IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

APPELLANT'S REPLY BRIEF ON THE MERITS

on behalf of

HELEN L. GOLAY

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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

APPELLANT'S REPLY BRIEF ON THE MERITS

on behalf of

HELEN L. GOLAY

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

Table of Contents

Table of Contents

Table of Authorities

CASES

Table of Authorities

TREATISES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF ON THE MERITS

on behalf of

HELEN L. GOLAY

SUMMARY OF ARGUMENTS

Respondent Attorney General contends the forensic analysts' reports in issue comprise nothing more than "instrument-generated raw data" and the "contemporaneous recordation of observable events." As such, respondent argues there is no Confrontation Clause violation because

the reports are not testimonial and the instruments that generated the reports are not witnesses.

Evidence adduced at trial, however, shows that respondent's contention rests on a flawed factual premise. In contrast with respondent's characterization of the forensic reports as nothing more than instrument-generated raw data, each of the forensic reports contained, inter alia, the forensic analyst's identification of the analyzed substance and its characteristics, supported by a peer reviewer's concurrence in that interpretation based on the appended instrument-generated data.

Under criteria established by the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*); *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*); and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527; 174 L.Ed.2d 314] (*Melendez-Diaz*), the forensic analysts' reports in this case, prepared in connection with a police investigation into the role of drugs in Kenneth McDavid's death and available for subsequent use in litigation to prove a fact in the prosecution's case against appellant, were testimonial in nature.

Respondent further argues that the results of the forensic analysts' reports in this case were properly admitted through the testimony of an expert, in this case the director of the coroner's laboratory, who was familiar with the testing protocol, able to rely on hearsay in forming his opinion regarding the identification and characteristics of the analyzed substance, and able to speak to the reliability of the forensic procedures followed in arriving at the reported results.

However, in *Crawford*, *Davis*, and *Melendez-Diaz*, the United States Supreme Court consistently rejected all contentions that the

Confrontation Clause allowed the testimonial statement of one witness to enter into evidence through the in-court testimony of a second. The Court expressly stated that (1) the ultimate objective of the Confrontation Clause is to ensure that the prosecution uses reliable evidence to convict the accused and that (2) the Clause commanded that reliability of the evidence be tested only through cross-examination. The Court specifically noted that it is the creator, and not the authenticator, of the testimonial statement that the accused is entitled to confront. Accordingly, appellant's Confrontation Clause rights were violated when the forensic analysts' reports entered into evidence through the in-court testimony of the director of the coroner's laboratory, who did not do the testing, but who authenticated the laboratory procedures that were followed and testified to the forensic analysts' findings regarding the analyzed substances.

Respondent further contends that *Melendez-Diaz* does not overrule this Court's decision in *People v. Geier* (2007) 41 Cal.4th 555. Respondent distinguishes *Melendez-Diaz* on the ground that California does not, as did Massachusetts, prove its case against the accused through the use of affidavits in lieu of live testimony and on the ground that raw test results are not formalized testimonial materials.

A review of the reasoning underpinning both cases, however, demonstrates that in *Melendez-Diaz*, the United States Supreme Court considered and rejected the various rationales relied upon in *Geier*, thus removing cogency from *Geier*'s analysis.

Where, for example, *Geier* rejected the reasoning that forensic laboratory reports were testimonial because they were made for the purpose of establishing or proving some fact, *Melendez-Diaz* embraced it.

Where *Geier* concluded that forensic reports are not testimonial because they represent the contemporaneous recordation of observable events, *Melendez-Diaz* considered and rejected the identical claim made by the dissent with the observation that the dissent misunderstood the role that near-contemporaneity had played in the case law.

Where *Geier* found the forensic report was not testimonial because it was the product of a neutral, scientific process utilizing a standardized protocol and prepared as part of the analyst's job and not for the purpose of incriminating the defendant, *Melendez-Diaz* expressly disagreed. *Melendez-Diaz* observed that cross-examination was the only way of assessing the reliability of forensic testing under the Confrontation Clause, and pointed out that it had overruled *Ohio v. Roberts* (1980) 448 U.S. 56 and its reliance on other indicia of trustworthiness, such as the neutrality or the reliability of scientific testing.

Where *Geier* parsed the steps involved in forensic testing into the nonaccusatory and therefore nontestimonial processing stage and the accusatory and therefore testimonial matching and statistical significance stages, *Melendez-Diaz* concluded that forensic laboratory results are testimonial statements and the analyst who creates them witnesses subject to the requirement of the Confrontation Clause. As a result, the distinction perceived by *Geier* between nonaccusatory and accusatory stages of forensic testing and reporting does not exist.

Accordingly, *Melendez-Diaz* has removed the underpinnings supporting the decision in *Geier*.

