S177046

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **VIRGINIA HERNANDEZ LOPEZ,** **Defendant and Appellant.**	Case No. S177046

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

As set forth in Respondent's Opening Brief on the Merits (RBOM) and as further discussed below, raw data generated by the GCMS instrument, and contemporaneous notes of observations regarding those data, are neither a statement by a witness nor testimonial, so they are not subject to the Confrontation Clause of the Sixth Amendment.

Moreover, the Sixth Amendment is satisfied if the defendant can adequately challenge the reliability of the underlying forensic test by exploring the methodology and proficiency with which it was performed. Where, as here, the supervisor has sufficient information and expertise to respond to the defense's concerns, the constitutional requirements are fulfilled.

In addition, the Sixth Amendment does not preclude an expert from relying on testimonial hearsay in forming his or her opinion. *Melendez-Diaz* did not change this longstanding rule. In the present case, the supervisor offered his own opinion as an expert in the field, based on his independent review of the data, and on his comprehensive knowledge of the methodology and protocol with which the test was performed.

Further, this Court's decision in *People v. Geier* (2007) 41 Cal.4th 555 has not been overruled by 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]. The courts in *Melendez-Diaz* and *Geier* were presented with entirely different factual situations. In *Melendez-Diaz*, affidavits were offered in lieu of live testimony while in *Geier*, an expert testified and was subject to cross-examination. *Melendez-Diaz* did not address a situation where a witness was on the stand.

Finally, there was undisputed evidence that Lopez drank before she drove and that the drinking contributed to the crash. Lopez would have learned nothing through cross-examination of the testing analyst that she

did not uncover through her cross-examination of the supervisor. Accordingly, any error was harmless beyond a reasonable doubt.

ARGUMENT

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

Although the Sixth Amendment guarantees a criminal defendant the right to confrontation and cross-examination, it does not preclude admission of all hearsay evidence. Rather, the confrontation right pertains only to testimonial statements of a witness. Data generated by a GCMS instrument do not fall within this category. Accordingly, admission into evidence of raw data and a report containing the contemporaneous transcription of those data did not violate Lopez's Sixth Amendment rights.

In its opening brief, respondent explained that the GCMS-generated written printout was not testimonial evidence. (RBOM 15-22.) The Confrontation Clause guarantees the defendant the right to be confronted with the "witnesses" against him. (U.S. Const., Amend. VI.) Data generated by an instrument fall outside the scope of the Confrontation Clause, because the instrument is not a witness and does not bear testimony against the accused. (*United States v. Hamilton* (10th Cir. 2005) 413 F.3d 1138, 1142-1143; *United States v. Khorozian* (3d Cir. 2003) 333 F.3d 498, 506; *Luginbhyl v. Commonwealth* (2005) 46 Va. App. 460, 466-467 [618 S.Ed.2d 347].) As one federal court explained, "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[.]" (*United States v. Lamons* (11th Cir. 2008) 535 F.3d 1251, 1263, emphasis in original.) "Raw data . . . is not subject to the

constraints of the confrontation clause[.]" (*State v. Bullcoming* (2010) 147 N.M. 487 [226 P.3d 1, 10]; accord, *Hamilton v. State* (Tex.App. 2009) 300 S.W.3d 14, 21-22.)

Lopez argues that the first page of the report is testimonial because it was not produced by an instrument but, rather, was handwritten. (AB 15-21.) But that page is simply a recordation of the results generated by the GCMS. It contains neither new information nor any subjective conclusions by the testing analyst. In any event, it is cumulative to the instrument-generated printouts and the testimony, so its admission could not have affected the results in Lopez's case.

Lopez sidesteps the question of whether an instrument can be a "witness" or make a "statement." She argues that the cases relied upon by respondent are no longer persuasive because they predate *Melendez-Diaz* and are superseded by that decision. (AB 26-30.) Lopez is wrong. Courts considering the issue even after *Melendez-Diaz* have reached the same conclusion respondent advocates here.

