Supreme Court No. S176213

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. HELEN GOLAY, Defendant and Appellant	S176213 Court of Appeal No. B209568

DEFENDANT'S SUPPLEMENTAL BRIEF

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I

INTRODUCTION

On July 13, 2011 the Court requested the parties to serve and file within 30 days Supplemental Briefs addressing the significance, if any, of the United States Supreme Court's recent decision in Bullcoming v. New Mexico, ___ U.S. ___ [2011 W.L. 2472799].

II

BACKGROUND AND CAPTION

In July 2006 the District Attorney of Los Angeles County filed multiple murder charges against Helen Golay and Olga Rutterschmidt, Los Angeles County Superior Court Case Number BA306576. On January 18, 2007 the Superior Court dismissed the case as to Defendant Golay because her right to a speedy preliminary hearing had been violated by the Court continuing the matter over her objection. That left co Defendant Rutterschmidt briefly

as the sole defendant, People v. Rutterschmidt. The District Attorney immediately refiled the case against Golay, Superior Court No. 315654 and then moved to have the two cases consolidated under the lead case of People v. Rutterschmidt, BA306576 (the low number).

Both Rutterschmidt and Golay were convicted and both appealed to the Court of Appeal where their convictions were upheld, People v. Rutterschmidt and Golay, Court of Appeal No. B209568.

Both Rutterschmidt and Golay filed separate Petitions for Review with this Court. Golay's Petition for Review was granted and co Defendant Olga Rutterschmidt's Petition for Review was denied. This Court should change the caption of the case to read People v. Golay. This Court has a policy of changing the names of cases when one defendant whose name is in the caption in the Court of Appeal is no longer a party in the Supreme Court. See, e.g., People v. Noriega , S160953 (December 23, 2009), where this Court changed the caption because the defendant in the Court of Appeal was no longer a defendant in the Supreme Court.

Golay wants to make sure her name is in the caption in case there is a subsequent Petition for Writ of Habeas Corpus in the federal court. She wants to make sure the federal court will know she did exhaust all available state remedies. Furthermore, if the decision of the Court in this case should be reviewed by the United States Supreme Court on a Writ of Certiorari Defendant Golay wants to make sure the United States Supreme Court knows she was a party to the proceeding in this Court.

Golay respectfully reminds this Court that she currently has pending before this Court a Motion for Calendar Preference.

III

STATEMENT OF THE CASE

On June 21, 2005 Kenneth McDavid was killed. McDavid's death was investigated by the Los Angeles Police Department. The criminal investigation was handled jointly by Los Angeles Police homicide detectives and the FBI. On May 16, 2006 the FBI filed a federal complaint in the United States District Court against Golay and Rutterschmidt . They were both arrested on May 18, 2006 and first taken into federal custody. On May 30, 2006 they were both indicted by a Federal Grand Jury for allegedly committing mail fraud. Before they could stand trial on the federal charges the District Attorney of Los Angeles County filed state court murder charges against Golay and Rutterschmidt on July 31, 2006.

Almost a year later and still prior to their jury trial in the instant case, this Supreme Court decided People v. Geier, 41 Cal.4th 555 (2007). The decision was handed down on July 2, 2007, almost one year after the District Attorney filed the charges in this case. The Geier case was a capital murder case and the opinion was authored by now retired Justice Moreno. During the trial in People v. Geier the prosecutor elicited testimony from Dr. Cotton, the laboratory director for Cellmark, a private, for profit company that performed DNA testing in criminal cases. Cellmark accepted criminal cases from both the prosecution and the defense. The defense objected to Dr. Cotton's testimony regarding the DNA match between the defendant's DNA and DNA from the victim. Dr. Cotton did not perform the test herself. Rather the test and analysis of the DNA was performed by Paula Yates, one of Cellmark's biologists. Dr. Cotton reviewed the forms Yates filled out at various points and also reviewed her handwritten notes. Dr. Cotton also reviewed other data in the case. Dr.

Cotton and Yates co signed the DNA report as well as two follow-up letters to the San Bernardino Sheriff's Department.

At trial the defense objected to Dr. Cotton's testimony. The defense argued that the test results were not admissible unless Paula Yates testified. On appeal defendant Geier argued that the testimony was admitted in violation of the Sixth Amendment right to confront and cross examine one's accuser as established by the United States Supreme Court in Crawford v Washington, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (2004). The majority of this Court rejected the Confrontation Clause argument. Justice Werdegar filed a separate concurring opinion . Justice Werdegar stated, 41 Cal.4th at 621:

> ". . . I would not hold or imply that all laboratory reports are non testimonial. Unlike the majority, moreover, I would not hold that any error in admitting the DNA match evidence was harmless beyond a reasonable doubt."

The trial in the instant case began with jury selection on March 12, 2008.

On Monday March 17, 2008 the United States Supreme Court granted certiorari in Melendez -Diaz v. Massachusetts , __ U.S. ___, 128 S.Ct. 1647 (2008). The prosecutor began her opening statement to the jury in this case on Tuesday morning March 18, 2008 (Reporter's Transcript, p. 911, hereinafter "RT"). After the opening statement the prosecutor called a few witnesses (RT 993-1097). At 4:23 P.M. on Tuesday March 18, 2008 the Court recessed until 9:00 A.M. the following morning (RT 1097, lines 21-25).