ARGUMENT

I.

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

A. THE FORENSIC LABORATORY REPORTS IN THIS CASE WERE TESTIMONIAL EVIDENCE WITHIN THE MEANING OF SIXTH AMENDMENT JURISPRUDENCE

The Attorney General contends the forensic reports in this case were not testimonial because: (1) the reports were prepared in the ordinary course of business in the coroner's laboratory and not for the purpose of providing prima facie evidence of the charged offense; (2) the reports consisted of data generated by a scientific instrument that an analyst recorded; (3) the reports detailed contemporaneous observations of toxicological results at the time of the testing "and offered no insight into any past events." (ABM[1] 21.)

Respondent characterizes the laboratory reports as instrument-generated "raw data" and argues they are not testimonial within the meaning of Sixth Amendment jurisprudence and, in particular, within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*) and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527; 174 L.Ed.2d 314] (*Melendez-Diaz*). (RB 21.)

---

[1] Answer Brief on the Merits (ABM).

As appellant will show below, the United States Supreme Court has spoken with specificity to each of the Attorney General's contentions and has irrefutably rejected them.

1. The United States Supreme Court Has Clearly Established That Reports Prepared in the Ordinary Course of Business in the Coroner's Laboratory Are Testimonial Evidence within the Meaning of Sixth Amendment Jurisprudence

The Attorney General claims the forensic reports are not testimonial because they are records that are routinely prepared in the regular course of business in the coroner's laboratory. (ABM 21.)

In *Melendez-Diaz*, however, the United States Supreme Court responded to analogous claims by the State of Massachusetts and by the dissent by expressly holding to the contrary. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2538-2539; see also discussion at AOBM[2] 19-20.)

Respondent does not explain why the holding in *Melendez-Diaz* is not applicable and controlling here.

Melendez-Diaz explained that reports made in the regular course of business are testimonial when the entity's "regularly conducted business activity is the production of evidence for use at trial." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538.)

There is no gainsaying that the regularly conducted business activity of the coroner's department is the production of evidence for use at trial. Dr. Joseph Muto, the director of the coroner's laboratory, testified that the laboratory's purpose in performing toxicology screens is "to see

---

[2] Appellant's Opening Brief on the Merits (AOBM).

whether or not drugs have played any role in the cause or manner of death." (6RT 1213.)

Melendez-Diaz explained why the forensic reports in issue, documents regularly kept in the course of an entity whose business activity is the production of evidence for use at trial, are testimonial evidence:

> Respondent argues that the analysts' affidavits are admissible without confrontation because they are "akin to the types of official and business records admissible at common law." [Citation.] But the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.
>
> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. [Citation.] But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was "calculated for use essentially in the court, not in the business." *Id.*, at 114, 63 S. Ct. 477, 87 L. Ed. 645. [Footnote omitted.] The analysts' certificates – like police reports generated by law enforcement officials – do not qualify as business or public records for precisely the same reason. (*Melendez-Diaz v. Massachusetts*, *supra*, 129 S. Ct. at p. 2538.)

It is plain to see that the United States Supreme Court has quite clearly said that reports made in the regular course of business are testimonial when the entity's regularly conducted business activity is the production of evidence for use at trial. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538.)

Moreover, *Melendez-Diaz* also stated that even if the affidavits in issue there *did* qualify as traditional official or business records, the authors of the affidavits would still be subject to confrontation because the reports were "calculated for use essentially in the court, not in the business." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538; in reliance upon *Palmer v. Hoffman* (1943) 318 U.S. 109, 114 [accident report by railroad company employee not a business record because "calculated for use essentially in the court, not in the business"].)

For these reasons, appellant asserts that the forensic reports in issue here, which were prepared by the coroner's laboratory as part of the investigation into Kenneth McDavid's death, are testimonial evidence because the regularly conducted business activity of the coroner's laboratory is the production of evidence for use at trial and because the forensic analysts' reports were "calculated for use essentially in the court, not in the business" of the laboratory.

2. The United States Supreme Court Has Clearly Established That Forensic Reports Providing Prima Facie Evidence of the Composition, Quality, and Net Weight of the Analyzed Substance Are Testimonial Evidence within the Meaning of the Sixth Amendment

The Attorney General also claims that the forensic reports in issue here are not testimonial evidence because they are "instrument-generated" "raw data" "gathered from a pre-programmed instrument." Respondent points out that the Sixth Amendment applies to testimonial statements by a witness and argues that Confrontation Clause concerns are

not implicated by such evidence because an instrument is not a witness and does not bear testimony. (ABM 21.)

