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 RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF RE *BULLCOMING V. NEW MEXICO*

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INTRODUCTION

As set forth in respondent's supplemental brief (RSB) and as further demonstrated below, *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705 (*Bullcoming*) has little effect on the present case. While Golay claims in her supplemental brief (ASB) that the facts in *Bullcoming* are "very similar" to the circumstances in her case, her argument is based on a flawed analysis of the meaning of *Bullcoming* and an inaccurate reading of the facts of the instant case.

Moreover, as set forth below, Golay's contention that any error in the admission of the laboratory test results was prejudicial must be rejected. Even without the admission of the test results, which concerned only one of the two victims, there was abundant evidence that Golay and her codefendant murdered the victims.

ARGUMENT

I. *BULLCOMING* HAS LITTLE EFFECT ON THIS CASE

In *Bullcoming*, the Supreme Court held that a "testimonial" out-of-court statement generally may not be introduced against the accused unless the witness who made the statement testifies at trial. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2713.) As Golay acknowledges (ASB 18-19), the forensic report in *Bullcoming* was introduced into evidence but the toxicology reports in this case were not. Thus, the holding of *Bullcoming* is not directly applicable to the admissibility of the toxicology evidence in the instant case. Nevertheless, Golay argues that this distinction does not matter because Joseph Muto, the laboratory director for the Department of Coroner, testified as to the contents of the reports. (ASB 19-20.) As discussed below, Muto properly testified as an expert witness relying in part on the results contained in the report, and was not a mere conduit for

the absent analyst's own conclusions. In any event, the non-admission of the reports at trial renders this case outside the reach of the *Bullcoming* holding.

Golay claims that *Bullcoming* left the definition of "testimonial" muddled. (ASB 21.) To the contrary, 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." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2717 [emphasis added].) Thus, it appears that a majority of the Court was willing to find the admitted laboratory report in *Bullcoming* "testimonial" only because it was created "solely" for law-enforcement purposes.[1]

Golay's attempts at bringing the facts of this case within the holding of *Bullcoming* are unavailing. Golay acknowledges Justice Sotomayor's separate concurrence, written in part "to emphasize the limited reach of the Court's opinion" (*Bullcoming*, *supra*, 131 S.Ct. at p. 2717), but she fails to distinguish persuasively the instant case from those factual situations that Justice Sotomayor specifically noted that *Bullcoming* did not address. In fact, the instant case falls squarely within three of those factual situations.

First, Justice Sotomayor noted that 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.) This Court has held that, in determining whether a statement is testimonial,

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1 Footnote 6, which defined as "testimonial" a statement having a "*primary purpose* of establishing or proving past events potentially relevant to later criminal prosecution," was only joined by four justices and thus is not part of the majority opinion. Justice Thomas, who provided the fifth vote for three of the four other parts of the majority opinion, did not join the footnote. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2714 fn. 6 [emphasis added].)

courts should evaluate the "primary purpose" for which it was made. (See *People v. Blacksher* (Aug. 25, 2011) ___ Cal.4th ___, 2011 WL 3715536, *25-26; *People v. Cage* (2007) 40 Cal.4th 965, 984-988.)

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 v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527]. 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.

Nevertheless, Golay argues that this autopsy was no different from blood testing performed on a live suspect as in *Bullcoming*. (ASB 23.) But, as discussed in respondent's supplemental brief (RSB 7), autopsy reports are prepared for specific medical purposes, set forth by state law, that exist independently of any law enforcement accusatory function. The purpose of a medical examination following a death is to determine the cause of death. In contrast, the purpose of drawing blood from a suspect for testing is generally to determine whether there is evidence to support a criminal prosecution. As Justice Sotomayor recognized, *Bullcoming* does not address a situation, such as the autopsy performed in this case, where the examination had an alternate primary purpose, distinct from criminal prosecution.

Second, the *Bullcoming* majority opinion repeatedly emphasized that the testifying witness had no connection to the laboratory report that was generated by another analyst. (See *Bullcoming*, *supra*, 131 S.Ct. at pp. 2712-2713, 2715.) In her 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.)