In *State v. Bullcoming*, *supra*, 226 P.3d 1, a technician prepared a report of the defendant's blood alcohol level based upon readings the technician obtained from a gas chromatograph instrument. Instead of calling that technician to testify at trial, the prosecution called an analyst who had no involvement in the preparation of the report. This analyst testified about the standard procedures used at the lab to record blood-alcohol levels, the testing methods, and the defendant's blood alcohol level at the time of the test. He also testified that the instrument did the work and that anyone could write and record the result. The instrument printed out the result, and a technician then transcribed it to a report. (*Id.* at p. 6.) The defendant argued that, under *Melendez-Diaz*, he had a right to confront the technician who recorded the results.

The New Mexico Supreme Court disagreed. The court noted that the technician was not required to interpret the results, exercise any independent judgment, or employ a particular methodology in transferring the information to a report. The technician merely transcribed data generated by the instrument. Thus, the technician "was a mere scrivener, and [d]efendant's true 'accuser' was the gas chromatograph machine which detected the presence of alcohol in [d]efendant's blood, assessed [d]efendant's [blood alcohol content], and generated a computer print-out listing its results." (*Id.* at p. 9.) Under these circumstances, the court held, "the live, in-court testimony of a separate qualified analyst is sufficient to fulfill a defendant's right to confrontation." (*Ibid.*)

Similarly, in *State v. Appleby* (2010) 289 Kan. 1017 [221 P.3d 525], two forensic technicians testified that they had used computer software to determine that the blood on one evidence item had a 1 in 14.44 billion chance of being from someone other than the defendant and that the blood on another evidence item had a 1 in 2 quadrillion chance of being from someone other than the defendant. (*State v. Appleby*, *supra*, 289 Kan. at p. 1053.) The defendant argued that admission of the computerized data violated his Sixth Amendment rights because the witnesses who testified had not placed the samples in the instrument and did not know how the data bases were compiled. The defendant relied upon *Melendez-Diaz.*

Rejecting the defendant's argument, the Kansas Supreme Court ruled that the DNA data was not testimonial. The court explained that the comparisons were made by placing the physical evidence with other physical evidence and that the writers of the computer programs had engaged in non-testimonial actions. Thus, "neither the data base nor the statistical program are functionally identical to live, in-court testimony, doing what a witness does on direct examination." (*Id.* at pp. 1057-1058.) While testimonial evidence was offered against the defendant, such

testimony came from witnesses who were on the stand and available for cross-examination. (*State v. Appleby*, *supra*, 289 Kan. at pp. 1058-1059.)

And, in *People v. Brown* (2009) 13 N.Y.3d 332 [918 N.E.2d 927], New York's highest court held that *Melendez-Diaz* did not render "testimonial" a DNA report that "consisted of merely machine-generated graphs, charts and numerical data" but included no subjective analysis. In such cases, the court held, it was not necessary to call the technicians who operated the instruments as witnesses, as long as there was testimony from someone qualified to interpret the results. (*People v. Brown*, *supra*, 13 N.Y.3d at p. 340.)

As these cases demonstrate, *Melendez-Diaz* does not undermine the conclusion that evidence generated by a validated and calibrated instrument is not "testimonial." In *Melendez-Diaz*, the prosecution did not introduce the raw data; instead, it introduced 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.) Further, the main reason advanced in support of the holding in *Melendez-Diaz* suggests that the confrontation clause would not apply to the raw *scientific* data as opposed to the interpretation of that data. The Court emphasized that the certificates were "quite plainly affidavits," i.e., statements of fact sworn by a declarant before an officer qualified to administer oaths, and thus 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. Finally, the data on its own is meaningless and inadmissible without an expert to interpret it. Unlike the sworn statements of the out-of-court affiants in *Melendez-Diaz*, the testimony of an expert who appears in court to interpret the data, and is subject to cross-examination, satisfies the confrontation right.

