In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIE LEO HARRIS, Defendant and Appellant.	CAPITAL CASE Case No. S081700

Kern County Superior Court Case No. 71427A
The Honorable Roger D. Randall, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

In his supplemental opening brief, appellant argues that the presentation of DNA evidence at trial through the deputy lab director, rather than the scientist who analyzed the samples, violated his confrontation rights under the Sixth Amendment of the federal constitution. (Supp. AOB 1-8.) Appellant cites the recent United States Supreme Court case of *Melendez-Diaz v. Massachusetts* (2009) __ U.S. __ [129 S.Ct. 2527] (*Melendez-Diaz*), to support his argument.

First, appellant forfeited this claim by failing to make a timely and specific objection to the introduction of this testimony. Second, assuming the claim is properly before this Court, respondent disagrees with appellant's assessment of *Melendez-Diaz* and its extension to the evidence presented in this case. *Melendez-Diaz* invalidated, as a violation of the Sixth Amendment confrontation clause, a Massachusetts state procedure whereby sworn affidavits setting forth forensic test results, without any foundational information or live testimony, were made admissible at a criminal trial. *Melendez-Diaz* did not purport to address situations, like the one in appellant's case, where a witness is called to the stand, is available for cross-examination, and the documentary evidence consists not of affidavits, but rather of the raw data generated by testing procedures. In such circumstances, the defendant's Sixth Amendment confrontation rights are satisfied. Lastly, error, if any, was harmless.

ARGUMENT

I. THE DNA EVIDENCE DID NOT VIOLATE APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

A. Factual Background

Charlotte Word testified as an expert for the prosecution. (28 RT 6470.)[1] Word is a Ph.D.-level scientist and deputy lab director at Cellmark Diagnostics (Cellmark), a private laboratory for DNA testing. (28 RT 6470-6471.) She received her Bachelor's of Science degree in biology and her Ph.D. in microbiology from the College of William and Mary in Virginia. (28 RT 6471.) Word did her post-graduate work in the areas of molecular biology and immunology at the University of Texas, Southwestern Medical School, in Dallas, Texas. (28 RT 6472.) After three and a half years of post-graduate research, Word became a member of the faculty at the University of New Mexico School of Medicine, where she taught and conducted research in the areas of molecular biology and immunology for five and a half years. (28 RT 6472.)

Word began working at Cellmark in 1990. (28 RT 6472.) Her job duties include reviewing the work of the laboratory scientists, reviewing the data they obtain, verifying the results of their work, signing off on their reports, and testifying as an expert in court. (28 RT 6472-6473.) Word has qualified and testified as an expert in DNA analysis in approximately 200 cases both in California and various other states. (28 RT 6473.)

Cellmark conducts testing for both the prosecution and defense in criminal cases. (28 RT 6473.) Cellmark conducts DNA testing on

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[1] "RT" refers to the Reporter's Transcript On Appeal; "Supp. AOB" refers to Appellant's Supplemental Opening Brief. Transcript citations will be preceded by a volume designation, if appropriate.

evidentiary samples in criminal cases on a daily basis. (28 RT 6473-6474.) When evidence is received by the laboratory for analysis, it is logged into an evidence log sheet and a case folder for that particular set of evidence is created. (28 RT 6474.) All of the work done on a particular case, from communications to test results, is kept in that case folder. (28 RT 6474.) The scientist assigned to a particular case is required to document each step of the testing process in the case folder, along with the actual results of the testing. (28 RT 6474-6475.) Word is responsible for ensuring the maintenance of proper records kept in the ordinary course of business. (28 RT 6476.)

Word noted several reasons for the documentation requirements. First, it provides a day-to-day record of all work done on each case, which allows the scientist to pick up exactly where they left off the previous day. (28 RT 6475.) Second, it provides documentation for Word and the other reviewers to review to ensure the standard laboratory procedures have been followed and assess the validity of the results and conclusions of the testing. (28 RT 6475.) Third, they provide a permanent record of the work performed on any particular case that can later be used to refresh someone's memory prior to testifying at trial. (28 RT 6475-6476.) Lastly, the case files are made available upon request by opposing counsel so they may have the testing procedures and results independently reviewed by their own expert. (28 RT 6476.)

Word explained that DNA is genetic material contained within each of the cells in the body that provides each person with their individual characteristics. (28 RT 6477.) Most regions of DNA are exactly the same from one individual to another, but there are some identifiable regions of DNA that differ from person to person. (28 RT 6478.) DNA identification testing focuses on the regions of DNA that vary from person to person, and compares those regions in a known sample to the same regions in a sample

of unknown origin to eliminate individuals as the source of that unknown sample. (28 RT 6477-6478.) The procedure used to compare the samples in this case is polymerase chain reaction (PCR), in which copies of specific regions of DNA are made in order to analyze those regions and compare them to known individuals. (28 RT 6479.) This is accomplished with the use of commercial test kits that are developed and manufactured strictly for this type of testing in criminal cases. (28 RT 6479-6480.) These test kits undergo strict quality control testing by the manufacturer and also in the laboratory when the testing is done. (28 RT 6480.) Each kit is designed to test specific regions of DNA that have been found to vary from person to person. (28 RT 6480.) One of the kits used by the laboratory in this case is the PM+DQAL kit, which copies six different regions of DNA at one time using the polymerase enzyme. (28 RT 6480.)

