In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

REYNALDO SANTOS DUNGO,

Defendant and Appellant.

Case No. S176886

Third Appellate District Case No. C055923
San Joaquin County Superior Court Case No. SF100023A
The Honorable Charlotte J. Orcutt, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF ON SIGNIFICANCE OF *BULLCOMING V. NEW MEXICO*

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INTRODUCTION

On June 23, 2011, the United States Supreme Court issued its latest decision on the reach of the Sixth Amendment's Confrontation Clause in *Bullcoming v. New Mexico* (June 23, 2011, No. 09-10876) __ U.S. __, 131 S.Ct. 2705 [2011 WL 2472799] (*Bullcoming*). 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 expert opinion evidence based in part on results of tests conducted and observations recorded by others. Accordingly, the decision has little effect on this case. Further, although the decision echoes *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527] in undermining a key the rationale of *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), it does not preclude the type of expert testimony offered in *Geier*, which is similar to that offered in this case—testimony by an expert who relies in part on forensic test results to form an independent opinion.

ARGUMENT

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

A. The *Bullcoming* Decision

In *Bullcoming*, the defendant was convicted of aggravated driving while intoxicated (DWI). (*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 before trial and did not testify. (*Id.* at pp. 2709-2713.) Following his arrest, the defendant's blood sample was sent to a laboratory, where forensic analyst Curtis Caylor tested the sample. The laboratory generated a report that included a "certificate of analyst," completed and signed by Caylor, noting 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 pp. 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 Razatos was a qualified expert who was available for cross-examination regarding the operation of the gas chromatograph machine, the results of the tests, and the laboratory's procedures. (*Bullcoming*, at pp. 2712-2713.)

The U.S. 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 against the accused unless the witness who made the statement testifies at

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[1] In that case, the U.S. 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.)

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 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." (*Id.* at p. 2716.) 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." (*Ibid.*)

In reaching its holding, the five-vote majority opinion, authored by Justice Ginsburg, found that Caylor was not a "mere scrivener" who simply transcribed machine data into his report, since he also made a number of representations about how the test was conducted. (*Bullcoming*, *supra*, 131 S.Ct. at pp. 2714-2715.) The Supreme Court 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 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 test 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 could muster only four votes for a footnote that defined "testimonial" as 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 containing information beyond the raw data. (*Id.* at p. 2722, emphasis in original.)

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

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 pointed out 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 the GCMS. 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

1. The Autopsy Report was not Offered in Evidence

Unlike *Bullcoming*, where the forensic report was introduced into evidence, the autopsy report in this case was not admitted at trial. The fact of the cause of death here was proven entirely by expert opinion testimony—not through a "forensic laboratory report containing a testimonial certification." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2710.) Thus, the holding of *Bullcoming* is not directly applicable here.

2. Autopsy Reports are not Testimonial

Respondent has argued that the autopsy report prepared by Dr. Bolduc was not testimonial because it was not created primarily for use in a criminal prosecution, but rather to comply with an independent statutory duty imposed on the coroner. (See Respondent's Opening Brief on the Merits, hereafter "OBM," at 18-26; see also Respondent's Reply Brief on the Merits, hereafter "RBM," at 3-6.) If anything, *Bullcoming* strengthens Respondent's argument in this regard.

In *Melendez-Diaz*, the Supreme Court found that the "certificates of analysis" prepared by state drug lab analysts fell within the "core class of testimonial statements" because they were "quite plainly affidavits" containing the "precise testimony the analysts would be expected to provide if called at trial." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2932.) The Court added that, under Massachusetts law, "the *sole* purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance." (*Ibid*, italics in original.)