In *Melendez-Diaz*, however, the United States Supreme Court held that forensic laboratory reports regarding the composition, quality, and net weight of an analyzed substance, the subject of the reports in issue here, are testimonial evidence under *Crawford* because they are made for the purpose of proving or establishing some fact. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532; *Crawford*, *supra*, 541 U.S. at p. 54; see also discussion at AOBM 8-9.)

Respondent does not distinguish or otherwise explain why *Melendez-Diaz* and *Crawford* are not applicable and controlling here.

2A. The Record Establishes That the Forensic Reports Included, inter alia, Analysts' Findings in Addition to the Instrument-Generated Data

First, however, it is important to correct and clarify the record regarding the forensic reports in issue. Respondent's characterization of the forensic reports as nothing more than "instrument-generated data" "gathered from a pre-programmed instrument" is not accurate. (ABM 20-28.)

In fact, the forensic reports in this case, like the affidavits in *Melendez-Diaz*, included the analyst's findings regarding the "composition, quality, and the net weight" of the analyzed substance. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.) Dr. Muto, the director of the coroner's laboratory, testified to the identity and quantity of the drugs stated in the

four forensic reports in issue.[3] He explained that under the laboratory's protocol the analyst regularly includes the identification and quantity of the drug found in his or her report. (6RT 1218.) He also stated that the laboratory has an institutionalized peer-review protocol for the purpose of confirming that another analyst could reasonably reach the same conclusions based upon the instrument-generated data. (6RT 1236.)

Thus, the record establishes that the forensic laboratory reports in issue here, which included the analysts' findings and conclusions regarding the analyzed substances, were much more than the instrument-generated data the Attorney General describes. The forensic reports included evidence the prosecution used against petitioner to prove that the homeless McDavid was sedated or unconscious with prescription rather than street drugs at the time of his death and that his death was therefore premeditated and intentional.

---

[3] Dr. Muto testified that the forensic reports showed that no illicit drugs were found; the presence of ethanol or drinking alcohol at .08 percent; and the presence of the following prescription drugs: (1) Zolpidem, the generic for Ambien, a hypnotic or sedative prescribed as a sleep aid, at 0.13 micrograms per milliliter of blood (6RT 1222-1225); (2) Hydrocodone, the generic for Vicodin, an analgesic prescribed for pain management, at 0.09 micrograms per milliliter (6RT 1225); (3) Topiramate, the generic for Topomax, normally prescribed as an anticonvulsant to control seizure disorders with side effects of sedation and dizziness, at 4.4 micrograms per milliliter of blood (6RT 1226-1229).

2B. The Forensic Reports Constituted Testimonial Evidence because They Were Made for the Purpose of Establishing That the Substances Found in McDavid's Blood Were, as the Prosecution Claimed, Prescription Sedatives and Alcohol

In *Melendez-Diaz*, the Court considered forensic analysts' "certificates of analysis" setting forth under Massachusetts law the composition, quality, and net weight of substances analyzed in the course of a criminal investigation and concluded that *Crawford* compelled the conclusion that the affidavits were testimonial statements and the analysts were witnesses for purposes of the Sixth Amendment. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532; see also discussion at AOBM 6-9.)

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

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

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

3. The United States Supreme Court Has Clearly Rejected the Contention that Forensic Laboratory Reports Are Not Testimonial Evidence because They Set Forth Contemporaneous Observations of Toxicological Results at the Time of Testing and Offer No Insight into Past Events

The Attorney General claims the forensic reports are not testimonial statements because they set forth contemporaneous observations of toxicological results at the time of testing and offer no insight into past events. (ABM 21.)

Respondent Attorney General argues that instrument-generated data do not constitute a testimonial statement by a witness within the meaning of Sixth Amendment jurisprudence because the instrument is not a witness and does not bear testimony. (ABM 21.) Respondent supports this argument with citations to a series of lower court cases that preceded the Supreme Court's opinion in *Melendez-Diaz* in which the lower courts held that instrument-generated information is not testimonial. (See ABM 21-23, citing, *inter alia*, *United States v. Washington* (4th Cir. 2007) 498 F.3d 225 [gas chromatograph results]; *United States v. Lamons* (11th Cir. 2008) 532 F.3d 1251 [telephone billing data produced by automated processing system]. Respondent also relies upon two post-*Melendez-Diaz* cases, *People v. Brown* (2009) 13 N.Y.3d 332 [918 N.E.2d 927] [machine-generated data contained no subjective analysis] and *State v. Appleby* (2009) 289 Kan. 1017 [221 P.3d 525] [statistical significance of DNA match created by computer software]. (ABM 25.)

