IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. VIRGINIA HERNANDEZ LOPEZ, Appellant.	)	Supreme Court Case No. S177046

On Review from a decision of the
Fourth Appellate District, Division One, Case No. D052885
Superior Court of San Diego, Case No. SCE274145
The Honorable Lantz Lewis, Judge

APPELLANT'S SUPPLEMENTAL BRIEF ON THE MERITS RE: BULLCOMING v. NEW MEXICO

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Appellant Virginia Hernandez Lopez hereby submits this Supplemental Brief in response to this court's order of July 13, 2011 requesting supplemental briefs addressing the significance, if any, of the United States Supreme Court decision in Bullcoming v. New Mexico (June 23, 2011) ___ U.S. ___ [180 L.Ed.2d 610, 131 S.Ct. 2705].

THE US SUPREME COURT DECISION IN BULLCOMING CONCLUSIVELY ESTABLISHES THAT THE BLOOD DRAW EVIDENCE IN THIS CASE WAS ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSE

On June 23, 2011, the United States Supreme Court issued its decision in Bullcoming. Justice Ginsberg, writing for the majority, stated:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification -- made for the purpose of proving a particular fact -- through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional

> requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.
> (Bullcoming, supra, 131 S.Ct. at 2710).

The facts of Bullcoming are virtually identical to the facts presented in this case in all material respects. Accordingly, Bullcoming's holding is applicable and dispositive of the issues presented here.

In Bullcoming, petitioner Donald Bullcoming was arrested on charges of driving while intoxicated (DWI). Principal evidence against Bullcoming was a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample. The New Mexico Supreme Court determined that, although the blood-alcohol analysis was "testimonial," the Confrontation Clause did not require the certifying

analyst's in-court testimony. Instead, New Mexico's high court held, live testimony of another analyst satisfied the constitutional requirements. The U.S. Supreme Court reversed the conviction and remanded the case for further proceedings.

A. Bullcoming conclusively establishes that the surrogate testimony of an analyst who did not conduct the testing does not meet the requirements of the Confrontation Clause

In Bullrunning, as here, the argument was made that the surrogate testimony of an analyst who did not conduct the testing was sufficient to satisfy the Confrontation Clause because the analyst who did conduct the testing acted as a "mere scrivener", simply recording results generated by a machine. The high court emphatically rejected the argument and the "potential ramifications" of such reasoning:

> 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. 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." See Davis v. Washington, 547 U.S. 813, 826, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (Confrontation Clause may not be "evaded by having a note-taking police[officer] recite the . . . testimony of the declarant" (emphasis deleted)); Melendez-Diaz [v. Massachusetts], 557 U.S., at ___, 129 S. Ct. 2527, 2546, 174 L. Ed. 2d 314, 336 [2009] (KENNEDY, J., dissenting) ("The Court made clear in Davis that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.").

(Bullcoming, supra, 131 S.Ct. at 2714-2715.)

The court went on to note that:

> [t]his Court settled in Crawford [v. Washington 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)] [that the 'obviou[s] reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause" and that analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Teresa. (Bullcoming at 2715, citing Melendez-Diaz 557 U.S., at ____, n.6, 129 S.Ct. 2727, 174 L.Ed.2d 314, 327.)

Here, as in Bullcoming, the prosecution presented testimony by an analyst, Mr. Willey, who had not conducted the blood draw tests

without ever asserting that the analyst who had conducted the tests, Mr. Peña, was unavailable. Here, as in Bullcoming, Mr. Willey could not convey what Mr. Peña knew or observed about the events his report concerned, nor could it expose any lapses or lies on the certifying analyst's part. Here, as in Bullcoming, Mr. Willey could not have any "independent opinion" concerning Ms. Lopez's BAC. Here, as in Bullcoming, when the State elected to introduce Peña's certified report, Peña, not Willey, became the witness whom Lopez had the right to confront. (Bullcoming, supra, 131 S.Ct. at 2715-2716.) Accordingly, here, as in Bullcoming, the testimony of a surrogate analyst does not meet the requirements of the Confrontation Clause.

B. Bullcoming conclusively establishes that the blood draw evidence in this case was testimonial

In Bullcoming, the Supreme Court rejected, as it had in Melendez-Diaz, the argument that the affirmations made by the analyst were not "adversarial" but rather simply "observations" made by an "independent scientist" in accordance with his "non-adversarial public duty." (Id., at 2717). The high court reiterated that "[a]

document created solely for an 'evidentiary purpose . . . ranks as testimonial" regardless of whether the document is "sworn". (Ibid.)

> In sum, the formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify [the analyst's] assertions as testimonial. (Id, at 2717.)

Indeed, the court held that in this regard, "Melendez-Diaz left no room for argument" and therefore, the conclusion that such reports are testimonial, is "inescapable." (Bullcoming, supra, 131 S.Ct. at 2716.)

Here, as in Bullcoming, the analyst's report was prepared in anticipation of litigation, it was accusatory, it was certified and "the formalities attending the report . . . are more than adequate to qualify [the analyst's] assertions as testimonial". Melendez-Diaz and Bullcoming leave no room for argument and the conclusion is inescapable.

C. The Confrontation Clause may not be avoided because of any real or imagined burden on the prosecution

The Bullcoming court rejected, factually and legally, the prosecution's argument that an "unbending application of the Confrontation Clause to forensic evidence would impose an undue

burden on the prosecution." (Bullcoming, supra, 131 S.Ct. at 2717.) First, the court expressed serious doubt about such "predictions of dire consequences", noting that only a small fraction of cases proceed to trial, retesting is available when the original analyst is not, and that in jurisdictions where analysts are routinely required to testify, "the sky has not fallen." (Id., at 2718-2719.)

Moreover, regardless of any burden, real or imagined, the Confrontation Clause "may not [be] disregard[ed] . . . at our convenience." (Id, at 2718, citing Melendez-Diaz, 557 U.S. (slip opin. 19-20.)

CONCLUSION

The Bullcoming decision is indistinguishable from the case at bar in all material respects. Accordingly, it is dispositive. The blood draw evidence in this case was introduced in violation of defendant's constitutionally guaranteed right to confront witnesses against her. Reversal is required.

Respectfully submitted,

DATED: 8/12/11

MAZUR & MAZUR

By: _____
Janice R. Mazur , Attorneys for appellant Virginia Lopez

CERTIFICATE OF WORD COUNT

The undersigned certifies that this Brief contains 1262 words, as counted by the WordPerfect word processing program used to generate this brief.

DATED: 8/12/11

JANICE R. MAZUR, attorney for appellant

AFFIDAVIT OF SERVICE BY MAIL

I am employed in the State of California, County of San Diego. I am over the age of eighteen and not a party to this action. My business address is 13465 Camino Canada, No. 106-103, El Cajon, CA 92021.

On August 12, 2011 I mailed documents described as **APPELLANT'S SUPPLEMENTAL BRIEF ON THE MERITS RE: BULLCOMING v. NEW MEXICO** via the United States mail in Whitefish, Montana in postage prepaid envelopes to interested parties in this action addressed as following:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Whitefish, Montana on this 12th day of August, 2011.

JANICE R. MAZUR