The jury trial resumed Wednesday morning March 19, 2008 with some brief concluding testimony by witness Michael McGann (RT 1205 - 1209).

The prosecutor then called witness Joseph Muto, the laboratory director for the

Department of the Coroner (RT 1209-1210). Muto testified with respect to "a toxicology screening that was done on a decedent named Kenneth McDavid..." (RT 1214, lines 13-14). The prosecutor asked Mr. Muto whether he had reports dated July 13 and July 21, 2006 and Mr. Muto responded that he did. At this point counsel for Golay asked to approach the bench (RT 1214, lines 19-20).

Outside the presence of the jury and at the sidebar, Golay's attorney stated,

> "If this witness is going to be offered to testify as to the results of the toxicology examination, my client, Ms. Golay, objects on the ground that under the Sixth Amendment, right of confrontation, she has a right to have the actual person who conducted the test come here to testify and be subjected to cross examination.
>
> Just last Monday, the Supreme Court granted [certiorari] in Melendez-Diaz, M-E-L-E-N-D-E-Z, D-I-A-Z v. Massachusetts, which is whether or not the confrontation clause does require the actual technician who did the tests to be present to testify. And so if that's what his witness is being offered for, to actually testify as to the results, we'll respectfully object on the ground of the Sixth Amendment right to confront the technician who took the tests." (RT 1214, line 28; RT 1215, lines 1-16).

The prosecutor responded to Golay's attorney's comment by stating that she did not think "there's a Sixth Amendment issue here." (RT 1215, lines 22-25).

The Court expressly overruled the defense objection (RT 1216, line 11).

Resuming his direct testimony, Mr. Muto testified there were four analysts who looked at the samples from McDavid's autopsy (RT 1217, lines 18-28). According to Mr. Muto, each of the four analysts provided their conclusions on their reports (RT 1217,

line 16). Mr. Muto testified that a particular deputy medical examiner was handling this particular case and it was Dr. Riley (RT 1219, lines 17-21).

The defense objected to the testimony of Mr. Muto. The Court stated in response to the objections :

> "You're objecting to this whole line of testimony, so you don't have to do it each time.
>
> The objection is overruled.
>
> Go ahead, Doctor." (RT 1221, lines 14-19). [1]

Muto testified based upon the laboratory report that McDavid had a blood alcohol level .08 which would be considered in California to be an impairment of one's driving's ability (RT 1222). Muto also testified that zolpidem was present in Mr. McDavid. That is a generic name for Ambien, which is a sedative (RT 1223).

Over objection Muto testified that Ambien is a prescription medication . He testified that it is a hypnotic or a sedative that is prescribed as a sleep aid. He said it was potentially a powerful sleep aid (RT 1224, lines 17-19).

With respect to the amount of Ambien in McDavid's body Muto testified that it was within "the therapeutic level." (RT 1225, lines 6-8).

Muto also testified that hydrocodone was found in McDavid's body. He testified that hydrocodone is a generic drug for Vicodin (RT 1225, lines 13-19). Muto testified that the amount of hydrocodone found in McDavid's body was higher than expected with respect to

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[1] The Court erroneously referred to Mr.Muto as a doctor. He was not a doctor.

therapeutic levels (RT 1225, lines 24-25).

Muto testified that an additional toxicology screening was done on July 21, 2006 on McDavid's blood that had remained in the coroner's laboratory (RT 1226, lines 14-19). Muto testified that someone named Daniel Anderson signed the report for July 21, 2006 (RT 1226-1227).

Golay's attorney again objected on the same basis as previously stated and again the Court overruled Golay's objection (RT 1227, lines 14-17).

Muto them went on to say that McDavid's blood was screened for additional prescription drugs and the response from Muto was that topiramate was found in McDavid's system. Topiramate is the generic name for a drug called Topamax (RT 1227, lines 22-28).

Muto testified that Topamax is normally prescribed as an anti convulsant to control seizure disorders. Muto testified that a toxic or higher level one of the effects is sedation (RT 1228).

Again, Golay's attorney objected to this line of questioning and again his objection was overruled (RT 1228, lines 10-11). Immediately after the Court again overruled Golay's attorney's objection Muto testified,

> "We found the level 4.4 micrograms per milliliter of blood." (RT 1228, lines 12-13).

Again, over the objection of Golay's attorney, the witness testified that the side effects of Topamax "include sedation and dizziness." (RT 1229, lines 19-22).

On cross examination Muto testified that he was not a pharmacologist (RT 1230, line 8).

On further cross examination Muto admitted that it was not common for the same person to review his own work (RT 1232 , lines 20-28).

Muto could not testify as to who did the peer review of the four toxicologists in this case (RT 1233, lines 11-18). On further cross examination Muto conceded that all of the drugs he testified to were detected by other persons, not by him (RT 1234-1235). He also admitted that all four of the toxicologists who allegedly detected certain drugs were all available to testify (RT 1235, lines 1-28; RT 1236, line 1).

Muto conceded at the conclusion of his cross examination that on occasion mistakes are made. He testified that peer review was designed to detect mistakes but there are mistakes made in the laboratory (RT 1236).

