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November 18, 2011

Fredrick Olhrich
Clerk of the Supreme Court
350 McAllister Street
San Francisco, CA 94102-3600

Re: People v. Regis Deon Thomas; No. S048337

Dear Mr. Olhrich:

In Argument VII of Appellant's Opening Brief, appellant argued that the autopsy report of Dr. James Wegner, and the testimony of Dr. James Ribe, whose testimony was based upon that autopsy, were testimonial hearsay within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36, and were thus admitted in violation of appellant's right to confrontation under the Sixth Amendment. (AOB, pp. 122-130.) Since appellant filed his Opening and Reply Briefs, this Court and the United States Supreme Court have issued several decisive cases addressing whether the Confrontation Clause is violated by the admission of expert testimony that is based on the work of another, unavailable expert. Appellant files this supplemental brief to address these authorities.

I. *Melendez Diaz v. Massachusetts* Overruled *People v. Geier*

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford*, the United States Supreme Court, rejecting its previous ruling that the reliability of the hearsay under scrutiny determined its admissibility, held that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Crawford, supra*, 541 U.S. at p. 61.) The Confrontation Clause precludes the introduction into evidence of "testimonial statements" unless the witness is shown to be unavailable and the defendant had a prior opportunity to cross-examine the witness. (*Crawford, supra*, 541 U.S. at p. 68.)

Crawford indicated that testimonial statements are made by witnesses who "bear testimony" and that "testimony" is defined as a "solemn declaration or affirmation for the purpose of establishing or proving some fact." (*Crawford, supra*, 541 U.S. at p. 51.) The Court observed that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Ibid.*) The Court further elaborated on "testimonial" statements in *Davis v. Washington* (2006) 547 U.S. 813. The Court held that statements by a victim of domestic violence to a 911 operator immediately after an assault were not testimonial, while statements made by a victim during a police interview shortly after an incident were testimonial and thus inadmissible absent confrontation. (*Id.* at pp. 827-828, 985-986.)

In *People v. Geier* (2007) 41 Cal.4th 555, 607, this Court ruled that testimony relaying information contained in a report of contemporaneous scientific observation recording "raw data" was admissible under *Crawford*, because the report was non-testimonial. In *Geier*, a laboratory supervisor testified regarding a DNA report that she had not authored. The supervisor also proffered a scientific opinion based on the test results, and testified that the report consisted of contemporaneously recorded observations. (*Id.* at pp. 593-595.) In finding the laboratory report to be non-testimonial, this court found "critical" the fact that the *Davis* court, in ruling that a 911 call was non-testimonial, had contrasted this "contemporaneous description of an unfolding event" with questioning by police about potentially criminal past events. Because the technician who authored the report in *Geier* had contemporaneously recorded her observations and analysis, the Court concluded that the technician, in writing the report, was not "testifying." (*Id.* at pp. 605-606.) The technician was simply doing her job in preparing her notes and report, rather than trying to incriminate the defendant. As such, "[r]ecords of laboratory protocols followed and the resulting raw data acquired are not accusatory." (*Id.* at p. 607.) This Court observed that the accusatory opinions in the case "were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, ..." (*Ibid.*)

After this Court's decision in *Geier*, the United States Supreme Court revisited the Confrontation Clause in the context of scientific reports. In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __, 129 S.Ct. 2527, the Court held that affidavits reporting the results of a forensic analysis showing that a substance was cocaine were "testimonial," and that it followed that the affiants were "witnesses" whom the defendant had a Sixth Amendment right to confront.

