In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

OLGA RUTTERSCHMIDT AND HELEN L. GOLAY,

Defendants and Appellants.

Case No. S176213

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

RESPONDENT'S SUPPLEMENTAL BRIEF RE *BULLCOMING v. NEW MEXICO*

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INTRODUCTION

On June 23, 2011, in *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705 (*Bullcoming*), the United States Supreme Court issued its latest decision on the reach of the Sixth Amendment's Confrontation Clause. While the decision clarified some parts of the Supreme Court's jurisprudence on the admissibility of certain forensic reports, it offered little guidance on the admissibility of instrument-generated data or on the admissibility of expert opinion evidence based in part on results of tests conducted and observations recorded by others. Accordingly, the decision has little effect on the instant case.

Further, although *Bullcoming* echoes *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __ [129 S.Ct. 2527] in undermining a rationale of *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), it does not preclude the type of expert testimony offered in *Geier*. Accordingly, even after *Bullcoming*, the result in *Geier* would be the same.

ARGUMENT

I. *BULLCOMING* IS A NARROW OPINION THAT HAS LITTLE EFFECT ON THE INSTANT CASE

A. The *Bullcoming* Decision

In *Bullcoming*, the defendant was convicted of aggravated driving while intoxicated. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2712.) At trial, the "[p]rincipal evidence" against him was a laboratory blood alcohol concentration (BAC) report generated by an analyst who had been placed on unpaid leave and did not testify. (*Id.* at pp. 2709-2713.) Following the defendant's arrest, his blood sample was sent to a laboratory, where forensic analyst Curtis Caylor analyzed it. The laboratory generated a report that included a "certificate of analyst," completed and signed by

Caylor, which noted the sample's BAC level. Caylor's certificate also affirmed that the sample's seal was received intact, that the statements in the remaining sections of the report were correct, and that he had followed the proper procedures. (*Id.* at pp. 2710-2711.)

The trial court admitted Caylor's laboratory report as a business record during the testimony of forensic analyst Gerasimos Razatos, a state laboratory scientist who had neither observed nor reviewed Caylor's analysis. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2712.) The New Mexico Supreme Court held that the report introduced at trial qualified as testimonial in light of *Melendez-Diaz v. Massachusetts*, *supra*, 129 S.Ct. 2527.[1] But the state court further held that its admission did not violate the Confrontation Clause because Caylor was a "mere scrivener," and because Razatos was available for cross-examination regarding the operation of the gas chromatograph machine, the results of the tests, and the laboratory's procedures. (*Bullcoming*, *supra*, 131 S.Ct. at pp. 2712-2713.)

The Supreme Court framed the issue before it as follows: "Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2713.) The Court answered this question in the negative. Citing "controlling precedent," the Court held that, if an out-of-court statement is testimonial in nature, it generally may not be introduced

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[1] In that case, the Supreme Court held that sworn "certificates of analysis" filled out and signed by state drug laboratory scientists were testimonial, and thus could not be introduced into evidence in lieu of witness testimony regarding the test results. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

against the accused unless the witness who made the statement testifies at trial. The Court reversed "[b]ecause the New Mexico Supreme Court 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." (*Id.* at p. 2713.) The Court later restated its conclusion this way: "In short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront." (*Id.* at p. 2716.) The Confrontation Clause, the Court added, "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." (*Ibid.*)

In reaching its conclusion, the five-justice majority found that Caylor was not a "mere scrivener" who simply transcribed machine data into his report, for he also made a number of representations about how the test was conducted. (*Bullcoming*, *supra*, 131 S.Ct. at pp. 2714-2715.) The majority opinion also indicated that the contemporaneous nature of such data recording was not significant: "Most witnesses, after all, testify to their observations of factual conditions or events, e.g., 'the light was green, 'the hour was noon.' Such witnesses may record, on the spot, what they observed." (*Id.* at p. 2714.) Noting that Caylor was on unpaid leave for undisclosed reasons, the Court added that, if Caylor had testified, "Bullcoming's counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for Caylor's removal from his work station." (*Id.* at p. 2715.)