First, these series of contentions by respondent are based upon an inaccurate factual premise, as appellant has explained in Section 2A, *supra*. Dr. Muto, the director of the coroner's laboratory, explained

that the forensic analyst's report included the analyst's interpretation of the data, i.e., the analyst's identification and weight of the analyzed substance, as well as records of his or her compliance with the laboratory's testing protocol, and that these analytical results were supported by the machine-generated data, which were appended to the report. The forensic report was then peer-reviewed pursuant to laboratory protocol to ensure that another forensic analyst looking at the machine-generated data would arrive at the same conclusion as did the analyst who actually performed the test and created the report. This evidence establishes that the forensic reports in issue comprised more than machine-generated raw data.

Respondent also argues that "the purpose of the [analyst's] handwritten report was to record the [machine-generated] data, not to offer testimony against Golay." (ABM 28.) In the way appellant has explained above, this assertion flies in the face of the facts adduced at trial regarding the practices and protocols of the coroner's laboratory and is not sustainable. The evidence establishes that the analyst interpreted the data and recorded his or her findings in the report. Significantly, respondent never explains why the laboratory would need to have an institutionalized peer-review process to ensure that a second forensic analyst would reach the same findings about the analyzed substance reached by the first analyst if the data were solely instrument-generated.

Moreover, in *Melendez-Diaz*, the United States Supreme Court flatly considered and rejected analogous claims. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2538-2539; see also discussion at AOBM 15-18.)

For example, the dissent in *Melendez-Diaz* contended the analysts should not be subject to confrontation because they were not

"conventional" witnesses in the sense that they did not recall "events observed in the past"; they did not observe either the crime or any human action related to it; they did not make their statements in response to interrogation.

As to the contention that the analyst's report consists of near-contemporaneous observations of the testing rather than a recollection of past events, the Court noted that the dissent misunderstood the role that contemporaneity played in the Court's decisions. The gist of the dissent's contention is akin to the analytical rationale underpinning *People v. Geier* (2007) 41 Cal.4th 555, which held that the Supreme Court established in *Davis v. Washington* (2006) 547 U.S. 813 that the critical point in determining whether a statement is testimonial is not whether it might reasonably be anticipated to be used at trial but the circumstances under which the statement was made. *Melendez-Diaz* pointed out that the victim's statements to police in *Davis* were made sufficiently close in time to the assault that her statements were admitted by the trial court as a present sense impression. And, yet, *Davis* determined the statements to be testimonial and therefore inadmissible absent an opportunity to confront the witness. Thus, *Melendez-Diaz* expressly rejected the contention that contemporaneity was a determining factor in determining whether a statement was testimonial. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.)

Melendez-Diaz also rejected the contention that the forensic analyst was not a witness because the analyst neither observed the crime nor any human action related to the crime. The Court noted that the dissent had provided no authority supporting the proposition and further noted that

such an interpretation would exempt all expert witnesses from testifying. (*Ibid.*)

Although respondent does not expressly make this contention, to the extent respondent's contentions may be read to imply that in order to be testimonial the statements must have been made in response to interrogation, *Melendez-Diaz* rejected that contention as well. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.)

Accordingly, for the reasons set forth here, appellant respectfully submits that the forensic analysts' reports in issue here were testimonial statements within the meaning of Sixth Amendment jurisprudence. As appellant will explain in the section that follows, the Confrontation Clause requires that the testimonial evidence be admitted at trial through the testimonies of the forensic analysts who created the reports and not through the in-court testimony of a second witness.

B. EXTRAJUDICIAL STATEMENTS PRODUCED UNDER "TECHNICALLY INFORMAL" CIRCUMSTANCES, SUCH AS THE FORENSIC EVIDENCE IN ISSUE HERE, FALL WITHIN THE PURVIEW OF THE PLURALITY DECISION IN *MELENDEZ-DIAZ*; THE OBJECTIVE OF THE CONFRONTATION CLAUSE TO ENSURE THE RELIABILITY OF THE EVIDENCE USED TO CONVICT THE DEFENDANT IS SERVED WHEN FORENSIC EVIDENCE IS SUBJECTED TO CROSS-EXAMINATION

The United States Supreme Court has held that the prosecution violates a defendant's Confrontation Clause rights when it introduces one witness' testimonial statement into evidence through the in-court testimony of a second witness. (*Melendez-Diaz*, *supra*, 129 S.Ct. 2532; see also discussion AOBM 10-22.)

Accordingly, absent unavailability and the opportunity for prior cross-examination, a supervising criminalist may *not* testify to the results of drug tests and the report prepared by another criminalist.