In *Bullcoming*, the Court indicated that the BAC report was testimonial because it was "created solely for an 'evidentiary purpose' . . .

made in aid of a police investigation." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2717, quoting *Melendez Diaz*.) In her concurring opinion, Justice Sotomayor stated that the BAC report with Caylor's certification was testimonial because it had a "primary purpose of creating an out-of-court substitute for trial testimony." (*Id.* at p. 2720, quoting *Michigan v. Bryant* (2010) 562 U.S. ___, 131 S.Ct. 1143, 1155.) However, Justice Sotomayor's view in this regard was shared by only three other justices. (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2714 fn. 6.) Accordingly, *Bullcoming* shows that a majority of the Supreme Court considers a forensic report to be testimonial only if its sole purpose—rather than its primary purpose—is for use in a criminal prosecution.[3]

It certainly cannot be said that the *sole* purpose for creating the autopsy report in this case was to use it in a criminal prosecution. Although a detective was present during part of the autopsy, Dr. Bolduc was required to generate the report as part of his duties as a deputy county coroner. (See Govt. Code § 27491; *Noguchi v. Civil Service Commission* (1986) 187 Cal.App.3d 1521, 1529; *People v. Roehler* (1985) 167 Cal.App.3d 353, 374.) For similar reasons, courts in other jurisdictions have held that factual findings in autopsy reports are not testimonial. (See *People v. Hall* (N.Y. 2011) 84 A.D.3d 79, 83-85; *People v. Cortez* (Ill. 2010) 931 N.E.2d 751, 756; *United States v. Feliz* (2d Cir. 2005) 467 F.3d 227, 237.)

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[3] In *Melendez-Diaz*, the Supreme Court described another "formulation" of testimonial as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at later trial." (*Melendez-Diaz*, *supra*, 129 S.Ct. at 2531, quoting *Crawford v. Washington* (2004) 541 U.S. 36, 51-52.) However, this "formulation" was not referred to at all in *Bullcoming*, suggesting that the Supreme Court does not consider it to be the proper test for evaluating whether statements in forensic reports are testimonial.

Reports published by various coroner's offices, including San Joaquin County's, confirm that homicides represent a minor fraction of cause of death determinations on an annual basis. (See, e.g., San Joaquin County Sheriff, *Annual Report of the Coroner* (2011) 11, 13 <http://www.sjgov.org/sheriff/annrpts10.pdf> [reporting that 68 out of 678 (10%) cause of death determinations in 2010 were homicides]; Riverside County Coroner, *2010 Statistics* <http://www.riversidesheriff.org/coroner/statistics.asp> [reporting that 104 out of 2341 (4%) of cause of death determinations in 2010 were homicides]; Los Angeles County Coroner, *2009 Annual Report* (2010) 24 [reporting that 765 out of 8734 (9%) of cause of death determinations in 2009 were homicides].) Given that only a small minority of autopsies result in homicide determinations, it cannot be said that the primary or sole purpose of autopsy examinations is to generate evidence for later use at trial.

Because the autopsy report in this case was not generated for either the primary purpose or the sole purpose of helping the San Joaquin District Attorney's office prosecute Dungo, the report was not testimonial. Thus, Dungo's Sixth Amendment right to confrontation was not violated when information from that report was cited during the prosecution's case.

3. Dr. Lawrence Had a Connection to the Autopsy

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 this case, Dr. Lawrence testified at a pre-trial hearing that he owns Delta Consultants and Forensic Medical Group, which performs autopsies for several counties under contract; that he hired Dr. Bolduc; and that he is Dr. Bolduc's supervisor. (5 RT 1495, 1513.) Dr. Lawrence was very familiar with Dr. Bolduc's work and was completely confident in Dr. Bolduc's ability and skills. (5 RT 1510, 1512.) Thus, unlike the testifying witness in *Bullcoming*, Dr. Lawrence had a direct connection to the author of the autopsy report. Accordingly, the instant case falls within the second type of scenario Justice Sotomayor described as outside the reach of the holding of *Bullcoming*.

4. Dr. Lawrence Rendered an Independent Opinion

As previously noted, the U.S. 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.