Golay argues that Muto "did not have sufficient involvement in the testing to allow him to report on what others concluded." (ASB 24.) Golay is incorrect. Muto testified that, as laboratory director, he supervised the work of each of the forensic analysts who contributed to the toxicology reports. Following his review, Muto signed the July 13, 2005, report, which showed that the victim's blood contained alcohol, a prescription sedative, and a prescription pain reliever. (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 *Bullcoming* holding.

Golay ignores Justice Sotomayor's third scenario not covered by *Bullcoming*: where an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. (*Bullcoming*, *supra*, 131 S.Ct. at 2722.) Here, Muto testified as an independent expert witness, relying in part on observations and instrument data recorded by others 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 reports generated by nontestifying analysts were not offered into evidence, and because the trial witnesses here provided independent expert opinion evidence, were subjected to cross-examination, and did not transmit the conclusions of a nontestifying expert, the instant

case also falls within the third category of cases described by Justice Sotomayor as beyond the reach of the holding of *Bullcoming*.

As discussed in more detail in respondent's supplemental brief, the *Bullcoming* opinion 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. In any event, this Court may wish to await the outcome of the United States Supreme Court's opinion in *People v. Williams* (2010) 238 Ill.2d 125, 939 N.E.2d 268, cert. granted sub nom, *Williams v. Illinois* (June 28, 2011, No. 10-8505), which presents an issue directly on point to the instant case: 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.

II. ANY ERROR IN THE ADMISSION OF THE TEST RESULTS WAS HARMLESS BEYOND A REASONABLE DOUBT

Golay contends that the introduction of Muto's testimony, in relying on the results of the toxicology tests, was not harmless. (ASB 26-29.) As discussed in detail in respondent's answer brief on the merits (AB), any error in admitting Muto's testimony on the toxicology results was harmless beyond a reasonable doubt.[2] (AB 32-37.)

There is no reasonable doubt that a rational jury would have convicted Golay even if the victim's toxicology results had not been admitted into evidence. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674; *People v. Geier* (2007) 41 Cal.4th

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2 For the Court's convenience, respondent recounts here the overwhelming evidence of Golay's guilt.

555, 608; see *Neder v. United States* (1999) 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35.) The evidence of Golay's guilt was overwhelming.

Overwhelming evidence linked Golay and Rutterschmidt to the vehicle at the time it was used to kill McDavid. On the night he was murdered, McDavid's body was seen lying in the alley at about 12:00 a.m. Shortly after 1:00 a.m., McDavid was discovered dead in the same location. (5RT 952-957, 969-973, 995-1005.) At 11:54 p.m. on the same evening, a person identifying herself as Golay called AAA, requesting a tow due to a mechanical problem and giving her location as the end of the alley where McDavid was found. (6RT 1239-1246, 1249-1250.) Records show that a call to directory assistance was placed at this time in Los Angeles from a cell phone number that was registered to Golay's daughter, Kecia Golay, but that, according to Rutterschmidt's handwritten notes, was used by Golay. (15RT 3970-3971, 3993-3994, 4030-4035.) The car, a 1999 Mercury Sable, was towed to a location in Santa Monica near Golay's Ocean Park address. (6RT 1251-1252; 17RT 4602.) At about 1:00 a.m., a call was placed in Santa Monica from Golay's cell number to Rutterschmidt's number. At 1:02 a.m., a call was placed from Rutterschmidt's number back to Golay's number. (15RT 4022-4027, 4035.) Therefore, Golay and Rutterschmidt were in contact with each other immediately after McDavid's murder, and the disabled murder weapon was towed to Golay's residence at her direction.