The Attorney General argues the contrary is true. Respondent contends that the plurality opinion in *Melendez-Diaz* is limited by the view of Justice Thomas that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J., citing in turn his conc. opns. in *White v. Illinois* (1992) 502 U.S. 346, 365; and in *Davis v. Washington* (2006) 547 U.S. 813, 836); ABM 11); *Marks v. United States* (1977) 430 U.S. 188, 193.) The thrust of the Attorney General's assertion is that because the forensic reports in issue here were not formalized testimonial materials the Confrontation Clause does not apply to them. But, as appellant explains below, the forensic

reports are testimonial for purposes of the Confrontation Clause within the contemplation of Justice Thomas.

In his concurring opinion in *Davis*, Justice Thomas explained that his view originates in the historical function of the Confrontation Clause, which was "to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the accused." (*Davis*, *supra*, 547 U.S. at p. 838.) Thus, the right to confrontation "was developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the 'civil-mode of criminal procedure, and particularly its use of *ex parte* examinations against the accused.'" (*Davis*, *supra*, 547 U.S. at p. 835; *Crawford*, *supra*, 541 U.S. at pp. 43, 50; *White*, *supra*, 502 U.S. at pp. 361-362.)

"'The predominant purpose of the [Marian committal] statute was to institute systematic questioning of the accused and the witnesses." J. Langbein, Prosecuting Crime in the Renaissance 23 (1974) (emphasis added). The statute required an oral examination of the suspect and the accusers, transcription within two days of the examinations, and physical transmission to the judges hearing the case. *Id.*, at pp. 10, 23. These examinations came to be used as evidence in some cases, in lieu of a personal appearance by the witness. *Crawford*, *supra*, at 43-44, 124 S. Ct. 1354, 158 L. Ed. 2d 177; 9 W. Holdsworth, A History of English Law 223-229 (1926)." (*Davis v. Washington*, *supra*, 547 U.S. at pp. 835-836.

Justice Thomas concluded that the statements regulated by the Confrontation Clause must include extrajudicial statements of the sort described above, which are taken through a formalized process, and statements produced during interactions with the police when the

interactions are somehow rendered "formal," e.g., through warnings given pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. (*Davis*, *supra*, 547 U.S. at p. 837; *White*, *supra*, 502 U.S. at p. 365.)

As well, Justice Thomas concluded that the Confrontation Clause also "reaches the use of technically informal statements when used to evade the formalized process. . . . That is, even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation." (*Davis*, *supra*, 547 U.S. at p. 838.)

Thus, in the view of Justice Thomas, extrajudicial statements are "testimonial" within the meaning of the Confrontation Clause when they are produced under "formal," "solemn" circumstances or when they are produced under circumstances that are not formal but their use by the prosecution at trial resemble the abuses targeted by the Confrontation Clause. (*Id.*, at pp. 837-838.) As appellant has noted above, the Supreme Court has indicated that the Confrontation Clause targets the prosecution's use of unreliable evidence to win a conviction.

In *Crawford*, the Supreme Court explained that the "ultimate goal" of the Confrontation Clause "is to ensure reliability of evidence." (*Crawford*, *supra*, 541 U.S. at p. 61.) The Court stated that the Confrontation Clause ensures reliability through a procedural rather than a substantive guarantee. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there

could be little dissent) but about how reliability can best be determined." (*Ibid.*)

In *Melendez-Diaz*, the Court, in the majority opinion in which Justice Thomas concurred, specifically addressed the reliability of "neutral scientific testing" and pronounced forensic evidence no more reliable than other kinds of evidence. "We . . . refute the suggestion that this category of evidence is uniquely reliable and that cross-examination of the analysts would be an empty formalism." (*Melendez-Diaz*, *supra*, 129 S.Ct. 2537 fn. 6.) Moreover, the Court stated specific concerns about the reliability of forensic evidence administered by law enforcement agencies, such as the forensic reports in issue here.

> Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." *Id.*, at S-17. A forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution. (*Melendez-Diaz*, *supra*, 129 S. Ct. at p. 2536.)

Melendez-Diaz observed: "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. [Citation.] And, of course, the prospect of confrontation will deter fraudulent analysis in the first place." (*Id.*, at p. 2537.)

The Court further concluded that the use of confrontation in the context of forensic evidence would weed out not only the fraudulent analyst, but the incompetent one as well because, as with expert witnesses generally, "an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." (*Ibid.*)

> Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009). And the National Academy Report concluded: "The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." National Academy Report P-1 (emphasis in original). (*Melendez-Diaz*, *supra*, 129 S. Ct. at p. 2537.)

Melendez-Diaz has thus made it abundantly clear that forensic evidence of the kind in issue here is not "uniquely reliable" and that cross-

examination of the analysts who created the evidence would serve the Confrontation Clause's recognized purpose of assuring the reliability of the evidence used by the prosecution to convict a defendant.

Accordingly, the Attorney General's contention that the admission into evidence of the results of a forensic analyst's report and findings through the testimony of an expert does not fit within the holding of *Melendez-Diaz*, as articulated in the concurring opinion of Justice Thomas, is lacking in merit. (ABM 7-20.)