At trial, Dr. Lawrence opined that the victim died as a result of "asphyxia due to strangulation." He based this opinion on the autopsy report prepared by Dr. Bolduc and photographs taken during the autopsy of the inside and outside of the body. (7 RT 1844-1846.) He relied on his 30 years of experience as a medical examiner, during which he has performed more than 8,000 autopsies, including between 50 and 500 where the cause of death was strangulation. (7 RT 1838-1841.) Dr. Lawrence further

opined that the victim was strangled for at least two minutes, based on the lack of significant injuries to the bones and organs in her neck. (7 RT 1846-1847, 1850-1851.) Although Dr. Bolduc's report contained a similar conclusion about the cause of death, Dr. Lawrence did not refer to Dr. Bolduc's conclusion during his testimony.[4] Instead, Dr. Lawrence rendered an independent opinion based on his expertise as applied to the underlying facts. In other words, unlike Razatos, Dr. Lawrence did not serve as a mere conduit for the testimonial statements of another person.

Respondent has argued that Dr. Lawrence's expert opinion on the cause of death and the duration of strangulation was the only relevant evidence in connection with the autopsy. (RBM at 8-10, 15-17.) Nothing in *Bullcoming* undermines that argument. Accordingly, 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*.

5. Dungo Had an Opportunity to Explore Dr. Bolduc's Credibility

Another important distinction between *Bullcoming* and *Dungo* is that, here, defense counsel had an opportunity to explore Dr. Bolduc's credibility during trial—but chose not to. In *Bullcoming*, the author of the BAC report (Caylor) had been placed on unpaid leave, but the defense could not explore that circumstance at trial because Razatos had no knowledge of the reason for the action. (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2715.)

In the instant case, by contrast, Dr. Lawrence was aware of the criticism of Dr. Bolduc's past performance and had personally investigated some of allegations regarding Dr. Bolduc's competency. (5 RT 1494-1495, 1507-1509.) Based on that pretrial testimony, the trial court ruled that

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[4] Dr. Bolduc's report drew no conclusion about how long the strangulation lasted. (7 RT 1869.)

defense counsel could ask Dr. Lawrence questions regarding Dr. Bolduc's proficiency. (6 RT 1533.) During trial, however, defense counsel did not ask Dr. Lawrence a single question about Dr. Bolduc.

Respondent expects that Dungo will emphasize language in *Bullcoming* stating that the "surrogate testimony" of Razatos prevented the defendant from testing the credibility and proficiency of Caylor. (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2715 & fn. 7.) However, this language regarding Caylor's credibility was based on the premise that the information in his report was testimonial. For the reasons discussed above, Dr. Bolduc's autopsy report was not testimonial, for it was not generated for the sole purpose of aiding the prosecution of Dungo. Further, because Dr. Lawrence was not a mere conduit for the contents of Dr. Bolduc's report, but rather rendered an independent expert opinion, Dr. Bolduc's credibility was not as important to the jury as was Caylor's.[5]

Finally, it bears repeating that, if this Court were to rule that the prosecution must call the examining pathologist in all cases where an autopsy report is used to support an expert opinion on the cause of death, prosecutions could be imperiled in other cases where the examining pathologist was unavailable due to retirement, relocation, illness or death.[6]

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[5] That circumstance could explain why defense counsel ultimately decided not to question Dr. Lawrence about Dr. Bolduc's proficiency.

[6] This Court has granted review in two other cases involving the admission of autopsy test results without testimony from the examining pathologist. (See *People v. Anunciation*, review granted March 18, 2010, S179423 and *People v. Thompson*, review granted Feb. 16, 2011, S188661.) The decisions below do not reveal why the examining pathologists in those cases were not called as witnesses.

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

Respondent has argued that *Melendez-Diaz* did not overrule this Court's decision in *People v. Geier*, *supra*, 41 Cal.4th 555 (OBM at 39-42.) However, respondent must now acknowledge that, to the extent *Geier* concluded that inherent differences between scientific observations and lay-witness recollections preclude scientific evidence from ever being "testimonial," the holding of *Bullcoming* is to the contrary. But this does not necessarily mean that the evidence in the forensic reports in *Geier* 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 U.S. Supreme Court in *Williams v. Illinois* (2010) 238 Ill.2d 125, 939 N.E.2d 268, *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 in part on a report prepared by a non-testifying analyst.