In reaching this conclusion, the *Melendez-Diaz* court completely undermined *Geier's* rationale. First, as to *Geier's* "contemporaneous description" rationale, *Melendez-Diaz* rejected the argument that a forensic analyst's report was not testimonial because it reported "near-contemporaneous observations." Contrary to this Court's reasoning in *Geier*, the United States Supreme Court noted that, in *Davis,* the statements to officers responding to a report of a domestic disturbance were testimonial notwithstanding that they were "near contemporaneous" to the events reported. (129 S.Ct. at p. 2535.) Moreover, the Court held, the proposed exception for witnesses who make "contemporaneous" observations would eliminate a defendant's right to confront a police officer's on-the-scene description of what the officer observed when he or she responded to a crime scene. (*Ibid.*) Second, as to *Geier's* conclusion that a forensic report was not testimonial because the witness preparing it was not accusatory, the *Melendez-Diaz* court found "no authority" for the proposition that those who did not see the crime "nor any human action related to it" should not be subject to confrontation. (*Ibid.*) They rejected the argument that forensic analysts should not be subject to confrontation because they are not "accusatory witnesses," stating that the argument "finds no support in the text of the Sixth Amendment or in our case law." (*Id.* at p. 2533.) The Supreme Court further rejected the notion that forensic witnesses should be immune from cross-examination because the testimony they provide is the result of "neutral, scientific testing." It reiterated its conclusion that it did not matter how reliable the evidence might be. (*Id.* at p. 2536, quoting *Crawford, supra*, 541 U.S. at pp. 61-62.)

The Court also pointed out that it was not evident that forensic testing "is as neutral or reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation." (*Melendez-Diaz*, 129 S.Ct. at p. 2536.) Rather, "[a] forensic analyst responding to a request from a law enforcement official may feel pressure - or have an incentive - to alter the evidence in a manner favorable to the prosecution." (*Ibid.*) Moreover, "an analyst's lack of proper training or deficiency in judgment may be disclosed in cross examination." (*Id.* at p. 2537.)

The *Melendez-Diaz* court thus definitively rejected the idea that a forensic report made to document facts for possible use in a criminal prosecution could be deemed "non-testimonial" when the witness's observations were recorded "near contemporaneously" and/or when the witness could be considered "neutral" or "non-accusatory." The conclusion in *Geier* that such reports were not testimonial has been overruled.

II. *Melendez-Diaz* and *Bullcoming* Confirm that the Autopsy Report and the Expert Testimony Based on the Report Were Inadmissible

In his briefing, appellant showed that an autopsy report is testimonial within the meaning of *Crawford*. (AOB, pp. 126-127.) This conclusion is confirmed by *Melendez Diaz*. In *Melendez-Diaz*, in acknowledging the dissent's point that "there are other ways - and in some cases better ways - to challenge or verify the results of a forensic test" (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2536) than through confrontation, the majority pointedly referred to autopsy reports as an *exception* to the dissent's contention, observing that "forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated." The Court concluded that confrontation remains the one constitutional way "to challenge or verify the results" of such forensic tests. (*Id.* at p. 2536, fn. 5.) From this, it is plain that autopsy reports are a form of forensic analysis subject to confrontation.

In its Reply Brief, respondent argued that an autopsy report is not testimonial because it is "routine documentary evidence" that is admissible as a "business record." (RB, p. 106.) However, *Melendez-Diaz* rejected the contention that anything admissible under a jurisdiction's business records exception is non-testimonial: "Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. [Citation.] But that is not the case if the regularly conducted business activity is the production of evidence for use at trial." (129 S.Ct. at p. 2538 [citation and footnote omitted].)

Although it is the "business" of the coroner to conduct autopsies, the purpose of an autopsy in a suspected homicide case is for prosecutorial use, rather than as a function of the coroner's administrative activities. Autopsy reports are precisely the type of out-of-court statement that must be excluded as hearsay because admitting them "opens wide the door to avoidance of cross-examination[.]" (*Palmer v. Hoffman* (1943) 318 U.S. 109, 114 [cited with approval in *Melendez-Diaz*, 129 S.Ct. at p. 2538] see also Grimm, Deise, & Grimm, *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions Are Testimonial* (2010) 40 U. Balt. L.F. 155, 181 [concluding that autopsy reports in homicide cases are testimonial under *Melendez-Diaz*].)[1]

