Melendez-Diaz* suggests that the confrontation clause applies to the raw data, as opposed to the interpretation of that data. Specifically, the Court stated that the certificates were "quite plainly affidavits," i.e., statements of fact sworn by a declarant before an officer qualified to administer oaths. Thus, they were the functional equivalent of live testimony. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

But raw data is neither sworn nor certified, and the instrument has no ability to testify in court.

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

Accordingly, Golay's "protection against the admission of unreliable evidence lies in the normal state evidence rules requiring an adequate foundation for the admission of the [data]." (*State v. Van Sickle*, *supra*, 813 P.2d at p. 914.) Admission of the instrument data into evidence through live testimony did not constitute a "'core class of testimonial statements' governed by the Confrontation Clause." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).) Neither the raw data nor the toxicology results were contained in "formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions." (*Ibid.*) Accordingly, the evidence of the toxicology results admitted here does not fall within the *Melendez-Diaz* majority holding, and testimony regarding these results did not violate the confrontation clause.

II. *MELENDEZ-DIAZ* DOES NOT OVERRULE THIS COURT'S DECISION IN *GEIER*

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

This Court rejected the claim. This Court held, based on its own interpretation of *Crawford* and *Davis*, that scientific evidence, like the report at issue before it, was non-testimonial. In so doing, this Court concluded that a statement is not testimonial unless: "(1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." (*Id.* at p. 605.)

This Court found that the DNA report satisfied the first and third criteria because it was requested by a police agency and it could reasonably be anticipated that it would be used at the criminal trial. (*Geier*, *supra*, 41 Cal.4th at p. 605.) However, the report did not meet the second criteria required for a testimonial statement because the analyst's observations constituted "a contemporaneous recordation of observable events rather than the documentation of past events." (*Ibid.*) The analyst's notes were generated as part of a standardized scientific protocol conducted pursuant to

her employment at the laboratory. *Geier* concluded that–akin to a 911 caller who the United States Supreme Court found was not making a testimonial statement–a laboratory analyst recording test data "'during a routine, non-adversarial process meant to ensure accurate analysis'" was not "'bear[ing] witness'" against the defendant within the meaning of the *Crawford* rule.[9] (*Id.* at pp. 605-607, citing *Davis*, *supra*, 547 U.S. at p. 822.)

Melendez-Diaz did not undercut this Court's reasoning in *Geier*. California does not follow the procedure outlawed in *Melendez-Diaz*, i.e., introducing witness affidavits instead of live testimony. Further, raw test results are not "formalized testimonial materials." Thus, *Melendez-Diaz* has no impact on *Geier* or on California's practices. Although improper introduction of forensic evidence may violate a defendant's Sixth Amendment rights, proper introduction of such evidence does not. As explained throughout this brief, *Melendez-Diaz* was concerned with a particular type of evidentiary practice, i.e., introduction of a bare-bones, after-the-fact declaration as prima facie evidence against the accused, without supporting testimony. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2531, 2537.) *Geier*, like the present case, involved raw data, contemporaneous recordation of observable events, an expert relying on work by others, and live testimony by a witness subject to cross-

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

examination. None of these circumstances was present in *Melendez-Diaz*; thus, the United States Supreme Court had no occasion to consider them.[10]

As noted above, the Court in *Melendez-Diaz* once again passed up the opportunity to provide a comprehensive definition of "testimonial" or a framework for determining whether a statement is testimonial in a particular case. In the absence of further guidance from the high court, the *Geier* three-part test remains a valid formula for evaluating the "testimonial" nature of an out-of-court statement. As can be readily seen, all three *Geier* criteria were met in this case. First, there was no statement made to a law enforcement agency. Instead, data were generated by an instrument and transcribed by a scientist into a report. Second, the scientific data did not describe a past fact relating to criminal activity. The printouts generated by the testing instrument were contemporaneous readings of the presence of alcohol and drugs as the blood was placed into the instrument. The report was a contemporaneous observation of the results of the alcohol and drug testing. The supporting documentation "merely recount[ed] the procedures [used] to analyze the samples." (*Geier*, *supra*, 41 Cal.4th at p. 607.) Third, the purpose of the test was not necessarily for use at a later trial. The test itself "[was] not [itself] accusatory, as [such] analysis can lead to either incriminatory or exculpatory results." (*Ibid.*)