A. Relevant Points of *Geier*

In *Geier*, a DNA expert with Cellmark Laboratories, Dr. Robin Cotton, testified that, in her opinion, DNA extracted from 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*, *supra*, 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 applied 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) 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 of "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 the 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 U.S. 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.[7])

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 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 ["[T]he comparative reliability of an analyst's testimonial report drawn from

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[7] 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.)

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, Dr. Cotton 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]." (41 Cal.4th 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 fell outside the narrow holding in *Bullcoming*.

Accordingly, while the relevant portion of the rationale of *Geier* has been undermined, the result can be 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 U.S. Supreme Court. Five days after issuing its opinion in *Bullcoming*, the Court granted certiorari in *Williams v. Illinois*, *supra*, 939 N.E.2d 268. 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 as an expert in DNA analysis Sandra Lambatos, a forensic biologist from the Illinois State Police (ISP) laboratory. She described how DNA testing works and the standards that Cellmark had in place to perform 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 machine-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* involve the admission of expert testimony, through an independent expert witness rather than by way of an absent analyst's report, the U.S. 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 the instant case and its three companion cases than the issue decided in *Bullcoming*. Accordingly, this Court may wish to await the outcome of *Williams* before proceeding further in these cases.

CONCLUSION

For the reasons discussed above, as well as the reasons set forth in its previous briefing, Respondent requests that the decision of the Court of Appeal be reversed.

Dated: August 11, 2011

Respectfully submitted,

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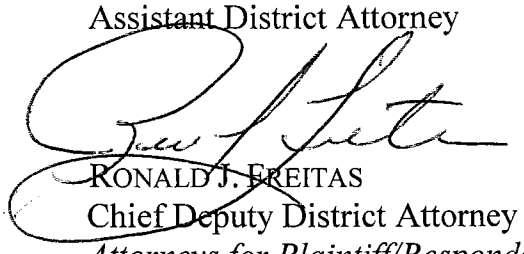

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Supplemental Brief on Significance of *Bullcoming v. New Mexico*** uses a 13 point Times New Roman font and contains 4,707 words.

Dated: August 11, 2011

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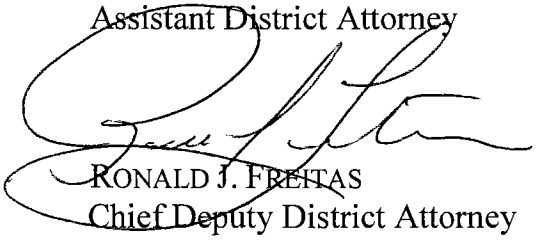
EDWARD J. BUSUTTIL
Assistant District Attorney



RONALD J. FREITAS
Chief Deputy District Attorney

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Dungo* No.: S176886

I declare:

I am employed in the Office of the District Attorney, San Joaquin County, 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 District Attorney, San Joaquin County, 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 District Attorney, San Joaquin County, is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 11, 2011, I served the attached RESPONDENT'S SUPPLEMENTAL BRIEF ON SIGNIFICANCE OF *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 District Attorney, San Joaquin County, at 222 East Weber, Room 202, Stockton, CA 95202, addressed as follows:

Anne Hopkins
Attorney at Law
P.O. Box 23711
Oakland, California 94623
(Attorney for Appellant)
served 2 copies

Kamala Harris
Attorney General of California
1300 I Street
Sacramento, CA 94244-2500

Clerk of the Superior Court
San Joaquin County
222 East Weber Avenue, Room 303
Stockton, CA 95202

Clerk, Court of Appeal,
Third Appellate District
900 N Street, Room 400
Sacramento, CA 95814

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

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 11, 2011, at Stockton, California.

Declarant