Significantly, the Court also pointed out that the state "did not assert that Razatos had any 'independent opinion' concerning Bullcoming's BAC." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2716.) Thus, the Court drew a distinction between an expert offering an independent opinion based on

results of tests he or she did not personally conduct and a witness serving as a mere conduit for results of tests he or she did not perform.

Moreover, Justice Ginsburg, who wrote the majority opinion, could muster only four votes for a footnote defining as "testimonial" a statement having a "primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2714 fn. 6.)[2] Meanwhile, the five-vote majority opinion stated: "A document created solely for an 'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial." (*Id.* at 2717.) Thus, it appears that a majority of the Court was willing to find Caylor's report "testimonial" only because it was created "solely" for law-enforcement purposes.

In addition, Justice Sotomayor, who joined the majority in the 5-4 decision, wrote a separate concurrence in part "to emphasize the limited reach of the Court's opinion." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2719.) Justice Sotomayor highlighted four scenarios neither presented for consideration nor resolved by the majority's opinion: (1) where the state has "suggested an alternative purpose, much less an alternate *primary* purpose, for the [forensic report]"; (2) where the person testifying "is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue"; (3) where "an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence"; and (4) where the state introduced only instrument-generated data instead of a testimonial report

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[2] Justices Scalia, Sotomayor, and Kagan joined in that footnote, but Justice Thomas, who provided the fifth vote for three of the four other parts of the majority opinion, did not.

that contained information beyond the raw data. (*Id.* at p. 2722, emphasis in original.)

As for the first scenario, Justice Sotomayor noted that New Mexico had not claimed that the BAC report was necessary to provide Bullcoming with medical treatment. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.) She pointed to three recent Supreme Court cases which stated that medical reports and statements of physicians are not testimonial. (*Ibid.*)

As for the second scenario, Justice Sotomayor noted that Razatos "conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.) She also noted that the New Mexico Supreme Court "recognized Razatos' total lack of connection to the test at issue." (*Ibid.*) She added, "We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report." (*Ibid.*)

As for the third scenario, Justice Sotomayor noted that "the State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration." Instead, Razatos only read from the report that was introduced into evidence. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.) "We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." (*Ibid.*)

As for the fourth scenario, Justice Sotomayor noted that New Mexico had not attempted to introduce only instrument-generated results, such as a printout from a gas chromatograph. Instead, New Mexico had elected to present a certification which contained those results and other statements regarding the procedures which Caylor used in handling the sample. Justice Sotomayor added, "[W]e do not decide whether . . . a State

could introduce (assuming an adequate chain of custody foundation) raw data generated by a machine in conjunction with the testimony of an expert witness." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.)

B. *Bullcoming* Has Little Effect on This Case

Unlike *Bullcoming*, where the forensic report was introduced into evidence, the toxicology reports in this case were not admitted at trial. Thus, the holding of *Bullcoming* is not directly applicable here to the admissibility of the victim's toxicology evidence. However, to the extent that *Bullcoming* stands for the proposition that the prosecution may not introduce certain forensic evidence by any means if it is testimonial in nature, unless the prosecution calls an analyst who participated in the testing, this case is distinguishable on several fronts.

Here, the toxicology reports were generated during a routine medical examination following a death. Furthermore, Joseph Muto, the laboratory director for the Department of Coroner, supervised the forensic analysis that resulted in the toxicology reports and testified as an expert witness.

1. A Primary Purpose of the Toxicology Reports Was Unrelated to Generating Evidence for Prosecution

As Justice Sotomayor noted, the *Bullcoming* opinion did not consider a scenario where the state contends that an alternate, or even primary, purpose for a report is unrelated to generating evidence for a subsequent prosecution. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.) In the present case, the toxicology reports were not prepared for the sole or even primary purpose of providing prima facie evidence of the charged offense at trial, unlike the laboratory report in *Bullcoming* or the certificates in *Melendez-Diaz*. They were instead prepared in the regular course of business for the toxicology laboratory in the coroner's department during a routine medical examination following a death. (6RT 1216-1217.) Here,

the primary purpose of the autopsy, which produced the toxicological samples, was unrelated to any criminal proceeding.