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

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

III. ANY ERROR IN ADMITTING THE LABORATORY DIRECTOR'S TESTIMONY ON THE TOXICOLOGY REPORTS WAS HARMLESS BEYOND A REASONABLE DOUBT

Even if Muto's testimony, relying on the analysts' reports, violated Golay's Sixth Amendment rights under *Crawford* and *Melendez-Diaz*, any such error was harmless.

> Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674.) 'Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' (*Ibid.*) The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' (*Neder v. United States* (1999) 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35.)

(*Geier*, *supra*, 41 Cal.4th at p. 608.) As the Court of Appeal concluded (Opn. at 33-34), there is no reasonable doubt that a rational jury would have convicted Golay even if McDavid's toxicology results had not been admitted into evidence.

First, if there had been problems with how the toxicology reports were generated or how testing was done, or if there were questions about methodology or acceptance of the testing procedures by the scientific community, Golay had the chance to explore these areas through the cross-examination of Muto. It was highly unlikely that the criminalists who actually analyzed McDavid's blood would have testified any differently because they would most likely have been required to rely upon the document itself to recount the test results. (See *People v. Arreola* (1994) 7 Cal.4th 1144, 1157 [testimony relating to admission of laboratory reports is

foundational; often author cannot even recall from memory the record's contents].)

Moreover, the evidence of Golay's guilt was overwhelming. The toxicology reports of McDavid's blood, showing the presence of several prescription sedative drugs, tended to show that McDavid died in a staged accident, in which he was killed while lying unconscious in the alley. But even without this laboratory evidence, overwhelming evidence proved that both McDavid and Vados were murdered by Golay and Rutterschmidt.

Overwhelming evidence linked Golay and Rutterschmidt to the vehicle at the time it was used to kill McDavid. McDavid's body was seen lying in the alley off Westwood Boulevard by a witness at about 12:00 a.m. on June 21, 2005. Shortly after 1:00 a.m., McDavid was discovered dead in the same location. (5RT 952-957, 969-973, 995-1005.) At 11:54 p.m. on the same evening, a person identifying herself as Golay called AAA, requesting a tow due to a mechanical problem and giving her location as a gas station at the corner of Santa Monica Boulevard and the alley where McDavid was found. (6RT 1239-1246, 1249-1250.) Records show that a call to directory assistance was placed at this time in Los Angeles from a cell phone number that was registered to Golay's daughter, Kecia Golay, but that, according to Rutterschmidt's handwritten notes, was used by Golay. (15RT 3970-3971, 3993-3994, 4030-4035.) The car, a 1999 Mercury Sable, was towed to a location in Santa Monica near Golay's Ocean Park address. (6RT 1251-1252; 17RT 4602.) At about 1:00 a.m., a call was placed in Santa Monica from Golay's cell number to Rutterschmidt's number. At 1:02 a.m., a call was placed from Rutterschmidt's number back to Golay's number. (15RT 4022-4027, 4035.) Therefore, Golay and Rutterschmidt were in contact with each other immediately after McDavid's murder, and the disabled murder weapon was towed to Golay's residence at her direction.

The circumstances at the crime scene indicated that McDavid's death was a murder. There were no glass or vehicle parts anywhere in the alley, as would be typical in a car/pedestrian accident. A bicycle and helmet found next to the victim's body were not damaged. McDavid suffered several blunt force compression injuries to his head and torso, but he had no leg fractures, indicating that he was run over rather than struck by a car while standing. His body position indicated that he had been dragged. (5RT 1029-1030, 1063-1075, 1087-1092; 6RT 1205-1206; 13RT 3444-3446, 3453.)