Once the laboratory receives the evidence sample and comparison samples from known individuals, there are four steps in the testing process. (28 RT 6481.) First, the DNA from the evidence sample is isolated from the rest of the cellular components. (28 RT 6481.) Second, the test kits are used to copy the DNA using PCR. (28 RT 6481.) Third, the types must be analyzed to determine which form exists at each region in that sample. (28 RT 6481.) If it is determined that a sufficient amount of DNA exists to proceed with the comparison, the first three steps are then performed on the samples from known individuals. (28 RT 6482.) The final step is to analyze and compare the results to determine whether an individual is excluded or included as a source of the DNA. (28 RT 6482.) The comparison is made by making a table of the results and comparing each region of DNA from the unknown sample to the same region in the known sample. (28 RT 6482-6483.) If the types from any particular region do not match, then that person is excluded as a contributor of the DNA. (28 RT 6483-6484.) If comparison of all the tested regions yields a complete

match, the individual cannot be excluded as a source and statistical calculations are performed to determine how common that set of genetic information is in the general population. (28 RT 6483-6484.) The frequencies used to make the calculations are reported in three different databases, Caucasian, African-American, and Hispanic. (28 RT 6486.)

In this case, Cellmark received five control samples from known individuals which included Alicia Manning, Michael Gonzales, Anthony Chappell, Charles Hill, and appellant. (28 RT 6489.) They also received several pieces of evidence for analysis and comparison to the known samples. (28 RT 6489.) Because the evidence samples in this case were thought to possibly contain sperm, an additional procedure had to be performed before the samples could be analyzed and compared. (28 RT 6491-6492.) The purpose of this procedure is to separate the sperm from the rest of the cellular material. (28 RT 6492.) The end result is one tube of DNA, the non-sperm fraction, which contains DNA from cellular material other than sperm and a second tube of DNA, the sperm fraction, which contains only sperm. (28 RT 6492.) Both the sperm and non-sperm fractions are then analyzed and compared to the known samples. (28 RT 6493.)

Word testified that tests were conducted on an evidence sample labeled "urine sample" to separate the non-sperm fraction from the sperm fraction. (28 RT 6496.) Appellant could not be excluded as a source of the DNA from both the non-sperm and sperm fractions. (28 RT 6496-6497.) The DNA in the sperm fraction of the urine sample was tested at six different regions and the statistical frequency was calculated as one in 1,100 in the African-American population, one in 11,000 in the Caucasian population, and one in 13,000 in the Hispanic population. (28 RT 6497-6498.) Word also testified that black fibers from a fur-like blanket were tested and compared to the control samples from the known individuals.

(28 RT 6498.) Appellant could not be excluded as a source of the DNA from both the non-sperm and sperm fractions. (28 RT 6498-6499.) The DNA in the sperm fraction of the fur-like blanket fibers was tested at nine different regions and the statistical frequency was calculated as one in 1.6 million in the African-American population, one in 4.8 million in the Caucasian population, and one in 9.1 million in the Hispanic population. (28 RT 6499.) Word further testified that vaginal swabs were tested and compared to the control samples from the known individuals. (28 RT 6501.) Appellant could not be excluded as a source of the DNA from the sperm fraction. (28 RT 6501-6502.) The DNA in the sperm fraction of the vaginal swabs was tested at 10 different regions and the statistical frequency was calculated as one in 410 million in the African-American population, one in 1.6 billion in the Caucasian population, and one in 1.5 billion in the Hispanic population. (28 RT 6502-6503.)

On cross-examination, appellant only asked Word one question, "Why do you use different regions for different samples?" (28 RT 6504.) Word explained that they perform the tests that are requested by the agency submitting the samples, and in this case the laboratory was asked to perform all of the tests on the vaginal swabs. (28 RT 6504.) She further explained that sometimes it is only possible to perform some of the tests, because each additional test requires additional DNA and the sample may be too small to perform all of the tests. (28 RT 6504.)

B. Appellant Has Forfeited This Claim

As appellant points out (Supp. AOB 3, fn. 1), he did not object to Word's testimony at trial. It is well settled that a defendant's failure to make a timely and specific objection to the admission of evidence on the ground asserted on appeal makes that ground not cognizable. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 20; *People v. Partida* (2005) 37 Cal.4th 428, 433-434; *People v. Sejias*(2005) 36 Cal.4th 291, 302; *People v. Morris*

(1991) 53 Cal.3d 152, 187-188; Evid. Code, § 353.) This rule of forfeiture applies to claims based on statutory rights, as well as claims based on violations of federal constitutional rights. (*In re Seaton* (2004) 34 Cal.4th 193, 198; *In re Jermaine B.* (1999) 69 Cal.App.4th 634, 646; Pen. Code, § 1259.) Word testified at appellant's first trial, so appellant was well-aware of the testimony she would offer at his second trial and of the fact that she was not the person who actually tested the DNA samples. (12 RT 2796-2864.) His failure to make a timely and specific objection to Word's testimony precludes him from raising this claim on appeal.