C. THE SUPREME COURT HAS ESTABLISHED THAT THE CONFRONTATION CLAUSE DOES NOT PERMIT THE TESTIMONIAL STATEMENT OF ONE WITNESS TO ENTER INTO EVIDENCE THROUGH THE IN-COURT TESTIMONY OF A SECOND WITNESS

The Attorney General contends that the laboratory director's testimony satisfied the requirements of the Confrontation Clause because (a) the laboratory director, testifying as an expert, properly could rely on testimonial or non-testimonial hearsay in forming his opinion; and because the requirements of the Confrontation Clause were satisfied by allowing appellant to cross-examine the laboratory director. (ABM 11-20.)

1. The Ultimate Goal of the Confrontation Clause Is to Ensure Reliability of Evidence; the Clause Commands That Reliability Only Be Assessed Through Cross-Examination

In her opening brief on the merits, appellant set forth the numerous instances in which the Supreme Court of the United States has clearly shown that the Confrontation Clause does not permit the testimonial

statement of one witness to enter into evidence through the in-court testimony of a second. (AOBM 10-29.) Cumulatively, these examples reveal a consistent adherence to the literal text of the Confrontation Clause.

Thus, in *Crawford*, the Court stated that the ultimate goal of the Confrontation Clause is to ensure reliability of evidence and that the Clause commands that reliability be assessed only through cross-examination. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford*, *supra*, 541 U.S. at p. 61, 68-69; see also discussion at AOBM 10-13.)

The Court took an immediate step toward ensuring that reliability would only be measured through cross-examination by overruling *Ohio v. Roberts* (1980) 448 U.S. 56, in which it had previously held that the Confrontation Clause did not bar testimonial statements that either fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. In overruling *Roberts,* the Court said: "Where testimonial statements are involved, we do not think the Framers meant to leave the *Sixth Amendment*'s protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" (*Crawford*, *supra*, 541 U.S. at p. 61; see also discussion at AOBM 12.)

In *Davis*, the Court made clear that the constitutional guarantee of testing reliability only through cross-examination would not be compromised even if the failure to compromise resulted in a "windfall" to the defendant. (*Davis*, *supra*, 547 U.S. at p. 833.) *Davis* involved allegations of domestic violence, a category of case where recanting victims are not uncommon, and the *Davis* Court considered the contention that

adherence to the guarantee of confrontation would unjustly benefit the defendant. The Court refused to abandon the constitutional guarantee of confrontation and indicated its view that a defendant's confrontation right might be compromised only "on essentially equitable grounds" pursuant to the rule of forfeiture by wrongdoing if the defendant was the cause of the witness' absence. (*Ibid.*; see also discussion at AOBM 13-14.)

In *Melendez-Diaz*, the Court considered various contentions that the reliability of testimonial statements by forensic analysts is better tested by means other than confrontation. Again, the Court reiterated that the Confrontation Clause guarantees that reliability of evidence is tested only through cross-examination. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536; see also discussion at AOBM 17-18.)

Also in *Melendez-Diaz*, the Court considered and rejected contentions that the guarantee of cross-examination should be relaxed to accommodate the needs of the judicial process. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2541; see also discussion at AOBM 20-22.)

Accordingly, the United States Supreme Court has repeatedly and consistently reiterated that reliability of evidence is the ultimate goal of the Confrontation Clause, which commands that reliability be assessed only through cross-examination.

2. The Supreme Court of the United States Has Established That the Confrontation Clause Does Not Permit the Testimonial Statement of One Witness to Enter into Evidence through the In-Court Testimony of a Second

In *Melendez-Diaz*, the Court made clear that the reliability of testimonial statements is tested through cross-examination of the statement's maker or creator. The Court expressly and specifically said the Confrontation Clause required that the defendant be able to confront the forensic analysts who performed the drug tests and whose testimonial statements were in issue. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532; see also discussion at AOBM 14.)

The Court reasoned that the analysts provided testimony against the defendant by proving that the substance he possessed was cocaine, a fact that was necessary for his conviction. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2533.) The Court further reasoned that the defendant had the right to confront the analyst because witnesses are either for the defendant or against the defendant. There is no such class of witness as one [i.e., the analyst] that is helpful to the prosecution but immune from confrontation. (*Id.*, at p. 2534; see also discussion at AOBM 14-15.)