On re direct examination Muto testified in response to a leading question by the prosecutor that the four toxicologists could also have been subpoenaed by the defense (RT 1237, lines 2-6).

Outside the presence of the jury Golay's attorney stated that the availability of any witness to the defense does not satisfy the Confrontation Clause requirement. Golay's attorney reiterated his argument under the Sixth Amendment and moved to strike the testimony of Muto, but that motion was denied (RT 1238, lines 10-16).

After Muto's testimony the prosecution called numerous other witnesses and then rested. The theory of the prosecution was that Golay murdered Ken McDavid by giving him the alcohol and drugs mentioned by Muto, driving him to an alley in Westwood, dumping his sedated body in the alley, backing up her vehicle, and then running him over to make it look like a hit and run accident (RT 5228, lines 7-8). The attorney for Rutterschmidt

also contended Golay murdered McDavid by running him over in the alley. Golay was born on February 3, 1931. She was in her mid 70's at the time of the alleged murder. The defense argued that Golay was too old and frail to have murdered McDavid but the prosecution contended that the sedation by all of the drugs enabled Golay to drive McDavid to the alley in Westwood , push his body out of the vehicle, and then run him over and leave (RT 5230-5234). The prosecution produced evidence that the drugs found in McDavid's body were also in Golay's medicine cabinet (RT 5440, lines 6-14) (argued by counsel for Rutterschmidt).

The defense argued that Golay's daughter who was in good shape and belonged to a health club, must have committed the act, not Defendant Golay (RT 5251, line 12). The evidence of the content of McDavid's body was material and important evidence (RT 5456, lines 10-21; RT5460, lines 20-23; RT 5464, lines 16-25).

The jury found both Golay and Rutterschmidt guilty of two counts of first degree murder.

Both defendants appealed their convictions and while their appeals were pending in the California Court of Appeal the United States Supreme Court decided Melendez-Diaz v. Massachusetts, 557 U.S. __, 129 S.Ct. 2527 (2009) on June 25, 2009.

Four days later, on June 29, 2009, the United States Supreme Court denied certiorari in Geier v. California, __U.S. __, 129 S.Ct. 2856 (2009). About a month and a half later, on August 18, 2009, the Court of Appeal below affirmed the convictions of Golay and Rutterschmidt . The Court of Appeal below had the benefit of the United States Supreme

Court' decision in Melendez-Diaz v. Massachusetts, supra and the knowledge that the United States Supreme Court had denied certiorari in the Geier case. It is not known whether the Court of Appeal below knew that on the same day the United States Supreme Court denied certiorari in Geier , June 29, 2009, it granted certiorari in Briscoe v. Virginia, 129 S.Ct. 2858 (2009). The United States Supreme Court obviously granted certiorari in Briscoe v. Virginia, supra, to give further consideration to the confrontation issue. It is not clear why the United States Supreme Court would deny certiorari in Geier yet grant it in Briscoe. While we can speculate as to what was going on because the Briscoe v. Virginia case was argued before the United States Supreme Court and therefore we have access to the oral argument and the questions propounded by the Justices, we do not know for sure what the significance was of the certiorari grant because on January 25, 2010 the Supreme Court of the United States vacated the judgment of the Supreme Court of Virginia and remanded the case for further proceedings not inconsistent with the opinion in Melendez-Diaz v. Massachusetts. See Briscoe v. Virginia, 130 S.Ct. 1316 (2010). The United States Supreme Court might have vacated and remanded Briscoe v. Virginia on January 25, 2010 because the United States Supreme Court was aware of the pendency of Bullcoming v. New Mexico. The Bullcoming case was before the New Mexico Supreme Court, which had granted review on July 21, 2008 . The New Mexico Court of Appeals had upheld the conviction for driving under the influence in State v. Bullcoming, 189 P.3d 679 (N.M. App. 2008). As stated, the New Mexico Supreme Court granted review of the New Mexico Court of Appeal's decision on July 21, 2008 and then rendered its own opinion, State v . Bullcoming, 147 N.M. 487, 226 P.3d 1 (N.M. 2010). On September 28, 2010 the United

States Supreme Court granted certiorari in Bullcoming v. New Mexico, 131 S.Ct. 62 (2010).

We now come to the question propounded by this Court to the parties - the effect, if any, of Bullcoming v. New Mexico on this case. We do know that the State has the burden of showing that the Confrontation Clause violation was harmless beyond a reasonable doubt. See Statement of Justice Sotomayor respecting the denial of certiorari in Gamache v. California, ___U.S. ___, 2010 DJDAR 17828 (November 29, 2010) and Chapman v. California, 386 U.S. 18, S.Ct. 824 (1967). The issue, of course, is whether the Confrontation Clause was violated in this case.