C. Word's Testimony Did Not Violate Appellant's Confrontation Rights

Appellant argues that reversal is required under *Melendez-Diaz* because that case established that laboratory reports of the type used in this case are testimonial, thereby requiring the author of those reports to testify. (Supp. AOB 2-8.) Appellant reads too much into *Melendez-Diaz*. Unlike *Melendez-Diaz*, the prosecution in this case called an expert witness to provide an independent expert opinion as to the DNA test results. Because appellant had a full opportunity to cross-examine that expert and explore the reliability of the test results, his right to confrontation was not violated.

The confrontation clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) Before *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) was decided, the right to confront witnesses existed up to the point where out-of-court statements fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.) After *Crawford*, however, those limitations on the confrontation right were supplanted by a bar on admission of any out-of-court statement classified as "testimonial," unless the declarant is unavailable and the defendant had a prior opportunity to

cross-examine the declarant regarding the statement. (*Crawford, supra*, 541 U.S. at pp. 59, 68.)

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the United States Supreme Court further clarified the distinction between testimonial and non-testimonial hearsay. *Davis* involved two companion cases in which victims reported domestic violence to law enforcement but did not testify at trial. In the first case, *Davis v. Washington*, the victim telephoned 9-1-1 and reported that the defendant was attacking her. She described the attack as it was occurring. In response to questioning by the 9-1-1 operator, she named the defendant as her assailant. In the second case, *Hammon v. Indiana*, police responded to a report of a domestic disturbance at the victim's house. When they arrived, the victim told them that everything was all right. She stated that earlier in the evening the defendant had pushed her, threatened her, and broken several items in her house. The officers had her sign a battery affidavit detailing her account of that evening's events. (*Davis, supra*, 547 U.S. at pp. 817-821.)

The *Davis* Court held that statements were not "testimonial" if the circumstances objectively indicated that the primary purpose of the interrogation was to enable the police to meet an ongoing emergency. By contrast, a statement would be "testimonial" when the circumstances indicated that there was no such emergency but instead, the primary purpose of the interrogation was to establish or prove past events which were potentially relevant to later criminal prosecution. (*Davis, supra*, 547 U.S. at pp. 821-824.) In reaching its conclusion, the *Davis* Court noted that the victim was describing events as they occurred, rather than giving a description of past events. (*Id.* at p. 827.) Furthermore, the Court states, "[n]o 'witness' goes into court to proclaim an emergency and seek help." (*Id.* at p. 828.) The situation in *Hammon*, however, was different. There, the officer was not seeking to determine "what was happening," but rather,

"what happened." (*Id.* at p. 830.) The victim's statements were taken some time after the events.

> Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.

(*Ibid.*; emphasis in original; footnote omitted.)

Then in *Melendez-Diaz*, the United States Supreme Court reviewed a Massachusetts court's decision to admit three "certificates of analysis" of forensic tests which showed that the substance seized by police and connected to the defendants was cocaine. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2530.) The certificates were sworn before a notary public by analysts of a state drug lab, but those analysts were not called as witnesses, nor was there any other expert testimony regarding the forensic tests. (*Id.* at p. 2531.) In a 5-4 opinion authored by Justice Scalia, the Supreme Court held that the admission of this evidence violated the confrontation clause of the Sixth Amendment because the documents at issue "are quite plainly affidavits" and were "functionally identical to live, in-court testimony, 'doing precisely what a witness does on direct examination.'" (*Id.* at p. 2532.)

The Supreme Court characterized its decision as a "rather straightforward application of our holding in *Crawford*" because the drug certificates fell within the "core class of testimonial statements" described in that case. (*Melendez-Diaz* , *supra*, 129 S.Ct. at p. 2532.) In *Crawford*, the Court stated that such statements included

> material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective

> witness reasonably to believe that the statement would be available for use at a later trial.

(*Crawford, supra*, 541 U.S. at pp. 51-52.)

In *Melendez-Diaz*, the Court did not expand this list to include test results contained in a lab report relied upon by expert witnesses. Indeed, the Court reiterated that its holding was "little more than the application of [its] holding in *Crawford*" because the certificates were "ex-parte out-of-court affidavits," which the prosecution used to prove its case. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2542.) Justice Thomas, who provided the crucial fifth vote, wrote separately to emphasize this point. His entire concurring opinion, absent citations, reads as follows:

> I write separately to note that I continue to adhere to my position that "the *Confrontation Clause* is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions." [Citations.] I join in the Court's opinion in this case because the documents at issue in this case "are quite plainly affidavits," *ante*, at 4. As such, they "fall within the core class of testimonial statements" governed by the *Confrontation Clause*. [Citation.]

(*Id.* at p. 2543, Thomas, J., concurring; emphasis in original.) Justice Thomas' concurring opinion made clear that the majority opinion did not address the situation where an expert witness provides opinion testimony at trial based in part upon work done by another analyst.