Lopez discusses scientific evidence in broad, general terms (AB 22-23) but fails to address GCMS or other instrument-generated testing. But it

is precisely this type of forensic testing that involves no subjective analysis. Here, as Willey testified, the analysis is performed by the GCMS instrument, not the technician. A computer analyzes the blood sample, and a printout is generated of the results. (4 RT 459-460.) The instrument is "totally automated"; the technician just "push[es] a button and leave[s]." (4 RT 469.) In fact, given the volume of testing performed, the original analyst would probably not remember any given test and would merely refresh his recollection by looking at his report. In such circumstances, requiring the technician's presence in court serves no useful purpose.[1]

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

Whether or not the writings were admissible, forensic alcohol supervisor Willey, as an expert, was properly permitted to testify to the opinion he formed in reliance upon them. The tests performed in this case were objective, mechanical, routine, and involved no exercise of independent judgment. Willey was familiar with the tests and with the procedures used by the lab. And he had supervised the testing analyst and was familiar with the analyst's work. The presence of the testing analyst in court would not have assisted Lopez in determining the reliability of the evidence -- the core function of the

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[1] Lopez cites to a 2009 study by the National Academy of Forensic Sciences. (AB 24, citing Garret & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions (2009) 95 Va.L.Rev. 1 ["Garret & Neufeld"].) The study, however, was focused on forensic disciplines involving pattern comparison, such as hair comparison, soil comparison, fingerprint comparison, bite mark comparison, shoe print comparison, and voice comparison. (Garrett & Neufeld, 95 Va.L.Rev. at p. 15.) Confrontation clause issues are unlikely to arise in most of these areas because they do not involve the physical consumption of evidence, making retesting before trial more practical.

confrontation clause. Accordingly, Willey's presence on the stand satisfied Lopez's confrontation rights.

Lopez and respondent agree on the rule governing the introduction of expert opinion. The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions—even if such sources include hearsay. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.) The trial court retains considerable authority, through its discretion under Evidence Code section 352 and its discretion in instructing the jury, to prevent the wholesale admission of incompetent hearsay under the guise of expert opinion. (*People v. Price* (1991) 1 Cal.4th 324, 416.)

Lopez contends that California law precludes an expert from simply repeating an inadmissible hearsay statement made by another. (AB 30-38.) She relies upon *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735 (AB 33-34), a civil case in which the court held that an expert could not base his opinion solely on medical records when he was not a percipient witness to the medical procedure in question and when the records were not properly authenticated as business records. (*Id.* at pp. 33-34.) Respondent agrees that the witness must properly qualify as an expert rather than, for example, a custodian of records, and that there must be a basis for the expert's opinion. However, these concerns are addressed by state law foundational requirements.

A trial court has broad discretion in ruling on foundational matters on which expert testimony is to be based. (*People v. Mayfield* (1997) 14 Cal.4th 668, 766; *Maatuk v. Guttman* (2008) 173 Cal.App.4th 1191, 1197.) Thus, it has authority to contain expert testimony to the area of expertise and to require an adequate foundation for the expert's opinion. (*People v. Hamilton* (2009) 45 Cal.4th 863, 912; *Kotla v. Regents of the University of California* (2004) 115 Cal.App.4th 283, 292.) Even when a witness qualifies as an

expert, he does not possess carte blanche to express any opinion within his area of expertise. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) For example, an expert may not base his opinion on facts without support in the evidence, on speculative or conjectural factors, on matters with no evidentiary value, or upon speculation and conjecture. (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.)

When lab reports, instrument printouts and lab test results are at issue, trial courts act well within their discretion in finding that these records are trustworthy and are supported by sufficient foundation. For example, lab reports referred to by experts likely will qualify as business records. Evidence Code section 1271 provides:

> 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 event 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.

A lab test result qualifies as a business record even if the person authenticating it did not run the test himself. (*County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1450-1452 [testimony by laboratory director regarding blood test run by technicians at his lab].) The testifying witness need not be present at every transaction which led to the making of the record, as long as the witness is familiar with the procedures followed. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 322.) Conversely, if the witness is not qualified to lay a foundation for the record, then the exception does not apply. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1313.)