ARGUMENT -

A. BULLCOMING V. NEW MEXICO SUPPORTS THE CONCLUSION GOLAY'S CONFRONTATION RIGHT WAS VIOLATED.

In Crawford v. Washington, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (2004) the United States Supreme Court unanimously reversed the Washington Supreme Court and held that the Washington assault conviction of defendant Crawford violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. In the trial over the objection of defendant Crawford , the prosecution played a tape recorded statement of defendant's wife, who did not testify. The Washington state trial court had allowed the tape recorded statement to be played because the recorded statement was trustworthy. The Washington Court of Appeals reversed the conviction, but the Washington Supreme Court reinstated the conviction, only to be reversed by the United States Supreme Court. Although the decision to reverse the Washington Supreme Court was unanimous, Chief Justice Rehnquist (joined by Justice O'Connor), would not have overruled its prior decision

in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

However, in his opinion for the Court in which six other justices joined, Justice Scalia overruled Ohio v. Roberts, supra and recognized the importance of the Sixth Amendment's Confrontation Clause and the need of the judicial branch to strictly follow its command. Justice Scalia recognized the importance of requiring testimony to be under oath and subject to cross examination.

In People v. Geier, 41 Cal. 4th 555 (2007), this Court had the opportunity to apply Crawford v. Washington, supra, to a rape and murder case where DNA evidence matching the victim with the defendant was presented by the laboratory director for Cellmark, a private , for -profit company that performs DNA testing in paternity and criminal cases. The laboratory director, Dr. Robin Cotton, did not actually do the DNA test, rather, that was done by a biologist employed by Cellmark. This Court rejected the defendant's argument that the Confrontation Clause of the Sixth Amendment required the prosecution to call biologist Paula Yates as a witness to have her testify under oath and subject to cross examination. This Court ruled that Yates' DNA report was not testimonial .

Although the Geier case involved DNA witnesses and reports generated by non law enforcement persons, Cellmark being a private institution, whereas here Muto and the four toxicologists worked for the Los Angeles Coroner's Office, which is arguably part of law enforcement, this Court did not believe that was a significant difference. People v. Geier, 41 Cal.4th at 605. This Court upheld the conviction after rejecting the Sixth Amendment confrontation argument by the defendant. While the United States Supreme Court denied certiorari in Geier the Supreme Court might have declined to take the case because it felt

that it did make a difference that the prosecution witnesses on the DNA issue worked for a private civilian laboratory. Of course, we do not know why the United States Supreme Court denied certiorari in Geier and we should not speculate.

We do know that four days before the United States Supreme Court denied certiorari in Geier it handed down its landmark decision in Melendez -Diaz v. Massachusetts , supra, which on a five to four vote, applied its decision in Crawford v. Washington, supra to laboratory reports. In her Petition for Review and in her Opening and Reply Briefs on the merits, defendant Golay has already explained and persuasively demonstrated the application of Melendez-Diaz v. Massachusetts to this case. Melendez-Diaz v. Massachusetts, authored again by Justice Scalia, was decided five to four. Nevertheless, the Melendez-Diaz v. Massachusetts decision is binding on this Court. Defendant Golay referred the trial court in this case to Melendez-Diaz v. Massachusetts two days after the United States Supreme Court granted certiorari. While the United States Supreme Court had not then decided the case on its merits defendant Golay still had the right to argue the Sixth Amendment issue and she did so with repeated objections.

Melendez-Diaz, supra, not only states the law in this country it is a clear indication that the United States Supreme Court is not going to back down from its Confrontation Clause position. Obviously there is a majority on the United States Supreme Court that will not allow state courts to violate the Sixth Amendment Confrontation Clause right of criminal defendants. When the United States Court granted certiorari in Briscoe v. Virginia, some thought the Court might back down and retreat from Melendez-Diaz v. Massachusetts . Instead, the Supreme Court on January 26, 2010 unanimously vacated the judgment of the

Supreme Court of Virginia and remanded the case for further proceedings to allow the Virginia Supreme Court to follow Melendez-Diaz v. Massachusetts . See Briscoe v. Virginia, ___ U.S. ___, 130 S.Ct. 1316 (2010).

We now come to Bullcoming v. New Mexico, ___ U.S. ___ [2011 WL 2472799] decided June 23, 2011. This Court's order of July 13, 2011 requested supplemental briefing as to the significance, if any, of the Bullcoming decision.

To apply Bullcoming v. New Mexico to the instant case we should focus on the line up of the justices. Our attention is first directed to Justice Kennedy, who voted with the majority in Crawford v. Washington. Justice Kennedy wrote the dissenting opinion in Bullcoming v. New Mexico. Justice Kennedy also wrote the dissenting opinion in Melendez-Diaz v. Massachusetts. We should also look at Justice Breyer, who supported Kennedy's dissenting opinion in Bullcoming v. New Mexico. Significantly, Justice Breyer also supported Justice Kennedy's dissenting opinion in Melendez-Diaz v. Massachusetts . We should also look at Chief Justice Roberts, who supported Kennedy's dissenting opinion in Bullcoming v. New Mexico as he did when he supported Justice Kennedy's dissent in Melendez-Diaz v. Massachusetts. Furthermore, Justice Alito supported Kennedy's dissenting opinions in both Bullcoming v. New Mexico and Melendez-Diaz v. Massachusetts.