Alternatively, because Justice Thomas was part of the five-justice majority, and because Justice Thomas subscribed to the included yet narrower, factually limited position described in his concurrence, his concurring view established the holding of the Court. It was the only holding to which five justices consented. (See *Marks v. United States* (1977) 430 U.S. 188, 193 ["When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices,

'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"]; see also *Panetti v. Quarterman* (2007) 551 U.S. 930, 949 ["When there is no majority opinion, the narrower holding controls."].)

Unlike the sworn affidavit at issue in *Melendez-Diaz*, DNA test results are not testimonial in nature. Other courts have held that machine-generated data, including DNA test results, are not testimonial because only persons, not machines, can make statements. (See *People v. Brown* (Nov. 19, 2009) 2009 N.Y. LEXIS 4047 [DNA report not testimonial "because it consisted of merely machine-generated graphs, charts and numerical data"]; *United States v. Moon* (7th Cir. 2008) 512 F.3d 359, 362 ["[T]he Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation *of* those data may be testimonial."]; *United States v. Washington* (4th Cir. 2007) 498 F.3d. 225, 230 ["The raw data generated by the diagnostic machines are the 'statements' *of the machines* themselves, not their operators."].)

In *United States v. Washington, supra*, 498 F.3d 225 (*Washington*), the defendant was arrested for being under the influence of PCP. Technicians placed the defendant's blood into a gas chromatography – mass spectrometry (GCMS) machine for testing. The GCMS generated raw data, which the lab director used in reaching his conclusion about the results of the tests. The defendant argued that his confrontation rights were violated because "the machine-generated data amounted to testimonial hearsay statements of the machine operators[.]" (*Id.* at p. 227.) The Fourth Circuit rejected this contention, finding that the data was neither a statement nor was it testimonial. (*Ibid.*) "The machine printout is the only source of the statement, and no *person* viewed a blood sample and concluded that it contained PCP and alcohol." (*Id.* at p. 230, emphasis in original.) The statements did not come from the technicians but from the

printout itself, and "'statements' made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause." (*Ibid.*) Thus,

> [a]ny concerns about the reliability of such machine-generated information is addressed through the process of authentication not by hearsay or Confrontation Clause analysis.

(*Id.* at p. 231.)

The *Washington* court, relying on *Davis*, *supra*, 574 U.S. 813, also found that the machine-generated data was not "testimonial." (*United States v. Washington*, *supra*, 498 F.3d at p. 232.) The court noted that the data "did not involve the relation of a past fact of history as would be done by a witness." (*Ibid.*) Instead, the machine-generated data was relating "the current condition of the blood in the machines." (*Ibid.*) While there was testimony linking the blood with past behavior, it was supplied by a witness – the laboratory director – who was subject to cross examination as required by the confrontation clause. (*Ibid.*)

> As the machine's output did not "establish or prove past events" and did not look forward to "later criminal prosecution" – the machine could tell no difference between blood analyzed for health care purposes and blood analyzed for law enforcement purposes – the output could not be "testimonial."

(*Ibid.*, citing *Davis*, *supra*, 547 U.S. at p. 821.)

In *United States v. Lamons* (11th Cir. 2008) 532 F.3d 1251, the defendant, a flight attendant, was charged with conveying a false bomb threat. (*Id.* at p. 1259.) At trial, the prosecution introduced raw billing data generated by CTI Group, a company which prepared billing CDs for Sprint. (*Id.* at p. 1262.) To make the CDs, CTI used an automated processing system. (*Ibid.*) A senior technical representative for CTI identified Exhibit 2 as a spreadsheet representing the data on the CD. (*Ibid.*) The spreadsheet showed calls made by the defendant to the airline on the dates and times in

question. (*Ibid.*) The defendant claimed that admission of the spreadsheet violated his Sixth Amendment rights. (*Id.* at pp. 1260-1261.) The Eleventh Circuit disagreed. The court noted that the confrontation clause applies only to "'witnesses' against the accused – in other words, those who 'bear testimony.'" (*Id.* at p. 1263, quoting *Crawford v. Washington*, *supra*, 541 U.S. at p. 51.) Furthermore, the purpose behind the confrontation clause was to protect against the use of "'ex parte examinations as evidence against the accused.'" (*United States v. Lamons*, *supra*, 532 F.3d at p. 1263, quoting *Crawford v. Washington*, *supra*, 541 U.S. at p. 51.) Thus, concluded the court:

> In light of the constitutional text and the historical focus of the Confrontation Clause, we are persuaded that the witnesses with whom the Confrontation Clause is concerned are *human* witnesses, and that the evidence challenged in this appeal does not contain the statements of human witnesses.

(*United States v. Lamon*, *supra*, 532 F.3d at p. 1263, emphasis in original.)

The court further noted that the Federal Rules of Evidence define a "statement" in terms of a declaration of action by a person,[2] and that this definition was helpful in determining the scope of the confrontation clause. (*United States v. Lamon*, *supra*, 532 F.3d at p. 1263) Finally, the court acknowledged that *Melendez-Diaz* was pending before the United States Supreme Court but found it unnecessary to await that decision because "the

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[2] Rule 801 of the Federal Rules of Evidence provides in part:

> The following definitions apply under this article:
> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
> (b) Declarant. A "declarant" is a person who makes a statement.

nature of the evidence in *Melendez-Diaz* is so different" from the machine-generated evidence in the case before it. (*Id* .at p. 1264, fn. 25.)