People v. Champion (1995) 9 Cal.4th 879 is instructive. In *Champion*, a technician employed by a police fingerprint laboratory applied a chemical to some pieces of paper, causing latent fingerprints to appear. She then photographed the prints and wrote a report describing these actions. Later, a police fingerprint expert examined the report and the photographs, compared the photographs to the defendant's fingerprints, and found that they were the same. The fingerprint expert testified at trial regarding the technician's actions as well as his own. The technician did not testify. (*Id.* at pp. 914-915.) This Court held that the expert properly testified about the contents of the technician's report because the report was within the business records exception to the hearsay rule as set forth in Evidence Code section 1271. (*Id.* at p. 915; see also *People v. Beeler* (1995) 9 Cal.4th 953, 978-979 [pathologist, who did not participate in autopsy, properly testified to contents of autopsy report under business records exception to hearsay rule]; *People v. Clark* (1992) 3 Cal.4th 41, 158 [same facts and result as in *Beeler*, but under Evid. Code, § 1280, hearsay exception for public records].)

Here, Willey's testimony met all of the requirements of Evidence Code section 1271. Willey testified that the data generated by the GCMS, and the report, were records normally kept and maintained by laboratory personnel as part of their reporting process. (4 RT 463-464.) Willey also testified that he was trained to identify the peaks, corresponding to chemicals, which appear on the printout generated by the GCMS. (4 RT 460.) Finally, Willey testified that samples are delivered to the evidence room, and from there to the alcohol department. They remain in a sealed envelope. The technician checks the name against a log sheet. The laboratory issues an identification number unique to each sample. (4 RT 459.) The lab has a procedure to make sure the GCMS is functioning properly at the time the sample is placed into the instrument. (4 RT 460.)

Each day, a technician runs calibrations, quality control tests, and line averages. Another quality control check is run after every tenth sample. Quality control procedures are also employed throughout the day. (4 RT 461.) In the instant case, Willey added, the standard calibrations, and before and after quality control samples were run. (4 RT 463.) Thus, the sources of the information, as well as its method and time of preparation, were such as to indicate its trustworthiness. Based on this foundational showing that the report itself was reliable, he was able to give his expert opinion regarding appellant's blood-alcohol content. This is the case regardless of whether the report was independently admissible under the confrontation clause. (See Evid. Code, § 801, subd. (b) [expert may base opinion on matters, "whether or not admissible," reasonably relied upon by experts in field].) As discussed further below, Willey's testimony satisfied the confrontation clause because he was subject to meaningful cross-examination, which included an opportunity to test the veracity of the materials on which he relied.

Lopez asserts that, to avoid violating the confrontation right, an expert must be more than a mere "conduit" for testimonial hearsay. (AB 34-36.) Respondent agrees. Lopez argues, however, for a bright-line rule that would require the person who performed the test, or placed the sample into the instrument, to appear in court.[2] (AB 23-26, 39-40.) But that is neither practical nor constitutionally compelled. As explained below, the Sixth Amendment is satisfied when the witness on the stand can provide adequate information about lab protocols, about the nature of the tests performed, about whether those tests were routine, about the procedures followed, and about the qualifications, training and experience of the testing analyst, so

[2] Presumably, if there were several persons involved in the testing, which is often the case, Lopez would require the presence of every single one of them.

that the defendant can meaningfully explore and challenge the validity of the test results.

Vann v. State (Alaska App., April 23, 2010) __ P.3d __ [2010 WL 1635834] is illustrative. In *Vann*, a murder case, a DNA lab received DNA samples from both the defendant and the victim. The samples were compared to genetic material taken from five items of evidence associated with the crime. At trial, a forensic analyst described the process of analyzing DNA. She testified that she analyzed three of the five samples and testified about the results of her analysis. Another analyst—one not presented at trial—had tested the other two samples. The testifying analyst testified that she had reviewed the report of the second analyst as well as the test data, confirmed the accuracy of the results, and agreed with the conclusions. (*Vann v. State*, *supra*, 2010 WL 1635834 at * 2-3.) Relying on *Melendez-Diaz*, the defendant argued that admission of the second analyst's results violated his Sixth Amendment rights. (*Id.* at * 5.)