Video security cameras in the alley captured the Sable turning into the alley at 11:43 p.m. and stopping. Five minutes later, the car reversed, stopped, and went forward again. (7RT 1540-1552.) Significant evidence linked Golay and Rutterschmidt to the Sable. The car had been sold about 18 months before McDavid's murder from a used car dealer to Rutterschmidt, who was accompanied during the purchase by another elderly woman. Rutterschmidt registered the car in the name of "Hilary

Adler." (7RT 1708-1718.) The year before, Adler's driver's license had been stolen from a gym where Kecia Golay was also a member. (7RT 1754-1762.) In January 2005, the Sable was cited for being parked in an alley near Golay's Ocean Park address. (9RT 2108-2111.) In April 2005, this alley, along with the parked Sable, was vandalized with red paint. (9RT 2136-2138.) In July 2005, the Sable received multiple parking tickets and was towed from a location near Rutterschmidt's Sycamore address. (7RT 1678-1681; 8RT 1804-1806, 1810-1812, 1834-1836.) In November 2005, the Sable was purchased at a lien sale with an odometer reading of 106,118 miles, just 184 miles more than the reading when Rutterschmidt bought the car in January 2004. (7RT 1674-1675; 8RT 1862.)

Blood and tissue samples collected from the undercarriage of the Sable matched McDavid's DNA profile with a probability of one in 10 quadrillion. (13RT 3321-3329, 3361-3363.) An inspection revealed that the Sable's fuel line had been recently broken and repaired, and the front tire was splashed with red paint. (8RT 1869-1871, 1874-1886.) The unmistakable inference is that Golay used this Sable to run over McDavid, in the process breaking a fuel line and leading to its mechanical breakdown. After having the Sable towed to her residence, Golay's first call was to Rutterschmidt.

Items discovered at the homes of Golay and Rutterschmidt provided further damaging evidence that linked the defendants to the victims. A note found in Golay's vehicle contained reference to a 1999 Mercury Sable, a partial license plate and VIN number that matched the Sable, a reference to "Hilary Adler," and information concerning Rutterschmidt and McDavid. (7RT 1667-1673, 1690-1691.) In Golay's home, officers found notes with information concerning Rutterschmidt and Vados. (15RT 3956-3958, 3962.) In Rutterschmidt's home, officers recovered notes that referenced McDavid, Golay's cell number, a lease for McDavid's apartment, and

several copies of Adler's driver's license. (7RT 1694-1698; 15RT 3970-3971, 3993-3994, 4013.)

Golay and Rutterschmidt's relationship with McDavid provided strong evidence of motive to kill both McDavid and Vados. In 2002, Golay and Rutterschmidt secured an apartment for McDavid, paid the rent, and ensured that no one else lived with him. (10RT 2493-2501-2512; 12RT 3009-3032, 3074-3089, 3182-3190, 3216-3217.) From January to June 2005, McDavid stayed in various motels, which were paid by Golay. (12RT 3156-3175.)

Beginning in 2002, Golay and Rutterschmidt took out multiple fraudulent insurance policies on McDavid's life. They completed 17 applications with McDavid as the insured for a total of $5,700,095. Generally, Golay and Rutterschmidt claimed falsely to be McDavid's cousin and fiancée, respectively. Thirteen of these applications resulted in policies being issued for a total of $3,700,040, listing either Golay or Rutterschmidt, or both, as beneficiaries. From this amount, after McDavid's death, $1,540,767 was paid to Golay, and $674,571 was paid to Rutterschmidt. (9RT 2222-2223; see also Opn. at 15-22.)

Six years before McDavid's death, Golay and Rutterschmidt had a similar relationship with another destitute individual, Paul Vados. Rutterschmidt paid the rent for Vados, who had no other apparent means of support. (14RT 3719-3720, 3736-3744, 3758-3765.) As with McDavid, Golay and Rutterschmidt took out multiple insurance policies on Vados's life, applying for the policies as Vados's fiancée and cousin, respectively. (See Opn. at 6-8.) On November 8, 1999, Vados's dead body was found, like McDavid, in an alley, the victim of a hit-and-run incident. Like McDavid, Vados had no fractures to his legs and had been run over rather than struck upright. (13RT 3381-3384, 3388-3393, 3398-3403, 3411-3428, 3342-3346.) Soon after, Golay and Rutterschmidt, claiming to be Vados's

fiancée and cousin, respectively, requested a copy of the police report. (13RT 3402-3403.)