Finally, in *United States v. Moon, supra*, 512 F.3d 359 (*Moon*), a chemist employed by the Drug Enforcement Agency (DEA) testified based on the readouts of two machines – an infrared spectrometer and a gas chromatograph – that the substance seized from the defendant was cocaine. (*Id.* at pp. 360-361.) The Seventh Circuit Court of Appeals found that the readings from the machines did not constitute a "statement" and were therefore not testimonial hearsay barred by the confrontation clause. (*Id.* at p. 362.) The court explained:

> A physician may order a blood test for a patient and infer from the levels of sugar and insulin that the patient has diabetes. The physician's diagnosis is testimonial, but the lab's raw results are not, because data are not "statements" in any useful sense. Nor is a machine a "witness against" anyone.

(*Ibid.*) The Seventh Circuit recently reaffirmed their holding in this case. (*United States v. Turner* (2010) 2010 U.S.App. LEXIS 683 [finding testimony by supervisor of analyst who conducted drug testing did not violate defendant's confrontation rights].)

Like its federal counterpart, the California Evidence Code defines a "statement" as oral, written or non-verbal conduct by a person. (Evid. Code, § 225.)[3] The DNA test results obtained in appellant's case are precisely the type of raw data which are neither a statement nor testimonial. Here, Word explained each step of the testing procedure. She testified that the tests are performed using commercially manufactured test kits. Then the scientist analyzes and compares the known samples to the unknown

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[3] Evidence Code section 225 provides:

> "Statement" means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.

sample using a table of the results. (28 RT 6481-6484.) The test results themselves are meaningless on their own. They require a scientist familiar with or involved in the process to interpret them. The testimony of such a witness at trial satisfies the defendant's confrontation rights. (See *Melendez-Diaz, supra*, 129 S.Ct. at p. 2532, fn. 1 ["[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case . . . but what testimony is introduced must . . . be introduced live."].)

Melendez-Diaz does not change the rule allowing for the admission of raw data as non-testimonial. (*People v. Brown, supra*, 2009 N.Y. LEXIS 4047 (*Brown*); *State v. Appleby* (Nov. 20, 2009) 2009 Kan. LEXIS 1080 (*Appleby*).)

In *Brown*, New York's highest court held that a DNA report introduced through a non-testing forensic biologist, was not "testimonial" as that term is used in *Crawford*, *Davis*, and *Melendez-Diaz*. (*People v. Brown, supra*, 2009 N.Y. LEXIS 4047 at ** 10-12.) The court stated that the report "consisted of merely machine-generated graphs, charts and numerical data" which on its own contained no subjective analysis. (*Id.* at ** 11.) The technicians themselves would merely have explained how they performed certain procedures. (*Ibid.*) And,

> [a]s the Court made clear in *Melendez-Diaz*, not everyone "whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must be called in the prosecution's case."

(*Ibid.*, quoting *Melendez-Diaz, supra*, 129 S.Ct. at p. 2532, fn. 1.)

In *Appleby*, two individuals employed by a forensic laboratory testified that by using computer software, they determined that the chance of blood on one evidence item being from someone other than the defendant was 1 in 14.44 billion and on the other item, the chance was 1 in

2 quadrillion. (*State v. Appleby, supra*, 2009 Kan. LEXIS 1080 at * 68-70.) The defendant moved to exclude the testimony because the testifying witnesses did not know how the data bases were compiled, and admission of the data violated his Sixth Amendment rights. (*Id.* at * 70.) The trial court denied the motion. (*Id.* at * 70-71.) The Kansas Supreme Court upheld the ruling. (*Id.* at * 80.) Applying *Melendez-Diaz* to the facts before it, the court held that the evidence at issue was not testimonial. (*Id.* at * 77.) The court noted that DNA itself was physical evidence and non-testimonial. (*Ibid.*) Further, the act of writing the computer programs to make the comparisons were non-testimonial actions. (*Id.* at * 78.) "In other words, neither the database nor the statistical program are functionally identical to live, in-court testimony, doing what a witness does on direct examination." (*Ibid.*) The only "testimonial" evidence, concluded the court, was elicited from the experts, who were on the stand and subject to cross-examination. (*Ibid.*)

The result reached by these courts is sound. In *Melendez-Diaz*, the prosecution did not introduce the raw data but merely bare-bones affidavits attesting that a substance was examined and was found to contain cocaine. (*Melendez-Diaz v. Massachusetts, supra*, 129 S.Ct. at pp. 2531, 2537.) In fact, the Supreme Court noted that the affidavits did not indicate what type of tests were performed, whether those tests were routine, and whether the results were subject to interpretation. (*Id.* at p. 2537.) Thus, it was impossible to determine whether the analysis was done according to proper scientific protocol or whether there was human error in the testing process. (*Id.* at pp. 2537-2538.)