Melendez-Diaz also considered and rejected contentions that allowed the prosecution to use the testimonial statements of forensic analysts at trial without subjecting the analysts to cross-examination. These included the claim, much like that raised by the Attorney General here, that the forensic reports were nothing more than contemporaneous observations made and recorded by the forensic analyst. The Court noted that its decision in *Davis* disproved the contention that contemporaneity of the

reporting determined whether a statement is testimonial and its maker a witness within the meaning of the Confrontation Clause. (*Id.*, 129 S.Ct. at p. 2535, citing *Davis*, *supra*, 547 U.S. at p. 820; see also discussion at AOBM 15-16 and discussion, *supra.*)

The Court also rejected the contention that the forensic analyst's report was not testimonial because the analyst had neither observed the crime nor human activity connected with it, which the Attorney General has made here. Noting that the contention had been made in the absence of supporting authority, the Court commented that the anticipated result of such a ruling would be that all expert witnesses would conceivably be exempted from confrontation and a police crime scene report would be admissible without the authoring police officer being subjected to cross-examination. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535; see also discussion at AOBM 16 and discussion, *supra.*)

The *Melendez-Diaz* Court also rejected the contention that the forensic statements were not made in response to interrogation and therefore were not testimonial. The Court again noted the lack of supporting authority for the contention, but also pointed out that the forensic reports in issue before it had in fact been prepared in response to a police request. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535; see also discussion at AOBM 17 and discussion, *supra.*)

The Court also rejected a series of contentions that the reliability of the forensic analysts' reports should be tested through other means, including claims scientific testing was neutral and not prone to manipulation or distortion or that the forensic analyst would not feel differently about his report when confronted by the defendant. The Court

found these arguments to be an echo of *Roberts*, which it had overturned, in which reliability was assessed by trustworthiness factors. The Court found that forensic evidence was not immune from risk of manipulation and held that cross-examination would weed out both the fraudulent and the incompetent analysts. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537; see also discussion at AOBM 17-19 and discussion, *supra*.)

The Court also considered and rejected the contention that the forensic statements should be admitted as a business records. In determining that it was the forensic analyst, the maker of the testimonial statements, who must testify, the Court drew a distinction between the roles of the maker and the authenticator of the statement. Thus, while a supervising forensic analyst may authenticate the procedures followed in a forensic protocol, he can never be the creator of the forensic report prepared by another. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2539-2540.)

For the reasons set forth above, appellant respectfully submits that the Court has repeated and consistently established that the Confrontation Clause does not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second. Accordingly, the Confrontation Clause does not permit the testimonial statements created by the forensic analysts who performed the toxicological analyses upon McDavid's blood in this case to enter into evidence through the in-court testimony of the laboratory's director.

II.

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

Respondent contends *Melendez-Diaz* did not undercut this Court's reasoning in *Geier* because California does not introduce witness affidavits in place of live testimony. Respondent further asserts that raw test results are not "formalized testimonial materials." Respondent argues that *Melendez-Diaz* was concerned with the use of a "bare-bones" affidavit against an accused. Thus, the Supreme Court did not consider the evidence before this Court in *Geier*, and in the present case, comprising raw data, contemporaneous recordation of observable events, an expert relying on work by others, and the live testimony by a witness subject to cross-examination. (ABM 29-31.)

Appellant has explained in this brief that the Attorney General's characterization of the forensic reports in issue as instrument-generated raw data is factually incorrect and unsupported by the record.

The forensic reports in issue here are testimonial statements within the meaning of Sixth Amendment jurisprudence for the reasons discussed in this brief, *supra*. *Melendez-Diaz* has expressly and specifically stated that forensic laboratory results are testimonial statements and the analyst who creates them witnesses subject to the requirements of the Confrontation Clause. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

In her opening brief on the merits, appellant discussed and compared the Confrontation Clause analyses followed in *Geier* and in

Melendez-Diaz and explained there that *Melendez-Diaz* had considered and rejected the various rationales that underpin the decision in *Geier*. As a result, appellant concluded that *Melendez-Diaz* has removed all cogency from *Geier*'s analytical underpinnings. In lieu of repeating that argument here, appellant respectfully refers the reader to that discussion and incorporates it here by reference. (AOBM 30-40).

Finally, as to respondent's assertion that forensic reports are properly admitted into evidence through the in-court testimony of an expert, the United States Supreme Court made clear in *Melendez-Diaz*, as appellant has explained above, that the Confrontation Clause does not permit the testimonial statements of one witness to be admitted into evidence through the in-court testimony of a second, the second witness' expert credentials notwithstanding because the role of the expert witness can only be that of an authenticator of the procedures and can never be that of the creator of the testimonial statement. The Confrontation Clause guarantees the reliability of the evidence the prosecution presents in order to convict by allowing the accused to confront the creator or maker of the testimonial statement.

For these reasons, appellant respectfully submits that the United States Supreme Court decision in *Melendez-Diaz* has invalidated *Geier*.

III.