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[1]Two of the out of state cases cited by respondent for the proposition that autopsy reports are admissible as "business" records are no longer good authority. One case cited by respondent *People v. Durio* (Sup.Ct. 2005) 794 N.Y.S.2d 863, 868-869, for the proposition that all business

The conclusion that scientific reports are subject to the Confrontation Clause was reinforced in *Bullcoming v. New Mexico* (2011) 564 U.S. __, 131 S.Ct. 2705, where the Court reversed the New Mexico Supreme Court's ruling that permitted the testimonial statement of one witness to be entered into evidence through the in-court testimony of a second person (*Bullcoming*, 131 S.Ct. at p. 2713.) In reaching this result, the court rejected the state's arguments that the report was nontestimonial, noting that the "argument fares no better here than it did in *Melendez-Diaz*." (*Id.* at p. 2717; Melendez-Diaz, *supra*, 129 S.Ct. at p. 2527.) The state argued that the affirmations made by the testing analyst were not "'adversarial' or 'inquisitorial,'" but were instead the observations of "'independent scientis[t]' made 'according to a non-adversarial public duty.'" (*Ibid.*) The Court rejected the argument and found the document to be testimonial, because, just as in *Melendez-Diaz*,"a state forensic laboratory, on police request, had analyzed seized evidence . . . and reported the laboratory's analysis to police . . ." the challenged evidence in *Bullcoming* had been created solely for an evidentiary purpose and was made in aid of a police investigation. (*Ibid.*)

The inadmissibility of the testimony of Dr. Ribe based on Dr. Wegner's autopsy report also was confirmed by the Court's holding in *Bullcoming v. New Mexico.* In *Bullcoming* the Court rejected the prosecution's argument that the testimony of a second analyst could substitute for that of the analyst who had done the work because the first analyst was a "mere scrivener" who had simply written down a result generated by a machine and the second analyst reported the result. (131 S.Ct. at p. 2713.) The Court found that the analyst "reported more than a machine-generated number" because he also had made certain representations "relating to past events and human actions not revealed in raw, machine-produced data." (*Id.* at p. 2714.) For example, the the first analyst asserted that the blood sample was received with the seal unbroken and that he had performed a particular test on the sample and had adhered to the required protocol. Such representations, the Court found, "are meet for cross-examination." (*Ibid.*)

The Court also explained that the "potential ramifications" of the state court's reasoning "raise red flags." (131 S.Ct. at p. 2714.)

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records were non-testimonial was abrogated by *People v. Rawlins* (2008) 10 N.Y.3d 136, 149-150 in light of *Davis v. Washington* (2006) 547 U.S. 813. The reasoning of a second, *Denoso v. State* (Tex.App. 2005) 156 S.W.3d 166, 182, was explicitly rejected by *Wood v. State* (Tex. App. 2009) 299 S.W.3d 200, 208, on the grounds that it was inconsistent with *Melendez-Diaz*.

> 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. [Citation.] 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."

(*Ibid.*, citing *Davis*, *supra*, 547 U.S. at p. 826 and *Melendez-Diaz, supra*, 129 S.Ct. at p. 2546 (Kennedy, J., dissenting).)

Moreover, even if the testimonial statement had involved no more than the analyst writing down a machine-generated number, "the comparative reliability of an analyst's testimonial report . . . does not overcome the Sixth Amendment bar." The decision in *Crawford*, the Court observed, had settled that the obvious reliability of a testimonial statement does not dispense with the requirement of confrontation. (*Bullcoming*, 131 S.Ct. at p. 2714.)

The Court next rejected the state court's assertion that surrogate testimony was adequate because the surrogate qualified as an expert with respect to the machine and the laboratory's procedure. A surrogate witness "could not convey what [the testing analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." Had the testing analyst testified, "Bullcoming's counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for [the testing analyst's] removal from his work station." Thus, live testimony from the testing analyst could not be characterized as "'a hollow formality.'" (*Bullcoming*, 131 S.Ct. at p. 2716 [citations and footnotes omitted].)