None of the reasons advanced by the *Melendez-Diaz* plurality for the decision suggest that the confrontation clause applies to the raw data, as opposed to the interpretation of that data. Specifically, the plurality stated that the certificates were "quite plainly affidavits," i.e., statements of fact

sworn by a declarant before an officer qualified to administer oaths. (*Melendez-Diaz v. Massachusetts*, *supra*, 129 S.Ct. at p. 2532.) Thus, they were the functional equivalent of live testimony. (*Ibid.*) The report is merely raw data which requires an expert to explain it. Indeed, absent a stipulation, the report would not be admitted without accompanying testimony. It is thus offered as an adjunct to that testimony, rather than "in lieu" of the testimony, as was the case in *Melendez-Diaz*. (See *Pendergrass v. State* (Ind. 2009) 913 N.E.2d 703, 708 [*Melendez-Diaz* did not preclude admission of sources, including DNA test results, relied upon by analyst's supervisor in forming opinion].) Accordingly, in such a situation, "protection against the admission of unreliable evidence lies in the rules requiring the state to provide an adequate foundation for the admission of the [data]" (*State v. Van Sickle* (1991) 120 Idaho 99, 103), not in the confrontation clause (*United States v. Washington*, *supra*, 498 F.3d at p. 231).

But even if the DNA reports in this case are testimonial, they were not introduced. Rather, the prosecutor called an expert – the deputy lab director – to testify about the DNA evidence in the case. She was subject to cross-examination and confrontation.

Despite appellant's claim to the contrary, Word's opinion testimony based upon the laboratory report (not admitted into evidence), was proper and did not run afoul of confrontation clause requirements. *Melendez-Diaz* did not overrule well-established evidentiary rules regarding expert opinion testimony. (See Evid. Code, § 801, subd. (b); see e.g. *Larkin v. Yates* (C.D. Cal. July 9, 2009) 2009 U.S. Dist. LEXIS 60106 [distinguishing *Melendez-Diaz* and finding admissible expert testimony about the results of DNA testing in a lab where testifying expert was a supervisor and where she independently reviewed all the relevant data and offered her own independent conclusions about the data reviewed].)

> As a general rule, a trial court had wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused.

(*People v. Page* (1991) 2 Cal.App.4th 161, 187.) The trial court did not abuse its discretion in this case.

California Evidence Code section 801, subdivision (b), provides that an admissible expert opinion may be "[b]ased on matter . . . made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion on the subject to which his testimony relates, unless an expert is precluded by law from using such matters as a basis for his opinion." In other words, expert witnesses are permitted to base their opinions upon reliable hearsay. (See e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618 ["So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony"].)[4]

> And because Evidence Code section 802 allows an expert witness to "state on direct examination the reasons for his opinion and the matter . . . upon which it is based," an expert

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[4] The Federal Rules of Evidence are in accord. Rule 703 of the Federal Rules of Evidence provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determined that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

> witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion.

(*Ibid.*) There can be no violation of a defendant's confrontation rights where the challenged statement was not admitted for its truth, but instead forms the basis for evaluating the expert's opinion. (*Cf. Tennessee v. Street* (1985) 471 U.S. 409, 414; *Crawford, supra*, 541 U.S. at p. 59, fn. 9 ["The [confrontation c]lause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. [Citation.]"].)

Nothing in *Melendez-Diaz* conflicts with this analysis. *Melendez-Diaz* did not hold that the confrontation clause dictates that every person who provides a link in the chain of information relied upon by a testifying expert be exposed to cross-examination, or that every person who can offer information about a forensic examination be called by the prosecution. Instead, *Melendez-Diaz* observed that the confrontation clause requires that the defendant be able to challenge the "honesty, proficiency, and methodology" of the analyst who did the laboratory work in order to "weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz, supra*, 129 S.Ct. at pp. 2537, 2538.)

Although Word did not perform any of the tests and relied on test results performed by an analyst under her supervision, nothing in *Melendez-Diaz* prohibits such testimony from a supervisor. Indeed this Court, faced with a similar challenge under *Crawford*, upheld the admission of testimony regarding DNA test results from an analyst other than the one who conducted the laboratory tests. (See *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*).) One important factor cited by *Geier* to support the admissibility of the laboratory test results was that the ultimate opinions offered at trial were through a qualified testifying witness – the original

analyst's supervisor. (*Id.* at p. 607.) The in-court presence of an expert to offer opinions based on independent review of raw data and material produced by laboratory colleagues was not addressed by *Melendez-Diaz*, but certainly provides the target for confrontation crucially missing in *Melendez-Diaz*.

In fact, when presented with the opportunity to review *Geier*, the United States Supreme Court declined to do so. Just four days after deciding *Melendez-Diaz*, the Court denied the petition for writ of certiorari in *Geier*. (*Geier v. California* (2009) __ U.S. __ [129 S.Ct. 2856].) To the extent it was not implicitly rejected by *Melendez-Diaz*, *Geier* remains controlling law in California.

In *Melendez-Diaz*, the Supreme Court explained that the case before it illustrated the problems created when no witness is called to testify about the testing process.

> The affidavits submitted by the analysts contained only the bare-bones statement that "[t]he substance was found to contain Cocaine." [Citation.] At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed.

(*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537.)