It is interesting to note that all four of these justices, Kennedy, Roberts, Breyer, and Alito, must have supported the decision in Briscoe v. Virginia to vacate the conviction and remand. That was done per curiam and therefore we do not know for sure why those four dissenting justices voted to support the per curiam order in Briscoe v. Virginia. There are

published articles by reporters who covered oral argument conducted two weeks prior to the per curiam order in Briscoe v. Virginia. It would be inappropriate for defendant Golay here to comment on the reported oral argument that led to the per curiam order in Briscoe v. Virginia so we will proceed to look at the plurality opinion in Bullcoming v. New Mexico. The first thing we observe is that Justice Sotomayor replaced retired Justice Souter. Justice Souter had supported the opinion of Justice Scalia in Melendez-Diaz v. Massachusetts but Justice Souter had already been replaced by Justice Sotomayor as of January 25, 2010 when the Court in its per curiam order vacated the Virginia Supreme Court decision and remanded the case for reconsideration in light of Melendez-Diaz v. Massachusetts. As stated, Justice Souter was with the majority in Melendez-Diaz v. Massachusetts. Also note worthy is the participation of Justice Kagan in Bullcoming v. New Mexico. Justice Kagan replaced Justice Stevens, who was with the majority in both Crawford v. Washington as well as Melendez-Diaz v. Massachusetts.

The bottom line is this. Based upon Bullcoming v . New Mexico and Melendez-Diaz v. Massachusetts, it is obvious that Justice Kennedy, who wrote the dissenting opinion in both cases, and Chief Justice Roberts and Associate Justices Breyer and Alito do not support the application of the Confrontation Clause of the Sixth Amendment to situations involving laboratory reports . We also note that Justices Breyer and Kennedy supported Scalia's decision in Crawford v. Washington , but split company with the majority on the laboratory technician issue.

We now turn to Justices Ginsburg, Scalia, Sotomayor, Kagan, and Thomas. These are the five justices whose views must be analyzed.

We should also lop off Part IV of the opinion in Bullcomimg v. New Mexico since apparently only Justice Scalia, the author of Melendez-Diaz v. Massachusetts and Crawford v. Washington, supports Part IV of the opinion.

Bullcoming v. New Mexico, supra, was a drunk driving case . Mr. Bullcoming in August 2005 rear ended a pick up truck, but left the scene before the police arrived. Later the police apprehended him and pursuant to a warrant drew blood to determine his blood alcohol concentration. The police sent the sample to the New Mexico Department of Health, Scientific Laboratory Division. A report was generated that was signed by a forensic analyst, Curtis Caylor. Mr. Caylor signed his report indicating that Mr. Bullcoming's blood alcohol concentration was 0.21 which supported a prosecution for aggravated driving under the influence of alcohol. Mr. Bullcoming's case was tried before a jury in November of 2005, after the U.S. Supreme Court's decision in Crawford v. Washington, but prior to its Melendez-Diaz decision. In this respect the chronology mirrors the chronology in the instant case. It will be recalled that defendant Golay's trial began just about the time the United States Supreme Court granted certiorari in Melendez-Diaz v. Massachusetts , but obviously before the final decision was handed down. The attorney for defendant Golay in this case referred to the certiorari grant in Melendez-Diaz v. Massachusetts as having occurred just two days before the testimony in question was offered but clearly the trial court did not have the benefit of the final decision in Melendez-Diaz v. Massachusetts.

On the day of the Bullcoming trial the prosecutor announced that he would not be calling Curtis Caylor as a witness because Mr. Caylor had recently been put on unpaid leave for an unrevealed reason. The defense attorney objected because allegedly the prosecutor

had not disclosed until the trial commenced that a witness other than the actual analyst would be testifying. The attorney for the defendant, Mr. Bullcoming, argued that had she known that the analyst who tested Mr. Bullcoming's blood was not available she would have made a different opening statement and indeed her entire defense might have been "dramatically different."

The prosecutor proposed to introduce Caylor's analysis by offering the testimony of another scientist, Gerasimos Rozatos. The defense attorney persisted in her objection that the introduction of testimony by somebody other than Caylor would violate the Sixth Amendment right to confront a witness against the defendant. The trial court overruled the objection and admitted the report as a business record. The jury convicted Mr. Bullcoming and the New Mexico Court of Appeals upheld the conviction. While Mr. Bullcoming's appeal from the New Mexico Court of Appeals to the New Mexico Supreme Court was pending, the United States Supreme Court decided Melendez-Diaz v. Massachusetts . Notwithstanding Melendez-Diaz v. Massachusetts, the New Mexico Supreme Court held the admission of the report did not violate the Confrontation Clause. The New Mexico Supreme Court observed that defendant Bullcoming's right of confrontation was preserved because his attorney had the right to confront and cross examine Razatos, who was able to serve as a surrogate for Caylor.

The United States Supreme Court granted certiorari to address the question as to whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test.

In an opinion for the Court authored by Justice Ginsburg, the Court stated that if an out of court statement is testimonial in nature it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. Justice Ginsburg stated that because the New Mexico Supreme Court had permitted the testimonial statement of one witness, i.e., Caylor, to enter into evidence through the in-court testimony of a second person, i.e., Razatos, the defendant's confrontation right was violated.

The facts of the Bullcoming case are very similar to the instant case involving defendant Golay. First, and most important, the four witnesses who conducted the test in this case were all available to testify. The defense established this through the testimony of Muto . Justice Ginsburg's opinion for the Court stated,

> "The state in the instant case never asserted that the analyst who signed the certification, Curtis Caylor, was unavailable. . . ."