Autopsy reports are prepared for specific medical purposes, set forth by state law, that exist independently of any law enforcement accusatory function. (See *Noguchi v. Civil Service Commission* (1986) 187 Cal.App.3d 1521, 1529.) Accordingly, the fundamental reason an autopsy is generated is to medically "develop . . . accurate and adequate information about the death of each and every human being, whenever possible." (*People v. Roehler* (1985) 167 Cal.App.3d 353, 374.) This purpose far exceeds the much narrower and incidental function of detecting evidence of a crime. Even the secondary reasons for collecting data at autopsies similarly do not relate exclusively to the criminal justice system, but rather, "range from beliefs about the fundamental dignity of man to such practical concerns as control of disease, the keeping of statistics, and of course, the detection of negligent or intentional wrongdoing." (*Ibid.*) As another court observed, "'a medical examiner, although often called a forensic expert, bears more similarity to a treating physician than he does to one who is merely rendering an opinion for use in the trial of a case.'" (*Manocchio v. Moran* (1st Cir. 1990) 919 F.2d 770, 777, quoting *State v. Manocchio* (R.I. 1985) 497 A.2d 1, 7.) Accordingly, because there was an alternate purpose for the toxicological report here, the events in the instant case are not covered by the *Bullcoming* holding.

2. Muto Supervised the Toxicology Analysis

In *Bullcoming*, the Court repeatedly pointed out that testifying witness Razatos had no connection to the BAC report generated by Caylor. (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2712 [noting that Razatos "had neither observed nor reviewed Caylor's analysis"]; *id.* at p. 2713 [noting that Razatos "did not participate in testing Bullcoming's blood"]; *id.* at p. 2715 ["surrogate testimony of the kind Razatos was equipped to give could

not convey what Caylor know or observed about the events his certification concerned, i.e., the particular test and testing process he employed"].) In her pivotal concurrence, Justice Sotomayor indicated that the result of the case might have been different if the testifying witness had been a "supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." (*Id.* at p. 2722.)

In the present case, by contrast, Muto testified that he supervised the work of each of the forensic analysts who contributed to the toxicology reports. Muto testified that the testing had been performed according to laboratory procedures and standards and checked for accuracy. (6RT 1210-1214, 1217-1225, 1235.) Thus, unlike the testifying witness in *Bullcoming*, Muto was not a mere conduit for the introduction of another's report. Rather, he had a direct connection to the testing and to the equipment used in the testing. Accordingly, the instant case falls within the second type of scenario Justice Sotomayor described as outside the reach of the holding of *Bullcoming*.

3. Muto Rendered an Independent Expert Opinion

As previously noted, the Supreme Court in *Bullcoming* found it significant that testifying witness Razatos had no "independent opinion" regarding the defendant's blood-alcohol content. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2716.) Justice Sotomayor emphasized that "this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." (*Ibid.*) The converse is true here.

Here, Muto testified as an expert witness, relying on statements of other experts in forming his opinion as to toxicological contents of the victim's blood. (6RT 1210-1217.) Further, forensic pharmacologist Dr. Vina Speihler provided an expert opinion, after reviewing the toxicological reports, that several of the substances in the victim's blood would cause

confusion and drowsiness. (14RT 3625-3632.) Accordingly, because trial witnesses here provided independent expert opinions concerning another analyst's reports, which were not admitted into evidence, the instant case also falls within the third category of cases described by Justice Sotomayor that are beyond the reach of the holding of *Bullcoming*.

4. The Admitted Data Was Generated by a Testing Instrument

Finally, Justice Sotomayor found it significant that the state in *Bullcoming* had not attempted to introduce only machine-generated results, such as a printout from a gas chromatograph, without the context of a related report. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.) In *Bullcoming*, the report introduced by the prosecution contained the certified statement by the forensic analyst, which included his transcription of a blood alcohol concentration apparently copied from a gas chromatograph printout. (*Ibid.*) Here, again, no report was admitted into evidence. Rather, Muto testified as to the data generated by the testing instrument from the blood sample, which was recorded by the analyst. Thus, the only evidence introduced from the report was the instrument-generated data, which falls within the fourth scenario outlined by Justice Sotomayor but not at issue in *Bullcoming*.