There is no logical reason why the confrontation clause should not be satisfied in this regard if the witness on the stand possesses sufficient qualifications and knowledge about the forensic testing process and can provide testimony regarding: (1) the training received by the analyst; (2) what test(s) were performed; (3) whether those tests were routine; and (4) the degree to which the analyst exercised proper judgment and skill in conducting the testing and reporting the results. As long as these areas can be explored by the defense, the identity of the person cross-examined

should be beyond the purview of the Constitution. (See *State v. Williams* (Wis. 2002) 644 N.W.2d 919, 926 ["[T]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests."].)

Assuming the defense has been provided with a copy of the analyst's report and laboratory notes, defense counsel should be able to expose any deviation from standard procedures in testing and reporting the results through cross-examination of a "surrogate" expert. Given that most laboratory analysts test hundreds if not thousands of evidentiary samples each year, it is highly unlikely that an analyst would remember the details of a particular test not recorded in their notes or reports. (See *Reardon v. Manson* (2d Cir. 1986) 806 F.2d 39, 41 ["In view of the fact that [the witness's] laboratory performs some 20,000 tests each year, it is most unlikely that the chemists who assisted [him] would have any independent recollection of the tests they performed. Their testimony inevitably would have been based on their laboratory notes, which [the witness] was well qualified to interpret."].)

In this case, Word testified that her job duties included reviewing the work of the laboratory scientists, reviewing the data they obtain, verifying the results of their work, and signing off on their reports. (28 RT 6472-6473.) As such, she could testify to the accuracy of the results and whether proper laboratory procedures were followed. In fact, Word did provide a detailed step-by-step explanation of the testing procedure used in this case. (28 RT 6477-6486.)

The Indiana Supreme Court recently held that the testimony of a laboratory supervisor regarding DNA tests performed by an analyst whose

work she reviewed satisfied the defendant's Sixth Amendment right to confrontation. (See *Pendergrass v. State* (Ind. 2009) 913 N.E.2d 703, 708.) To paraphrase that court,

> If the chief mechanism for ensuring reliability of evidence is to be cross-examination, [appellant] had that benefit here. If there were systemic problems with the laboratory processes, [Word] would be a competent witness, perhaps the ideal witness, against whom to lodge such challenges.

(*Ibid.*) It appears, however, that appellant did not believe there were any problems with the testing procedures or the results in this case because he did not cross-examine Word on these topics. In fact, as previously stated, his cross-examination of Word consisted of only one question. (28 RT 6504.)

In sum, because appellant had a full opportunity to cross-examine Word regarding the findings of the DNA tests in this case, as well as the procedures employed by the analyst, his Sixth Amendment right to confrontation was not violated. Nothing in *Melendez-Diaz* compels a different conclusion.

D. Any Possible Confrontation Clause Violation Was Harmless

Assuming for the sake of argument that Word's testimony violated appellant's right to confrontation, any possible violation was harmless beyond a reasonable doubt.

Confrontation clause violations are subject to federal harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdell* (1986) 475 U.S. 673, 681-684.) The harmless error inquiry asks: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18.) Here the answer is yes.

Appellant admitted that he engaged in sexual intercourse with Alicia on the night of her murder. The results of the DNA testing simply confirmed what appellant had already admitted. The real question for the jury to decide was whether the sex between appellant and Alicia was consensual, as appellant claimed, or rape. The mere fact that appellant's DNA was found in Alicia's vagina did not answer this question. The jury, therefore, had to look to the various pieces of circumstantial evidence to determine whether the sex was consensual or not. The evidence supporting lack of consent was substantial.

First, the evidence showed that appellant and Alicia had a less than amicable relationship, which supports a finding of lack of consent. Alicia was irritated by appellant's constant phone calls to the apartment because they were disrupting her studying. She was so irritated that she confronted Bucholz about the calls and asked her to tell appellant to stop calling the apartment. Even after Bucholz told appellant to page her instead of calling the apartment he continued to call the apartment. (27 RT 6157-6160, 6204-6205, 6296-6297) Alicia also told Lane that appellant called so frequently she had purposefully stopped answering the phone. (30 RT 6934.) Moreover, appellant's girlfriend had called the apartment looking for Bucholz and she threatened Alicia, prompting her to call the police. (27 RT 6163; 29 RT 6621.) Alicia was so upset by this that she confronted appellant and Bucholz about the threats the day before her murder, and she told him to tell his girlfriend not to call the apartment again. (27 RT 6161-6165.) From this evidence, the jury could have reasonably concluded that Alicia would not have had a consensual sexual relationship with appellant.

Second, Alicia and Charles were in a serious and committed relationship that was certainly not as rocky as the defense wanted the jury to believe. The evidence showed that Alicia and Charles planned to move to the east coast together after Alicia graduated. (30 RT 6950.) Charles

admitted that he and Alicia contemplated breaking up, but decided to stay together and continue with their future plans. (30 RT 6959, 6967-6968, 6983-6984.) The fact that Alicia and Charles had dinner and spent the evening together the night before Alicia's murder (27 RT 6165; 30 RT 6935, 6953-6954) further shows that they were still committed to their relationship. Moreover, the "Charles sweetheart" letter that was written by Alicia sometime in the week leading up to her murder indicates Alicia was still deeply in love with Charles and does not show any signs of an imminent break-up. The evidence of Alicia and Charles' relationship further supports a finding of lack of consent.