In contrast, the four witnesses who did the testing in the instant case were all available. The record in Bullcoming v. New Mexico indicated that Mr. Caylor had been placed on unpaid leave for an undisclosed reason. Here, in contrast, all four analysts were available but the prosecutor deliberately chose not to call them.

Justice Ginsburg also noted that defendant Bullcoming did not have an opportunity to cross examine Caylor . Likewise, defendant Golay was not given the opportunity to cross examine the four witnesses who prepared the reports in the instant case.

It is true that in the Bullcoming case the actual report was admitted into evidence over objection whereas in the instant case the prosecutor did not introduce the reports

themselves. However, this is a distinction without a difference because Muto was permitted to testify, over objection, as to the contents of the reports. Therefore it did not make any constitutional difference whether the prosecutor here against Golay offered reports or whether the prosecutor here offered the testimony of Muto, whose testimony was based upon the reports. Muto testified while looking at the reports in front of him.

The State argued in Bullcoming v. New Mexico that the results of the gas chromatograph machine called for no interpretation or exercise of independent judgment on Caylor's part. The majority in Bullcoming v. New Mexico rejected this argument. The Court stated,

> "In any event, the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. The majority stated that the Sixth Amendment Confrontation Clause commands not that evidence be reliable but that reliability be assessed in a particular manner."

The Court concluded this portion of its decision by stating,

> "Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they posses 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'"

The United States Supreme Court rejected the New Mexico State Supreme Court's contention that Razatos could substitute for Caylor because Razatos qualified as an expert witness with respect to the gas chromatograph machine and the laboratory procedures. In response to the argument of the New Mexico Supreme Court, the United States Supreme Court stated,

> ". . . [T]he [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross examination."

The Supreme Court of the United States rejected the argument that if the trial is fair there is no Sixth Amendment violation. There is no substitute procedure that can cure a violation and no additional showing of prejudice is required to make the violation complete said the Supreme Court.

The Supreme Court concluded this portion of its opinion by stating that when the State of New Mexico elected to introduce Caylor's certification, Caylor became a witness that Mr. Bullcoming had the right to confront.

Defendant Golay anticipates that the Attorney General will argue that unlike Bullcoming v New Mexico, no report was actually introduced against Golay. If that argument is made it will reveal that the Attorney General has misunderstood the point. The prosecution may not dispense with the right of confrontation by not introducing the report itself but simply by having a substitute witness give the results of the report.

The United States Supreme Court also reviewed the issue of whether the report introduced in the Bullcoming case was "testimonial." The State of New Mexico in the Bullcoming case argued that the failure of the report from the laboratory to be sworn made the report not testimonial . The State of New Mexico attempted to distinguish its case from Melendez-Diaz v. Massachusetts, where the analysts' findings were notarized. Ironically, the State of New Mexico argued that the lack of a notary for the New Mexico report made the report non testimonial and therefore not subject to the Confrontation Clause. Apparently the

argument was based on the theory that a notarized statement is more like testimony and therefore should be subject to the Confrontation Clause whereas an unnotarized statement is more like non testimony. Surely it cannot be the case that the lack of a notary and the lack of a sworn statement makes a report more qualified to be introduced as opposed to the same statement that is notarized. All things being equal one would assume that a notarized statement would be superior to an unnotarized statement. It should not matter whether the statement is notarized or not . What should matter is the nature of the statement. In any event, we do not have notarized statements or non notarized statements in the instant case. Rather, we have one witness, Muto, testifying over objection as to the results of a report generated by available witnesses.

The issue of what is testimonial is a little muddled. Footnote 6 is appended to the following sentence:

> "An analyst's certification prepared in connection with a criminal investigation or prosecution, the Court held, is 'testimonial,' and therefore within the compass of the Confrontation Clause. . . ."

Justice Ginsburg, the author of the Court's opinion, did not adopt footnote 6 nor did Justice Thomas join footnote 6. Footnote 6 began with the statement indicating what ranks as "testimonial." Footnote 6 noted that business and public records are generally admissible absent confrontation. This statement apparently is only supported by Justices Scalia, Sotomayor , and Kagan.

Justice Scalia supported the full opinion of the Court and Justices Sotomayor and Kagan supported footnote 6 but did not agree with Part IV. As stated, Justice Ginsburg, the author of the opinion, and Justice Thomas , did not agree with footnote 6 and also did not

agree with Part IV.

Since Part IV did not command a majority it may not be necessary to analyze it. Part IV discussed an issue that was raised by the prosecution in this case which was that the defense could have requested the testing of the same material that was tested by the four witnesses from the Coroner's Office. Part IV states that the Confrontation Clause imposes the burden on the prosecution to present witnesses, not upon the defendant to bring those adverse witnesses into court.