The five-justice majority opinion in *Bullcoming* is, as Justice Sotomayor described, limited in reach, and provides little guidance to the instant case. *Bullcoming* does not foreclose the admissibility of forensic science opinion testimony by an expert who did not perform the laboratory analysis. Given that Justice Sotomayor was the fifth vote in *Bullcoming*, her concurring opinion strongly indicates that she, in conjunction with the four dissenters, could find such evidence admissible where the original lab report is not offered into evidence, and where the in-court witness provides an independent opinion about the meaning of the data and can adequately

describe the testing process, methods, and the quality of the original analyst's work. If the testifying witness either observed or participated in the testing as a supervisor or reviewer, as in this case, it is all the more likely that the Confrontation Clause is satisfied.

II. ALTHOUGH *BULLCOMING* UNDERMINES A RATIONALE OF *GEIER*, IT DOES NOT INVALIDATE THE RESULT

Respondent's answer brief on the merits argued that *Melendez-Diaz* did not overrule this Court's decision in *Geier*, *supra*, 41 Cal.4th 555. (Resp. Answer Brief on the Merits at pp. 29-31.) It appears, however, that *Geier* is inconsistent with *Bullcoming* and *Melendez-Diaz* to the extent *Geier* held scientific evidence is never testimonial because of its contemporaneous recordation and inherent differences between scientific observations and lay-witness recollections. Still, any undermining of facets of *Geier*'s rationale does not necessarily mean that the evidence in the forensic reports in that case was testimonial or that, even if it were, the expert's testimony based on those reports violated the Confrontation Clause. A nearly identical issue is now pending before the United States Supreme Court in *Williams v. Illinois*, cert. granted June 28, 2011 (No. 10-8505). Meanwhile, the instant case presents an issue never reached in *Geier*: whether an expert witness may provide an opinion based on testimonial statements in a report prepared by a non-testifying analyst.

A. Relevant Points in *Geier*

In *Geier*, a DNA expert with Cellmark Laboratories, Dr. Robin Cotton, testified that, in her opinion, DNA extracted from the vaginal swabs of a rape/murder victim matched a sample of the defendant's DNA. She also provided calculations regarding the frequency of the matched DNA profile among different population groups. (*Geier*, *supra*, 41 Cal.4th at p.

593.) The defendant argued that this testimony violated his right to confrontation because Dr. Cotton's opinion was based on testing that she did not personally conduct. (*Id.* at pp. 593-594.)

This Court focused on whether the information in the DNA reports on which Dr. Cotton relied was testimonial, and concluded that it was not. In reaching its conclusion, this Court conducted a detailed review of numerous cases around the nation that had examined the constitutionality of admitting the results of forensic tests conducted by non-testifying analysts. It also scrutinized *Crawford v. Washington* (2004) 541 U.S. 36 and *Davis v. Washington* (2006) 547 U.S. 813—the Supreme Court's then-most recent Confrontation Clause cases—for factors that could be considered in the context of scientific evidence. (*Geier*, *supra*, 41 Cal.4th at pp. 596-605.) This Court concluded that, together, those cases stood for the proposition that a statement is testimonial if: (1) it is made to a law enforcement officer or by or to a law enforcement agent; and (2) it describes a past fact related to a criminal activity for (3) possible use at a later trial. (*Id.* at p. 605.)

With regard to the second point, this Court drew a distinction between scientific reports that concern a "contemporaneous recordation of observable events" and recollections by lay witnesses of potentially criminal past events. (*Geier*, *supra*, 41 Cal.4th at pp. 605-607.) This Court held that the former are non-accusatory because they are made pursuant to routine, formalized scientific methods and can lead to results that are either incriminatory or exculpatory. (*Id.* at pp. 606-607.) The critical inquiry in determining whether a statement is testimonial, this Court concluded, is "the circumstances under which the statement was made." (*Id.* at p. 607.)