Third, the physical injuries to Alicia's body support a finding of lack of consent. A piece of glass was found underneath the plaid shorts that were lying on the floor close to Alicia's feet (27 RT 6299-6306; 28 RT 6396; 29 RT 6676), indicating she was hit with at least one glass object before her shorts were removed. Dr. Brown testified that it was likely that Alicia was rendered unconscious by the blunt force trauma to her head. (28 RT 6518.) From this, the jury could have reasonably concluded that Alicia was unconscious during the sexual assault, which would explain the lack of vaginal trauma during nonconsensual sexual intercourse. Further, Dr. Brown testified that a lack of vaginal trauma is not uncommon in cases of rape. (28 RT 6526, 6534.) Even the defense's own expert, Dr. Stanley, testified that in some cases of rape there is no vaginal injury, and the most scientifically valid, large scale studies show that only 20 to 40 percent of cases of sexual assault involve vaginal injury. (31 RT 7142.) He further testified that external injuries to the body, including bruising, scratches, scrapes, cuts, stab wounds, and blunt force trauma, occur in 80 percent of sexual assault cases. (31 RT 7145-7148.) The placement of the glass beneath the shorts and the physical injuries to Alicia's body support a finding of rape.

Finally, Alicia's behavior upon finding out that she might have an STD shows she was not having a sexual relationship with anyone except her boyfriend. On May 15, Alicia went to the health center to get a birth control refill and to get checked for a possible urinary tract infection. The nurse practitioner performed a full examination and tested Alicia for STDs. (30 RT 6987-6988.) On the weekend of May 17, Alicia visited Charles at his parents' house in Tulare and she told him she might have an STD and he must have given it to her. (30 RT 6925, 6951-6952, 6959.) Alicia did not find out that all of the tests came back negative until May 19. (30 RT 6987-6988.) If Alicia was having a sexual relationship with appellant, it would make no sense for Alicia to tell Charles she thought he gave her an STD. Particularly if you believe appellant's story that they just started having sex about a month prior, because it would make more sense in that situation for appellant to be the one who gave her the STD. Had Alicia been having sex with someone other than Charles, it would have been more reasonable for her to remain silent until she got the test results, because if they were negative Charles would never have to know about her affair. The fact that she not only told Charles before getting the results, but also told him she thought he had given her the STD shows that she was not having sex with anyone else. All of this evidence taken together is more than sufficient to support a conclusion that appellant and Alicia did not have consensual sex the night of her murder.

If appellant raped Alicia, the logical conclusion is that he also robbed and killed her. The prosecution presented strong circumstantial evidence to support this conclusion, including appellant's lack of an alibi for the time of the murder (29 RT 6683-6687, 6689, 6707), appellant's proximity to Alicia's apartment (29 RT 6662-6663), appellant's proximity to the area where Alicia's car was found (29 RT 6665-6666), appellant's initial lies about having any relationship with Alicia and ultimate admission to having

sex with her on the night of the murder (29 RT 6763-6768, 6790-6795, 6798-6799, 6817-6819), and appellant's attempts to sell items matching those taken from Alicia's apartment after the murder (30 RT 7000-7001, 7024-7027; 31 RT 7065-7066).

Even without the admission of Word's testimony, in light of the remaining evidence, it is clear beyond a reasonable doubt that a rational jury would have found appellant guilty.

E. There Are No Guilt Phase Errors To Accumulate

Appellant argues that the admission of Word's testimony, in conjunction with the other guilt phase errors, requires reversal. (Supp.AOB 8.) Respondent, however, has shown that none of appellant's contentions have merit. Moreover, appellant has failed to establish prejudice from any of the claims he raises. Accordingly, his claim of cumulative error must be rejected. (See *People v. Lewis* (2001) 25 Cal.4th 610, 635; *People v. Staten* (2000) 24 Cal.4th 434, 464.)

CONCLUSION

For the foregoing reasons, and the reasons set forth in Respondent's Brief, respondent respectfully requests that the convictions be affirmed.

Dated: January 22, 2010

Respectfully submitted,

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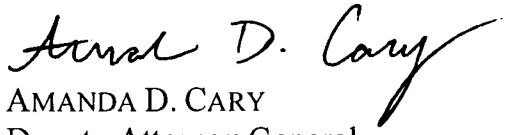

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 7,966 words.

Dated: January 22, 2010

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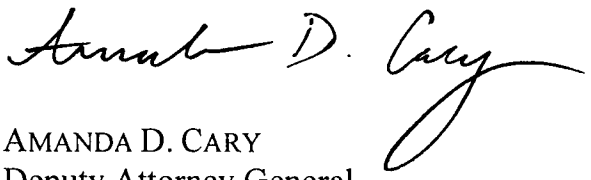

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Harris**
No.: **S081700**

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 January 26, 2010, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** 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 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

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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 January 26, 2010, at Fresno, California.

Lynda Gonzales
Declarant

Lynda Gonzales
Signature

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