Part IV of the opinion also discussed a procedure whereby a defendant could serve notice and demand that the prosecution call the author or analyst of the report. Again, Part IV did not command a majority of the Court and therefore further discussion is not warranted. However, it might be helpful to review Justice Sotomayor's concurring opinion because Justice Sotomayor is one of the five justices in the majority. Justice Sotomayor concurred in the opinion of Justice Ginsburg with the exception of Part IV. Justice Sotomayor joined Justice Ginsburg's opinion except with respect to Part IV but then filed a separate concurring opinion. Justice Sotomayor agreed with the Court that the New Mexico trial court erred in admitting the blood alcohol concentration report. Justice Sotomayor stated that she wanted to emphasize that she considers the report to be testimonial because its primary purpose was evidentiary. That , of course, is true with respect to the test results and reports by the four non testifying witnesses. The reports were generated with respect to a coroner's investigation of an obvious homicide. Whether the police knew or believed that McDavid was the victim of a murder as opposed to a felony hit and run homicide makes no difference . The Coroner's Office was obviously generating information to be used in an

anticipated criminal trial whenever the perpetrator might be apprehended. It should make no difference that in Bullcoming v. New Mexico the suspect was already known and blood was already extracted from him. In the instant case it was the victim whose bodily fluids were tested, not the defendant's or a suspect's. That should make no difference. In both cases it was clearly anticipated that the results would be used in some sort of criminal case.

Justice Sotomayor's concurring opinion agreed with Justice Ginsburg's opinion that the New Mexico Supreme Court contravened the U.S. Supreme Court precedents in holding that the report was admissible via Razatos' testimony.

Justice Sotomayor then in Part II of her concurring opinion proceeded to point out there was no other purpose for the blood alcohol report other than to be used in a criminal case. For example Justice Sotomayor pointed out that the report was not necessary to provide Mr. Bullcoming with medical treatment. Likewise, there was no other purpose for testing Mr. McDavid's bodily fluids other than using the results in a possible criminal prosecution should a suspect be apprehended and tried.

Justice Sotomayor then went on to discuss hypothetical differences between the Bullcoming case and other cases. The hypotheticals that she raised in her concurring opinion were not resolved by her or by the Court. Justice Sotomayor stated that it was not a case where the person testifying was a supervisor, reviewer, or someone else with a personal connection to the scientific test. Justice Sotomayor pointed out Razato conceded on cross examination that he played no role in producing the report and did not observe any portion of Caylor's conduct with respect to the testing. Justice Sotomayor concluded this paragraph by stating that the Court would not address what degree of involvement is sufficient because

Razatos had no involvement whatsoever in the relevant test and report.

A brief, further review of Muto's testimony indicates that he did not have sufficient involvement in the testing to allow him to report on what others concluded. He has a B.S. degree from the University of Southern California . He is not a doctor (RT 1211, lines 7-12). He testified that he either conducts a peer review or what he called administrative review (RT 1212). He acknowledged that it is the criminalists who do the analyzing of the material removed by the Coroner's Office (RT 1213, lines 25-28). He used the word "we" but actually he meant the analysts do the actual work. He said they look at blood samples, liver samples, brain tissue and biological fluids (RT 1213, lines 15-24). Muto testified that the Coroner's Office has different analysts looking and doing different things . They analyze a number of samples (RT 1214, lines 6-10). Muto testified that each analyst "will date and sign a cover sheet that has their conclusions based on the analytical data (RT 1217, lines 13-17).

Muto then reviewed the July 13 report which he mistakenly stated had five different analysts . Actually there were four (RT 1217, lines 18-28, RT 1218, lines 1-8).

Muto testified that the report of July 13, 2005 was generated by clerical staff (RT 1218, lines 25-26). Muto testified he signed the July 13 report before it was sent to Dr. Riley (RT 1219, lines 22-24).

Muto acknowledged that he was not the one who did the testing and he was not the one who detected the presence of any drugs. Rather, his analyst did that (RT 1222, lines 15-28; RT 1223, lines 1-8). He acknowledged that it was an analyst, not himself, who detected hydrocone (RT 1225; lines 13-17).

He also commented on a second report of July 21, 2006. This was an additional toxicology test performed on Mr. McDavid's blood (RT 1226, lines 15-19). Muto testified that he had the report for July 21, 2006 (RT 1226, lines 20-27). Muto admitted that he, Muto, did not sign the report. Rather, the report was signed by another supervisor, Daniel Anderson. Mr. Anderson was not produced as a witness (RT 1227, lines 3-11). It was a Mr. Fu who found other substances including Topamax (RT 1227, lines 22-28; RT 1228, lines 1-13).

Justice Sotomayor stated,

> "It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. . . ."

Here Muto observed no tests. He said he signed the July 13, 2006 report but not the July 21, 2006 report.

What the prosecutor and Muto did in this case was no different than actually submitting the written report into evidence. He testified that he had the report in front of him and was basically looking at his report while testifying (RT 1216, lines 18-26). There is really no difference between submitting a report on the one hand and looking at it on the witness stand on the other and testifying as to its contents.

Also noteworthy is the comment by Justice Sotomayor that the Court was not deciding whether the State could introduce raw data generated by a machine in conjunction with the testimony of an expert witness. Justice Sotomayor stressed that the opinion of the Court did not address any of these factual scenarios.

Justice Kennedy mentioned the alleged situation in Los Angeles regarding the alleged burden place upon the Los Angeles Police Department by the Melendez-Diaz v. Massachusetts decision. Justice Kennedy quoted from an amici curiae brief submitted by the State of California . Since Justice Kennedy's opinion was a dissenting opinion it would not be helpful to discuss it in more detail. Suffice it to say it is clear that a majority of the U.S. Supreme Court would disapprove of the ruling of the Court of Appeal and of the Superior Court in this case regarding admission into evidence of critically important evidence. The importance of the evidence will be discussed below.

