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November 29, 2011

Frederick K. Ohlrich
Clerk of the Supreme Court of California
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *The People of the State of California v. Regis Deon Thomas* **(CAPITAL CASE)**
Case No. S048337
Response to Appellant's Supplemental Letter Brief

Dear Mr. Ohlirch:

Pursuant to the Court's Order dated November 22, 2011, respondent respectfully files this Reply to Appellant's Supplemental Letter Brief in the above-referenced case.

INTRODUCTION

Appellant contends that two recent decisions of the United States Supreme Court – *Melendez-Diaz* (2009) 557 U.S. ___ [129 S.Ct. 2527, 174 L.Ed.2d 314] and *Bullcoming v. New Mexico* 131 S.Ct. 2705 [180 L.Ed.2d 610] – made any evidence relating to the autopsy of Officer Burrell "testimonial" within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36, and, therefore, inadmissible because the pathologist who actually performed the autopsy and prepared the related report did not testify to his death prior to trial. The recent decisions relied upon by appellant have little or no effect on the expert witness testimony of the pathologist who actually testified at trial. In any event, the autopsy report's conclusions that Officer Burrell died of multiple gunshot wounds could not possibly have prejudiced appellant because it was supported by other independent evidence.

APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS NOT VIOLATED BY DR. RIBE'S TESTIMONY THAT RELIED, IN PART, ON THE AUTOPSY REPORT PREPARED BY ANOTHER PATHOLOGIST

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him[.]" (U.S. Const., Amend. VI.) The object of that clause is to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Maryland v. Craig* (1990) 497 U.S. 836, 845.)

A. The *Crawford* Decision and its Progeny

In *Crawford v. Washington, supra*, 541 U.S. 36 (*Crawford*), the United States Supreme Court concluded that nontestimonial hearsay remains subject to state hearsay law and may be exempted from Confrontation Clause scrutiny entirely. (*Crawford, supra*, 541 U.S. at p. 68.) But where testimonial evidence is involved, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Ibid.*) While the Supreme Court left for another day any effort to spell out a comprehensive definition of "'testimonial'" (*ibid.*), it stated that it includes "'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.'" (*Id.* at p. 52.) Although the high court declined to set out a comprehensive definition of "testimonial," it provided illustrations of statements that would fall into this category. The Court explained that "testimonial" statements include "'ex parte in-court testimony or its functional equivalent – that is, 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'"; and statements made in interrogations by law enforcement agents. (*Crawford, supra*, at pp. 51-52.) At the very least, "'testimonial'" means "testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." (*Id.* at p. 68.)

In *Davis v. Washington* (2006) 547 U.S. 813, 822 (*Davis*), the United States Supreme Court provided additional guidance narrowing the scope of what qualified as "testimonial":

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In *Davis*, the Court held that a statement made by a domestic violence victim to a 911 operator did not fall within the definition of "testimony," in that it was not made to detail some past event. (547 U.S. at p. 826.) Rather, the victim described the events as they were occurring in an ongoing emergency, and the 911 operator's questions were asked in an effort to resolve the emergency. (*Ibid.*) Therefore, the Court held that the victim was not testifying, but rather was announcing an emergency and seeking help.

In *Hammon v. Indiana*, a case consolidated with Davis, the Court concluded that the victim's statement was testimonial. (*Davis, supra*, 547 U.S. at pp. 829-830.) In that case, the police responded to the scene of a reported domestic disturbance and found the victim alone and appearing frightened. The victim told the officer that her husband attacked her. The officer had the victim fill out and sign an affidavit. (*Id.* at pp. 819-820.)

The Court found that the interrogation was clearly part of an investigation into possible criminal past conduct, which the testifying officer expressly acknowledged. There was no emergency in progress; the officer "was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.'" Thus, the primary, if not the sole, purpose of the interrogation was to investigate a possible crime, rendering the statements testimonial. (*Davis, supra*, 547 U.S. at pp. 829-832.)

In *People v. Cage* (2007) 40 Cal.4th 967, this Court summarized the principles announced in *Davis*:

> First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out of court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the purpose ascribed to testimony–to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined "objectively," considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.

(*People v. Cage, supra*, 40 Cal.4th at p. 984, fns. omitted, italics in original.)