Video security cameras in the alley captured the Sable turning into the alley at 11:43 p.m. and stop. Five minutes later, the car reversed, stopped, and went forward again. (7RT 1540-1552.) Significant evidence linked Golay and Rutterschmidt to the Sable. The car had been sold about 18 months before McDavid's murder from a used car dealer to Rutterschmidt, who was accompanied during the purchase by another elderly woman. Rutterschmidt registered the car in the name of "Hilary Adler." (7RT 1708-1718.) The year before, Adler's driver's license had been stolen from a gym where Kecia Golay was also a member. (7RT 1754-1762.) In January 2005, the Sable was cited for being parked in an alley near Golay's Ocean Park address. (9RT 2108-2111.) In April 2005, this alley, along with the parked Sable, was vandalized with red paint. (9RT 2136-2138.) In July 2005, the Sable received multiple parking tickets and was towed from a location near Rutterschmidt's Sycamore address. (7RT 1678-1681; 8RT 1804-1806, 1810-1812, 1834-1836.) In November 2005, the Sable was purchased at a lien sale with an odometer reading of 106,118 miles, just 184 miles more than the reading when Rutterschmidt bought the car in January 2004. (7RT 1674-1675; 8RT 1862.)

Blood and tissue samples collected from the undercarriage of the Sable matched McDavid's DNA profile with a probability of one in 10

quadrillion. (13RT 3321-3329, 3361-3363.) An inspection revealed that the Sable's fuel line had been recently broken and repaired, and the front tire was splashed with red paint. (8RT 1869-1871, 1874-1886.) The unmistakable inference is that Golay used this Sable to run over McDavid, in the process breaking a fuel line and leading to its mechanical breakdown. After having the Sable towed to her residence, Golay's first call was to Rutterschmidt.

Items discovered at the homes of Golay and Rutterschmidt provided further damaging evidence that linked the defendants to the victims. A note found in Golay's vehicle contained reference to a 1999 Mercury Sable, a partial license plate and VIN number that matched the Sable, a reference to "Hilary Adler," and information concerning Rutterschmidt and McDavid. (7RT 1667-1673, 1690-1691.) In Golay's home, officers found notes with information concerning Rutterschmidt and Vados. (15RT 3956-3958, 3962.) In Rutterschmidt's home, officers recovered notes that referenced McDavid, Golay's cell number, and a lease for McDavid's apartment. Also found was an envelope on which was written, "Helen sent pictures of: Hilary Adler," and which contained several copies of Adler's driver's license. (7RT 1694-1698; 15RT 3970-3971, 3993-3994, 4013.)

Golay's method of killing McDavid was supported by the presence of 47 bottles of prescription drugs, including several sedatives, at her home. Many bottles contained crushed powder rather than pills, indicating that they could be given to someone without their knowledge. (13RT 3461-3465; 14RT 3606-3607, 3610, 3619-3620.)

Golay and Rutterschmidt's relationship with McDavid provided strong evidence of motive to kill both McDavid and Vados. In 2002, Golay and Rutterschmidt put McDavid up in an apartment. Golay signed the lease and paid the rent, and Rutterschmidt checked in on him. The women became alarmed when McDavid allowed friends to stay with him.

Rutterschmidt hired a private security guard to remove the other individuals from the apartment. (10RT 2493-2501-2512; 12RT 3009-3032, 3074-3089, 3182-3190, 3216-3217.) From January to June 2005, McDavid stayed in various motels, which were paid by Golay with her credit card or by cash. (12RT 3156-3175.)

Beginning in 2002, Golay and Rutterschmidt took out multiple fraudulent insurance policies on McDavid's life. They completed 17 applications with McDavid as the insured for a total of $5,700,095. Generally, Golay and Rutterschmidt claimed falsely to be McDavid's cousin and fiancée, respectively. To secure the policies, they often claimed McDavid had a high income, that they were partners, and that there were no other policies in force. Thirteen of these applications resulted in policies being issued for a total of $3,700,040, listing either Golay or Rutterschmidt, or both, as beneficiaries. From this amount, after McDavid's death, $1,540,767 was paid to Golay, and $674,571 was paid to Rutterschmidt. (9RT 2222-2223; see also Opn. at 15-22.)