The *Vann* court explained that *Melendez-Diaz* did not resolve the question before it, because in that case written certificates of analysis were the only evidence against the accused, whereas in the case before it a witness had taken the stand. (*Vann v. State*, *supra*, 2010 WL 1635834 at * 5-6, 8-10.) After surveying case law from other jurisdictions, the court arrived at the following rule: If the expert is merely a "conduit" for another's opinion then the testimony is impermissible; but, if the expert is offering his or her own independent opinion, then there is no Sixth Amendment violation. (*Id.* at * 10.) The court recognized that its rule depended upon the circumstances of each case, and that the "conduit" versus "independent" label was, "in fact, only a shorthand way of expressing the court's conclusion as to whether cross-examination of that one witness will satisfy the defendant's right of cross-examination or whether (instead) the government must produce one or more additional

witnesses." (*Id.* at * 12.) To guide lower courts in making this decision, the *Vann* court said, the key was whether the concerns in *Melendez-Diaz* were satisfied, for example, whether the testifying witness could adequately address the testing analyst's training, judgment and testing skills; the tests that were performed; whether those tests were routine; and whether they required the exercise of judgment that the testing analyst might not have possessed. (*Id.* at * 12, citing *Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2537-2538.) Applying its rule to the facts before it, the *Vann* court found no Sixth Amendment violation in the defendant's case. (*Vann v. State*, *supra*, 2010 WL 1635834 at * 13-14.)

The *Vann* court rejected a contention identical to the one made by Lopez here (AB 25-26, 39), that cross-examination of the analyst who actually conducted the test was necessary to accomplish the goal identified in *Melendez-Diaz* of weeding out fraud or incompetency in analysis. The court noted that, while there was always a possibility of testing error, this was the type of problem that *Melendez-Diaz* had addressed in footnote 1 of its opinion, in which it held that the government was not required to present every conceivable witness or negate any conceivable possibility of evidence tampering. (*Vann v. State*, *supra*, 2010 WL 1635834 at * 15.) The *Vann* court observed that concerns about the possibility of testing error are addressed by foundation and chain-of-custody requirements; these issues go to the weight and not the admissibility of the evidence. (*Ibid.*)

Another recent opinion considering the issue is *State v. Dilboy* (N.H., April 20, 2010) __ A.2d __ [2010 WL 1541447]. In *Dilboy*, the defendant was charged with negligent homicide after killing two people while driving under the influence of narcotics. At trial, the assistant laboratory supervisor testified that, under his supervision, blood and urine samples were tested at the lab. He also explained how the laboratory received, processed and tested samples. He further testified that he managed lab employees,

reviewed results, and testified about them in court. The supervisor gave the results of the tests and offered his opinion on the effect of the drugs found in the defendant's blood on a person's behavior. (*State v. Dilboy*, *supra*, 2010 WL 1541447 at * 6-7.) Relying on *Melendez-Diaz*, the defendant argued that the test results were inadmissible absent testimony from the analysts who performed the tests. (*Id.* at * 6.)

The New Hampshire Supreme Court rejected the argument, finding that "*Melendez-Diaz* simply did not determine whether the technician or analyst who performed the scientific tests at issue must testify at trial." (*State v. Dilboy*, *supra*, 2010 WL 1541447 at * 10.) The court noted that the concurring opinion of Justice Thomas underscored the "limited reach" of the decision. (*Ibid.*) And it concluded that an expert may rely upon testimonial statements when the expert renders an independent judgment and applies his or her training to the sources of information, because the opinion is an "original product which can be tested through cross-examination." (*Id.* at * 9-10.) The court added that the admissibility of such testimony would need to be determined on a case-by-case basis. (*Id.* at * 9.) The *Dilboy* court found that in the case before it, the defendant's confrontation rights were satisfied. (*Id.* at * 10.)

And, in *Rector v. State* (2009) 285 Ga. 714 [681 S.E.2d 157], the Georgia Supreme Court found permissible testimony by the state's chief toxicologist about a toxicology report prepared by another doctor, when the toxicologist had reviewed the report and reached the same conclusion. The court explained:

> [R]ather than being a mere conduit for the doctor's findings, the toxicologist reviewed the data and testing procedures to determine the accuracy of the report. An expert may base his opinions on data gathered by others [citation].