There was also significant evidence that Golay and Rutterschmidt had been preparing a third victim. Rutterschmidt approached Jimmy Covington, a homeless man, and put him up for about a week in an office space that was paid for by Golay. Rutterschmidt promised him $2,000 if he gave her personal information and filled out some forms. (12RT 3224-3245, 3303-3311.)

Moreover, following their arrest, Golay and Rutterschmidt made incriminating statements as they were placed in an interview room together. Rutterschmidt blamed Golay for taking out "many insurances" that "raised the suspicion." Golay tried to calm Rutterschmidt, telling her that "they could be listening." Rutterschmidt continued berating Golay for being "greedy" with "all these God damn extra insurances." Golay responded: "You better be quiet. You better not know anything." She reminded her partner to "remember the bottom line." Rutterschmidt replied: "I was the cousin, you were the fiancée. Baloney." (Supp. CT 20-22, 28-32.)

Nevertheless, Golay argues that "this was not an open and shut case" because there was evidence that her daughter, Kecia, who was "healthy and strong" and belonged to a health club, actually murdered McDavid. (ASB 26-29.) Contrary to Golay's assertions, there was no credible evidence linking Kecia to the murders.

Kecia Golay was only tangentially linked to any events in this case. First, Kecia was a member of the health club where Hilary Adler had her driver's license stolen. That license was later used by Rutterschmidt and another elderly woman to buy the Mercury Sable that was subsequently used to kill McDavid. It is a speculative reach to argue that Kecia stole the license from Adler, gave it to her mother, and then was solely responsible for killing McDavid. (7RT 1708-1718.)

Second, the cell phone used to call from the alley on the night that McDavid was killed was registered to Kecia. But this was explained by Rutterschmidt's handwritten notes that stated that this phone was used by Golay. (15RT 3970-3971, 3993-3994, 4030-4035.) There was absolutely no evidence indicating that Kecia used this phone on the night of McDavid's murder to call Rutterschmidt.

Golay asserts, without citation to the record, that evidence was offered that she was "too elderly and too feeble to carry out the murder." (ASB 28.) The record contains no such evidence. McDavid, who was apparently homeless at the time of his murder, was killed as a car drove over his body that lay in an alley. The evidence that McDavid's blood contained prescription sedatives and painkillers, which were found in ground form in containers in Golay's house, would have been helpful to explain McDavid's unconsciousness in the alley when he was murdered. But such evidence was certainly not necessary; McDavid was homeless, and it was a reasonable inference for the jury to find that he had passed out in the alley even without any further assistance from Golay or Rutterschmidt. And there was no evidence that Golay was "too feeble" to push his unconscious body out of her car before she ran him over. Once he was lying in the alley, all Golay had to do was drive her car over him several times, which the video evidence showed.

Accordingly, any error in the admission of the results of the toxicology reports was harmless beyond a reasonable doubt.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: September 23, 2011

Respectfully submitted,

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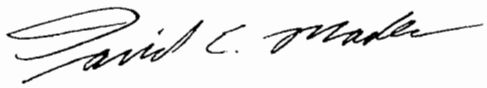

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF RE *BULLCOMING V. NEW MEXICO*** uses a 13 point Times New Roman font and contains 2,945 words.

Dated: September 23, 2011

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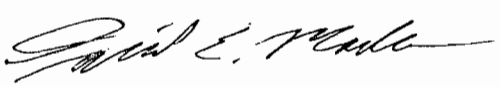

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Olga Rutterschmidt and Helen L. Golay**
Case 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 with postage thereon fully prepaid that same day in the ordinary course of business.

On September 23, 2011, I served the attached **Respondent's Response to Defendant's Supplemental Brief re *Bullcoming v. New Mexico*** by placing a true copy thereof enclosed in a sealed envelope 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:

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On September 23, 2011, I caused an original and 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 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 September 23, 2011, at Los Angeles, California.

K. Amioka
Declarant

Signature

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