B. THE INTRODUCTION OF THE EVIDENCE WAS NOTE HARMLESS

Because the error in this case was of constitutional dimension the State has the burden of proof beyond a reasonable doubt that the error in admitting the evidence was harmless. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967). That is not so. The evidence was not harmful. The Court of Appeal only briefly summarized part of Golay's defense.

Defendant Golay was not only prosecuted by the prosecutor, she was also accused by counsel for co defendant Olga Rutterschmidt of murdering Mr. McDavid as well as Mr. Vados. However, Olga Rutterschmidt did not testify. The accusation was made by her attorney in closing argument. For this reason apparently Olga Rutterschmidt's attorney did not object on confrontation grounds to the evidence to which Golay objected. Apparently all along the prosecutor was planning to point the finger at defendant Golay.

Defendant Golay's contention was that a third party, her healthy and strong daughter,

murdered McDavid (The daughter was a suspect according to LAPD (RT 5483)). There was substantial circumstantial evidence pointing to Helen Golay's daughter. Her daughter was a member of the Spectrum health club, as was Hilary Adler, the witness whose wallet and driver's license were stolen. Records from the Spectrum Club established that the day Hilary Adler's wallet and driver's license were stolen was the same day that Golay's daughter was present. The Mercury Sable vehicle had been registered to Adler (RT 5473, line 17-28). Golay's daughter had a lengthy felony record. Some of the evidence offered by the defense was excluded but other evidence was considered by the jury including the fact that on the day Mr. McDavid died an AAA tow truck operator (Luis Jaimes) was at the scene where the car malfunctioned, the car being the alleged murder weapon. Someone (Golay's daughter) got a ride back to her home in Santa Monica with tow truck operator Jaimes, who came to the scene to retrieve the Golay vehicle which had run over McDavid. That vehicle had been registered in the name of witness Hilary Adler whose identity was stolen by someone who had access to Adler's driver's license. (Helen Golay's daughter) . (RT 5464-5465)

Testimony suggested that someone (Golay's daughter RT 5225, lines 12-21)) called AAA for the tow truck but the call according to phone records showed that it was made after a call to 411 was made to get the phone number of the AA A. Defendant Golay's AA A credit card account was used but there was no evidence that tow truck operator Jaimes actually took an impression from the credit card for AAA. Evidence established that a family member could call AAA and get AAAto come even without showing the actual AAA card.

The evidence established that the person who made the call obviously did not have

the AAA card in her possession (RT 4825) because that is why information (411) was called to get the number of AAA. If one had the AAA card in her possession she would have been able to obtain the AAA telephone number without having to first call information (411) (RT 4817-4823; 4828-4829). Also, it was Golay's daughter's cell phone which was used to call AAA to come to tow the car (RT 5478, line 10) (RT 4823-4824).

Evidence was offered that defendant Golay was too elderly and feeble to carry out the murder. The murderer had to be someone younger and stronger such as the daughter, who was a member of the Spectrum health club and who, according to records, frequented the Spectrum health club.

To overcome the obvious contention that defendant Helen Golay was much too old to handle someone such as Ken McDavid, the prosecution wanted to establish that Helen Golay must have provided McDavid with sedatives to either knock him out or render him in a condition that would allow an elderly woman to put him in the car and then push him out of the car and run him over. The prosecution introduced evidence that the same sedatives found by the four laboratory technicians were found in Golay's medicine cabinet. But the LAPD admitted seeing the daughter go in and out of Golay's house when LAPD conducted a surveillance. Also, some prescription drugs with the daughter's name were found.

It must be emphasized that this was not an open and shut case. There was no confession , no admission, no eye witness who observed any murder or killing and no direct physical evidence . The tow truck operator (Jaimes) testified that the person who rode in the tow truck with him back to Santa Monica could have been anywhere above 40 years old, which was the age of the daughter. Golay and her daughter lived close to each other in

Santa Monica. The tow truck operator Jaimes did not identify defendant Golay in court at the preliminary hearing and trial or in photos (RT 1294-1295). Thus, there was no eye witness identification , no physical evidence, no confession, and no admission.

Accordingly, it cannot be said that beyond a reasonable doubt the evidence offered in this case over objection was harmless.

V

CONCLUSION

For the reasons stated in the Petition for Review and the Opening and Reply Briefs and this Supplemental Brief, defendant Helen Golay respectfully asks this Honorable Court to reverse her conviction and allow her to stand trial again without the violation of the Confrontation Clause of the Sixth Amendment.

Respectfully submitted,

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Supreme Court No. S176213

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. HELEN GOLAY, Defendant and Appellant	S176213 Court of Appeal No. B209568

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Supplemental Brief is produced using 13-point Roman type and contains approximately 7,942 words which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 2, 2011

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Attorney for Petitioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2115 Main Street, Santa Monica, California 90405.

On the date shown below I served the foregoing document described as:_ **DEFENDANT'S SUPPLEMENTAL BRIEF** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

David E. Madeo, Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013

I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Santa Monica, California on August 2, 2011.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed at Santa Monica, California on the 2 day of August 2011.

Judith A. Burgdorf

JUDITH A. BURGDORF