Six years before McDavid's death, Golay and Rutterschmidt had a similar relationship with another destitute individual, Vados. Rutterschmidt paid the rent for Vados, who had no other apparent means of support. (14RT 3719-3720, 3736-3744, 3758-3765.) As with McDavid, Golay and Rutterschmidt took out multiple insurance policies on Vados's life, applying for the policies as Vados's fiancée and cousin, respectively. (See Opn. at 6-8.) On November 8, 1999, Vados's dead body was found, like McDavid, in an alley, the victim of a hit-and-run incident. Like McDavid, Vados had no fractures to his legs and had been run over rather than struck upright. (13RT 3381-3384, 3388-3393, 3398-3403, 3411-3428, 3342-3346.) Soon after, Golay and Rutterschmidt, claiming to be Vados's fiancée and cousin, respectively, requested a copy of the police report. (13RT 3402-3403.)

There was also significant evidence that Golay and Rutterschmidt had been preparing a third victim. Rutterschmidt approached Jimmy Covington, a homeless man, and put him up for about a week in an office space that was paid for by Golay. Rutterschmidt promised him $2,000 if he gave her personal information and filled out some forms. When he became uncomfortable with her demands, she became belligerent, and he left. (12RT 3224-3245, 3303-3311.)

Moreover, following their arrest, Golay and Rutterschmidt made incriminating statements as they were placed in an interview room together. Rutterschmidt blamed Golay for taking out "many insurances" that "raised the suspicion." Golay tried to calm Rutterschmidt, telling her that "they could be listening." Rutterschmidt continued berating Golay for being "greedy" with "all these God damn extra insurances." Golay responded: "You better be quiet. You better not know anything." She reminded her partner to "remember the bottom line." Rutterschmidt replied: "I was the cousin, you were the fiancée. Baloney." (Supp. CT 20-22, 28-32.)

Even without the evidence of the toxicology reports, whether or not the results were testimonial, there was overwhelming evidence proving that Golay and Rutterschmidt conspired to murder, and did murder, McDavid and Vados.

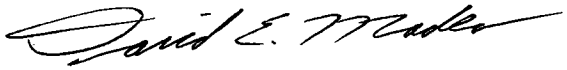
CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: April 28, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
PAMELA C. HAMANAKA
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General



DAVID E. MADEO
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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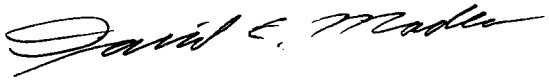
CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON MERITS** uses a 13 point Times New Roman font and contains 10,524 words.

Dated: April 28, 2010

EDMUND G. BROWN JR.
Attorney General of California



DAVID E. MADEO
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Olga Rutterschmidt and Helen L. Golay***
No.: **S176213**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 30, 2010, I served the attached **ANSWER BRIEF ON MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Janyce Keiko Imata Blair
Attorney at Law
Bleckman & Blair
Suite 3 Ocean Plaza
302 West Grand Avenue
El Segundo, CA 90245

The Honorable David S. Wesley, Judge
Los Angeles County Superior Court
Shortridge Foltz Criminal Justice Center
210 West Temple Street, Department 100
Los Angeles, CA 90012-3210

Truc T. Do, Deputy District Attorney
Los Angeles District Attorney's Office
Clara Shortridge Criminal Justice Center
210 West Temple Street, Room 17-116
Los Angeles, CA 90012

Robert Grace, Deputy District Attorney
Los Angeles District Attorney's Office
18000 Foltz Criminal Justice Center
210 West Temple Street, 18th Floor
Los Angeles, CA 90012

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 30, 2010, at Los Angeles, California.

Bernard M. Santos
Declarant

Signature

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