(*Rector v. State*, *supra*, 285 Ga. at p. 716, internal quotations omitted.)

Other opinions are in accord. (See cases cited at RBOM 24-25; see also *State v. Lopez* (Ohio App., March 1, 2010) __ N.E.2d __ [2010 WL 703250 at * 7-12]; *United States v. Darden* (D. Md. 2009) 656 F.Supp.2d 560, 561-564.)

Nothing in *Melendez-Diaz* conflicts with the results reached in these cases. *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 Supreme Court stated that the defendant must be able to challenge the "honesty, proficiency and methodology" of the analyst(s) who did the laboratory work in order to "weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2537, 2538.) If the witness on the stand is able to address these key questions, then there is no Sixth Amendment violation. In making this determination, courts should consider whether the testifying witness can adequately provide information relating to lab protocols, what tests were performed, the procedures which were followed, whether the tests were subjective or routine, the familiarity of the testifying witness with the testing analyst's training and experience, and any independent conclusions reached by the testifying witness based on his or her own assessment of the test results. If the circumstances of the case show that the testifying witness is not simply repeating the hearsay of others, then the testimony should be allowed. While there is always the possibility of a flaw in the original testing, such issues are addressed through foundational and authentication requirements, and can be explored through cross-examination of the testifying witness. As one federal court explained:

> Certainly, a technician who conducts lab tests could intentionally or unintentionally affect the data generated. The same could be said, however, for anyone handling the sample in the chain of custody, or anyone involved in the authenticity of the sample or anyone certifying the accuracy of the test devices. Yet, the Supreme Court noted that it was not holding that these potential witnesses must appear as part of the prosecution's case.

(*United States v. Darden*, *supra*, 656 F.Supp.2d at p. 564, citing *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1.)

Lopez is wrong in her assertion that Willey acted as "mere conduit" for hearsay information prepared by testing analyst Jorge Peña. (AB 36-37.) Willey detailed his scientific training. He testified that he was a criminalist and forensic alcohol supervisor with the San Diego County Sheriff's Department crime laboratory. (4 RT 456.) This was a state-certified position that allowed him to supervise criminalists for purposes of alcohol analysis. (4 RT 455-456.) He was also a criminalist who had worked at the laboratory, in the field of alcohol analysis, for 17½ years. (4 RT 455.) Before he started at the crime lab, he had been employed as a technologist at two hospitals and at a few private laboratories. (4 RT 456.) To qualify for his position, he held a bachelor of science degree in general biology, undertook graduate work in the same field, and was required to take several proficiency exams. (4 RT 457.) He had testified as an expert on over 700 occasions, and had performed his own analysis on samples tens of thousands of times. (4 RT 458.) He was familiar with the crime lab's procedures for processing blood samples for alcohol analysis. (4 RT 458-459.)

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

of the GCMS. (4 RT 459.) After samples are tested in the instrument, its computer generates a paper printout of the results. (4 RT 459-460.) The printout shows a graph that, by the widths and heights of the peaks depicted on it, corresponds to the chemical being tested in the sample. (4 RT 460.) Willey also testified about safeguards that the lab uses to ensure that the tests are run properly and that the GCMS remains calibrated and in working order. (4 RT 460-461.)

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

Willey testified that the test performed by Peña reported that, at 1:04 a.m. on August 19, 2007, about two hours after the crash, Lopez's blood-alcohol level was ".09 grams percent." (4 RT 465-466.) Importantly, Willey's testimony constituted an independent conclusion, based on his separate abilities. (4 RT 467.)

Thus, Willey was able to address the concerns outlined 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. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537.) In fact, he played a key role in ensuring that the GCMS instrument and the protocols

in the laboratory were functioning as they were designed to do. Lopez was able to expose any potential deficiencies in his testimony through the "crucible of cross-examination." (*Crawford*, *supra*, 541 U.S. at p. 61.) While Lopez might have preferred testimony from Peña, such testimony was not constitutionally compelled. Accordingly, the Court of Appeal erred in concluding that Willey's presence on the stand was insufficient to satisfy Lopez's confrontation rights.