THE ERRONEOUS ADMISSION INTO EVIDENCE OF THE FORENSIC ANALYSTS' REPORTS THROUGH THE TESTIMONY OF THE LABORATORY DIRECTOR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

This Court did *not* request that the parties brief the matter of prejudice. However, the Attorney General has chosen to brief the issue. (ABM 32-37.) And, so, appellant replies.

Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) "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." (*Delaware v. Van Arsdall*, *supra*, at p. 681.) 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.)

At trial, the prosecution presented evidence that McDavid died with enough alcohol and prescription drugs in his system that he was either asleep or sleepy and confused when he was struck and run over by a car. This evidence functioned to prove that he died in a staged pedestrian-vehicle incident and not as the result of an accident. The prosecutor also argued that McDavid was so loaded with sedatives that he could not have driven or walked to the alley. (19RT 5231.) The clear implication of such an argument in this circumstantial evidence case is that McDavid's death

came about because some person or persons drugged him, transported him to the alley, deposited his body in the middle of the alley, and then ran over his body with a vehicle. The prosecution thus used the drug screen evidence to prove a deliberate and premeditated murder.

The evidence was important to the prosecution's proof of a premeditated murder because without it the jury likely would have found McDavid died as the result of an accident. It is after all within the common urban experience to find a homeless person in an alley behind a commercial block of stores, as it is within the common urban experience to find a homeless person with an alcohol problem asleep in an alley behind a commercial block of stores.

The admission of the drug screen evidence thus cannot be said to have been harmless beyond a reasonable doubt with regard to proving that McDavid's death was a premeditated murder. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Nor was it harmless beyond a reasonable doubt with regard to the death of Paul Vados because the prosecution argued that similarities in the Vados and McDavid cases proved that Vados was the victim of a murder rather than of a vehicle-pedestrian accident. (19RT 5242-5244.) In arguing that McDavid had been drugged and brought to the Westwood alley, the prosecutor told the jury that McDavid was 7.5 miles from the Hollywood hotels where he was last know to have been and that he was so loaded on sedatives he could not have gotten there on his own. (19RT 5231.) The prosecutor then made the parallel argument where Vados was concerned, stating that Vados was 3.6 miles from his Fedora Street apartment. (19RT 5245.) This argument concerning similarities manifestly

invites the jury to infer that Vados too had been drugged and transported to the LaBrea alley where he was run over, despite the absence of forensic evidence that Vados had been drugged. Once more, the function of the drug screen evidence would be to prove Vados was murdered and that the murder had been premeditated. The erroneous admission of the McDavid drug screen evidence infected appellant's conviction of the murder of Paul Vados and the effect of that error on the Vados' murder count was not harmless beyond a reasonable doubt. That is, it is not clear beyond a reasonable doubt that a rational jury would have found appellant guilty of the death of Paul Vados absent the erroneous admission of the McDavid drug screen. (*Neder v. United States*, *supra*, 527 U.S. at p. 18.)

CONCLUSION

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

DATED: 11 May 2010

Respectfully submitted,

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

CERTIFICATE OF WORD COUNT

Rule 8.520, subdivision (c)(1), California Rules of Court, states that a reply brief on the merits in the Supreme Court produced on a computer must not exceed 8400 words including footnotes, but excluding the tables, the certificate of word count required by the rule, and any permitted attachment.

Pursuant to 8.360, subdivision (b), and in reliance upon Microsoft Office Word 2007 software which was used to prepare this document, I certify that the word count of this brief is 7794 words.

DATED: 11 May 2010

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

PROOF OF SERVICE

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

On **13 May 2010**, I served the

Reply Brief on the Merits on behalf of Helen L. Golay in People v. Rutterschmidt and Golay (S176213; B209568; LASC BA306576)

on the interested parties in said action by placing_____ the original/_XX_ true copies thereof, enclosed in sealed envelope(s) addressed as stated on the attached mailing list,

_XX__WITH POSTAGE/DELIVERY FEE fully prepaid, at El Segundo, California, with the

__United States Postal Service

__X___United Parcel Service

I am "readily familiar" with the firm's practice of collecting and processing documents for mailing. It is deposited with the U.S. Postal Service/United Parcel Service on that same day in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit on mailing affidavit.

____BY PERSONAL SERVICE. I delivered such envelope(s) by hand to the addressee(s) denominated on the attached mailing list.

_XX_(State) I declare under penalty of perjury that the foregoing is true and correct.

____(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on 13 May 2010, at El Segundo, California.

Janyce K. Blair

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

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

Doc: Reply Brief on the Merits on behalf of Helen L. Golay

MAILING LIST

VIA UNITED PARCEL SERVICE

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

2. Helen Golay, Appellant
(Address omitted)

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