In a footnote, this Court rejected the defendant's argument that the admission of the expert's DNA testimony was error under state law because it was tantamount to testimony by one expert repeating the opinion of another. (*Geier*, *supra*, 41 Cal.4th at p. 608, fn. 13.) However, this Court

never reached the question of whether, if the DNA reports were testimonial, the state was required under the Sixth Amendment to call as a witness the analyst who wrote those reports.

B. The Impact of *Bullcoming* on *Geier*

As noted above, the Supreme Court in *Bullcoming* decided that the prosecution could not introduce the results of Caylor's BAC report as evidence of those results – as opposed to the basis for an independent expert opinion – without calling him as a witness. The Court explained that, for purposes of the Confrontation Clause, a statement can be testimonial even if it reflects observations recorded "on the spot." (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2714.) The Supreme Court rejected the argument that, because Caylor's recording of the data did not involve any interpretation or the exercise of judgment, admission of the test results from the gas chromatograph machine did not violate the Confrontation Clause. The Court noted that Caylor's certification included more than an instrument-generated number, and that the reliability of a testimonial report drawn from such instrument-generated data "did not overcome the Sixth Amendment bar." (*Id.* at p. 2715.)[3]

These statements undermine this Court's rationale for concluding that the DNA test report in *Geier* was necessarily non-testimonial, even if admitted as evidence of its contents. The Supreme Court implicitly

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[3] The Court illustrated this point with the following example: "Suppose a police report recorded an objective fact—Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. . . Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically 'No.'" (*Bullcoming*, *supra*, 131 S.Ct. at pp. 2714-2715.)

rejected the proposition that statements are not testimonial simply because they are recorded contemporaneously in a scientific setting. The Supreme Court also rejected any notion that scientific test results are immune from the demands of the Confrontation Clause because they rely on factual observations rather than on interpretation or the exercise of independent judgment. (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2715 ["The comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar."].) And nothing in the Court's opinion suggests that scientific evidence is not testimonial because it is not inherently incriminating.

However, there are key differences between the circumstances in *Bullcoming* and *Geier*. Unlike Razatos in *Bullcoming*, the testifying witness in *Geier* supervised the analyst who conducted the testing, reviewed and cosigned the DNA report in the case, as well as two follow-up letters to the investigating police agency, and rendered an independent opinion on the evidence. (See *Geier*, *supra*, 41 Cal.4th at pp. 594-596.) Moreover, in *Geier*, the accusatory DNA match evidence was "reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, [the lab director]." (*Id.* at p. 607.) As such, the original analyst's report did not assume evidentiary value as did the report in *Bullcoming*. "As an expert witness," noted this Court in *Geier*, "[the DNA expert] was free to rely on [the testing analyst's] report in forming her own opinions regarding the DNA match." (*Id.* at p. 608, fn. 13.) Thus, the witness in *Geier* was providing evidence of the DNA test results as an independent expert, and not as a mere conduit for another person's scientific conclusions. Under these circumstances, Dr. Cotton's testimony would fall outside the narrow holding in *Bullcoming*.

Accordingly, while the reasoning in *Geier* has been undermined, the result is justified on other grounds.

C. Potential Impact of *Williams v. Illinois*

An alternate justification for the result in *Geier* may well emerge in another case now pending in the United States Supreme Court. Five days after issuing its opinion in *Bullcoming*, the Court granted certiorari in *People v. Williams* (2010) 238 Ill.2d 125, 939 N.E.2d 268, cert. granted sub nom, *Williams v. Illinois* (June 28, 2010, No. 10-8505). That case presents the following question: "Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause." (www.supremecourt.gov/qp/10-08505qp.pdf.)