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

Lopez asserts that *Melendez-Diaz* overruled this Court's decision in *People v. Geier*, *supra*, 41 Cal.4th 555. (AB 41-44.) In so doing, Lopez ignores the fact that *Melendez-Diaz* and *Geier* involved two very different situations. As Lopez acknowledges (AB 42), in *Geier*, unlike *Melendez-Diaz*, an expert testified and relied upon contemporaneous laboratory notes and reports prepared by another to support her expert opinion. (*Geier*, *supra*, 41 Cal.4th at pp. 594-596.)

"It is axiomatic that cases are not authority for propositions not considered " [citations]." (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127, internal quotations omitted.) *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* involved raw data, contemporaneous recordation of observable events, an expert relying on work by others, and live testimony by a witness subject to cross-examination. None of these circumstances was present in *Melendez-Diaz*; thus the Supreme Court had no occasion to consider them. (*State v. Dilboy*, *supra*, 2010 WL 1541447 at * 10.)

As also explained (RBOM 32-34), *Geier* developed a three-part test for determining whether a statement is testimonial. Under the test in *Geier*,

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) described a past fact related to criminal activity for (3) possible use at a later trial." (*Geier*, *supra*, 41 Cal.4th at p. 605.) Lopez does not address this test or propose any alternative. While the affidavits in *Melendez-Diaz* were clearly "testimonial" under the *Geier* test, the Supreme Court has yet to provide a comprehensive definition of the term. Absent further guidance from the Supreme Court, the *Geier* three-part test remains a workable formula for evaluating the "testimonial" nature of a statement made out of court. Accordingly, *Melendez-Diaz* did not overrule *Geier*.

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

Lopez concedes that she drank the night of the crime. (AB 44-45.) Lopez argues, however, that the blood draw was the "only evidence" she was intoxicated at the time and that therefore, admission of the written documents and Willey's testimony was prejudicial. (AB 45.)

Lopez is wrong. As set forth in the Respondent's Opening Brief on the Merits, Lopez told bar employee Quentin Porter that she had a couple of drinks before she got behind the wheel of her car. (2 RT 106.) Lopez smelled like alcohol. (2 RT 121.) Another employee saw her drinking beer and tequila. (4 RT 491-494, 504, 512, 506-508, 550-551, 607.) Lopez also admitted to one of the paramedics that she had been drinking. (2 RT 213, 220-221.) A highway patrol officer responding to the scene smelled alcohol on Lopez's person. (3 RT 321.) Lopez took the stand and testified that after she finished work for the day, she drank two shots of tequila. (6 RT 856-859.) The prosecution's accident reconstruction expert listed Lopez's intoxication as one of the contributing causes of the crash. (6 RT 827-828.)

Moreover, contrary to Lopez's assertion (AB 47), there was no evidence other than her own self-serving testimony that the victim had any responsibility for his death. In fact, the defense called an accident reconstruction expert whose only disagreement with the prosecution's expert was the speed at which the vehicles were traveling. (7 RT 986-987.) And this expert had Lopez traveling at a faster rate of speed than the victim. (7 RT 951.)

Finally, Lopez fails to explain what she would have gained by cross-examining Peña which was not uncovered through her thorough, probing cross-examination of Willey. (4 RT 467-484.) As set forth in Argument II, above, Willey was intimately familiar with the laboratory's procedures, the GCMS, the written materials, Peña's work and the tests performed in this case. Accordingly, any error was harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: May 20, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 5724 words.

Dated: May 20, 2010

EDMUND G. BROWN JR.
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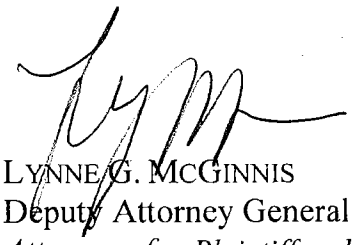

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

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

I declare:

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

On May 21, 2010, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on May 21, 2010 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 21, 2010, at San Diego, California.

M. Seda
Declarant

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Signature

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