The Court next stressed that courts are not free to develop exceptions to the requirement of confrontation based on a conclusion that the values behind the Clause could be sufficiently served absent confrontation. It found instructive a recent case involving the right to counsel of choice, *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146. In that case, the Court found that if a "particular guarantee" of the Sixth Amendment is violated, a substitute procedure cannot cure the violation. Just as "representation by substitute counsel does not satisfy the Sixth Amendment, neither does the opportunity to confront a substitute witness." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2716.)

The facts of the instant case resemble in all material respects those present in *Bullcoming*. The government called as a surrogate witness Dr. Ribe. Dr. Ribe was allowed to relay to the jury the factual representations in Dr. Wegner's autopsy report-- although, as with the analyst in *Bullcoming*, Dr. Ribe neither performed nor observed the autopsy at issue.

Respondent argued that evidence of the autopsy report was admissible because it was relied upon for a non-hearsay purpose: *i.e.*, as a basis for the opinion of Dr. Ribe. (RB p. 106.)[2] However, to the extent that the evidence was properly before the jury for a non-hearsay basis, both *Melendez-Diaz* and *Bullcoming* make it clear that the Confrontation Clause is still violated. Under the rationale of those cases, it is not the introduction of testimonial statements by one person into evidence that implicates the Confrontation Clause, but that the substance of that testimonial statement is conveyed to the trier of fact by another person. In this case, Dr. Ribe's testimony about the cause of death and the manner in which the wounds were inflicted was based on the substance of the assertions in the unavailable coroner's report, in violation of the Confrontation Clause. The statements in the autopsy report were presented for their truth, to support Dr. Ribe's opinion. If the statements were not true, then Dr. Ribe's testimony based on the report was worthless. Since Dr. Ribes' testimony depended on the credibility of Dr. Wegner's report, his testimony regarding that report violated the Confrontation Clause.

The ability to cross-examine Dr. Ribe regarding the report did not satisfy the Confrontation Clause. As held in *Bullcoming*, the Confrontation Clause does not permit the testimonial statements of a forensic analyst to be introduced through the testimony of a surrogate witness. (131 S. Ct. at p. 2710.) Because Ribes took no part in the analysis conducted by Dr. Wegner, the Clause did not permit her to testify as a surrogate for the analysts.

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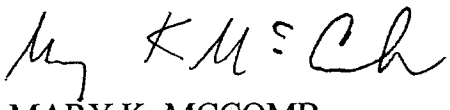
[2]On June 28, 2011, the United States Supreme Court granted a petition for writ of certiorari in *Williams v. Illinois*. (*People v. Williams* (Ill. 2010) 939 N.E.2d 268, cert. granted *Williams v. Illinois*, No. 10-8050.) The question presented in *Williams* is: "Whether the prosecution violates the Confrontation Clause when it presents, pursuant to a state rule of evidence, the substance of a testimonial forensic laboratory report through the trial testimony of an expert witness who took no part in the reported forensic analysis, where the defendant had no opportunity to confront the analysts who authored the report." To the extent that the resolution of this case turns on whether the autopsy was properly before the jury as a basis for Dr. Ribe's opinion, appellant urges that this Court wait for the resolution of *Williams* to decide the issue. (See Appellant's Motion to Schedule Oral Argument.)

For these reasons, appellant's conviction and sentence must be reversed.

DATED: November 18, 2011

MICHAEL J. HERSEK
State Public Defender



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DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Regis Deon Thomas**
Case Number: **Supreme Court No. Crim. S048337**
Los Angeles County Superior Court No. BA075063

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S SUPPLEMENTAL LETTER BRIEF

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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 on **November 18, 2011,** at Sacramento, California.

Denise A. Armendariz