Williams presents facts more closely analogous to those in *Geier* than did *Bullcoming*. In *Williams*, semen samples collected from a rape victim were sent to a Cellmark laboratory in Maryland for analysis. The resulting DNA profile matched the defendant's DNA profile, which had been placed in a DNA database after he was arrested for an unrelated offense. (*People v. Williams*, *supra*, 939 N.E.2d at pp. 270-271.) At trial, the prosecution called Sandra Lambatos, a forensic biologist from the Illinois State Police (ISP) Laboratory, as an expert in DNA analysis. She described how DNA testing works and the standards that Cellmark had in place when performing DNA analysis for the ISP. (*Id.* at pp. 271-272.) She then offered an independent expert opinion about the DNA match itself, concluding that the semen from the victim's vaginal swab was a match to the defendant, and providing probability statistics for the match. (*Id.* at p. 272.) Lambatos explained that she reviewed Cellmark's DNA report as well as supporting data—including instrument-generated diagrams (electropherograms) indicating the presence of particular alleles—to arrive at her conclusion. (*Ibid.*) The Cellmark report was not introduced into

evidence and Lambatos did not read the contents of the report into evidence. (*Ibid.*)

The Illinois Supreme Court held that Lambatos' reliance on the Cellmark DNA report to support her expert opinion did not violate the Confrontation Clause. (*People v. Williams*, *supra*, 939 N.E.2d at p. 279.) The state court reasoned that the contents of the report were not testimonial statements admitted for their truth, but only "to show the underlying facts and data Lambatos used before rendering an expert opinion in the case." (*Ibid.*) The court explained: "The evidence against the defendant was Lambatos' opinion, not Cellmark's report, and the testimony was introduced live on the witness stand." (*Ibid.*)

Given that both *Williams* and *Geier* involved the admission of evidence through an independent expert witness rather than by way of an absent analyst's report, the Supreme Court's ruling in *Williams* should establish whether experts may rely on testimonial hearsay in forming their opinions without violating the Confrontation Clause. Moreover, as discussed, the issue presented in *Williams* is more closely aligned with the issues raised in this case and its three companion cases than the narrow question decided in *Bullcoming*. Accordingly, this Court may wish to await the outcome of *Williams* before proceeding further in these cases.

CONCLUSION

Neither the analysis nor the holding in *Bullcoming* requires this Court to alter its holding in *Geier*. Until the United States Supreme Court decides *Williams*, there is no mandate from the high court on the issue of admissibility of forensic evidence through a witness other than the original analyst. Accordingly, for the reasons stated here and in respondent's answer brief, this Court should uphold *Geier* and find that Golay's right of confrontation under the Sixth Amendment was not denied when a supervising criminalist testified, as an expert witness, to the results of drug tests in a report prepared by another criminalist.

Dated: August 19, 2011

Respectfully submitted,

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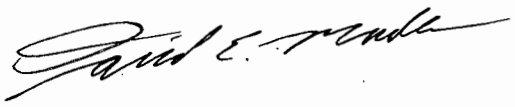

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 4,478 words.

Dated: August 19, 2011

KAMALA D. HARRIS
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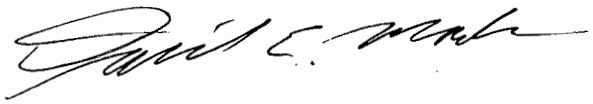

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No.: **S176213**

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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.

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On August 19, 2011, I caused thirteen (13) copies of the **RESPONDENT'S SUPPLEMENTAL BRIEF RE *BULLCOMING v. NEW MEXICO*** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102-4797 by Overnight Messenger Service.

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 August 19, 2011, at Los Angeles, California.

Bernard M. Santos
Declarant

Signature

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 22, 2011, I served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF RE *BULLCOMING v. NEW MEXICO*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Roger Jon Diamond
Attorney at Law
2115 Main Street
Santa Monica, CA 90405

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 August 22, 2011, at Los Angeles, California.

Bernard M. Santos
Declarant

Signature

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SECOND AMENDED DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

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David H. Goodwin
Attorney at Law
P.O. Box 93579
Los Angeles, CA 90093

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 August 22, 2011, at Los Angeles, California.

Bernard M. Santos
Declarant

Signature

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