B. The *Melendez-Diaz* Decision

Next, in *Melendez-Diaz v. Massachusetts* (*Melendez-Diaz*), the United States Supreme Court considered whether testimonial evidence might include the results of some forensic testing. In that case, the defendants were arrested on suspicion of drug dealing, and the police submitted suspected drug samples to a state laboratory that was required, under Massachusetts law, to test samples upon police request. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2530.) At trial, in lieu of live testimony, the prosecution submitted three "certificates of analysis," sworn to before a notary public and signed by the crime laboratory analysts, stating that material seized by police and connected to the defendant was cocaine. (*Id.* at p. 2531.)

The Supreme Court held that the admission of the certificates violated the defendant's Sixth Amendment right to confront the witnesses against him. The Court held that the certificates, despite their label, were in fact affidavits, i.e., "'declarations of fact written down and sworn to by the declarant before an officer authorized to administer oaths' [citation]." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) The certificates, the Court continued, were the functional equivalent of live testimony because they asserted "the precise testimony the analysts would be expected to provide if called at trial." The documents were "functionally identical to live, in-court testimony," and their sole purpose was to provide evidence against the defendant. (*Ibid.*) The *Melendez-Diaz* Court characterized its opinion as a "rather straightforward application of our holding in *Crawford*." (Id. at p. 2533.)

Melendez-Diaz, however, was a five-to-four decision, in which Justice Thomas explained that he concurred in the majority opinion only because the certificates of analysis were "quite plainly affidavits" and thus fell "'within the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).) Justice Thomas explained that the

confrontation clause is limited to "extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions." (*Ibid.*, internal quotations and citation omitted.)

"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 . . . .' [Citation.]" (*Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d 260], omission in original.) "When there is no majority opinion, the narrower holding controls. [Citation.]" (*Panetti v. Quartermain* (2007) 551 U.S. 930, 949 [127 S.Ct. 2842, 168 L.Ed.2d 662].) Therefore, the concurrence of Justice Thomas provides the holding of the case in *Melendez-Diaz*. At the very least, it provides a firm basis for distinguishing *Melendez-Diaz* from cases that do not involve formal affidavits.

C. The *Bullcoming* Decision

Most recently, on June 23, 2011, in *Bullcoming v. New Mexico, supra*, 131 S.Ct. 2705 (*Bullcoming*), the United States Supreme Court issued its latest decision on the reach of the Sixth Amendment's Confrontation Clause. In that case, the defendant was convicted of aggravated driving while intoxicated. (*Bullcoming, supra*, 131 S.Ct. at p. 2712.) At trial, the "[p]rincipal evidence" against him was a laboratory blood alcohol concentration (BAC) report generated by an analyst who had been placed on unpaid leave and did not testify. (*Id.* at pp. 2709-2713.) Following the defendant's arrest, his blood sample was sent to a laboratory, where forensic analyst Curtis Caylor analyzed it. The laboratory generated a report that included a "certificate of analyst," completed and signed by Caylor, which noted the sample's BAC level. Caylor's certificate also affirmed that the sample's seal was received intact, that the statements in the remaining sections of the report were correct, and that he had followed the proper procedures. (*Id.* at pp. 2710-2711.)

The trial court admitted Caylor's laboratory report as a business record during the testimony of forensic analyst Gerasimos Razatos, a state laboratory scientist who had neither observed nor reviewed Caylor's analysis. (*Bullcoming, supra*, 131 S.Ct. at p. 2712.) The New Mexico Supreme Court held that the report introduced at trial qualified as testimonial in light of *Melendez-Diaz, supra*, 129 S.Ct. 2527. But the state court further held that its admission did not violate the Confrontation Clause because Caylor was a "mere scrivener," and because Razatos was available for cross-examination regarding the operation of the gas chromatograph machine, the results of the tests, and the laboratory's procedures. (*Bullcoming, supra*, 131 S.Ct. at pp. 2712-2713.)

The Supreme Court framed the issue before it as follows: "Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." (*Bullcoming, supra*, 131 S.Ct. at p. 2713.) The Court answered this question in the negative. Citing "controlling precedent," the Court held that, if an out-of-court statement is testimonial in nature, it generally may not be introduced against the accused unless the witness who made the statement testifies at trial. The Court reversed "[b]ecause the New Mexico Supreme Court permitted the testimonial statement of one witness, i.e., Caylor, to enter into evidence through the in-court testimony of a second person, i.e., Razatos." (*Id.* at p. 2713.) The Court later restated its conclusion this way: "In short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront." (*Id.* at p. 2716.) The Confrontation Clause, the Court added, "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Ibid.*)

In reaching its conclusion, the five-justice majority found that Caylor was not a "mere scrivener" who simply transcribed machine data into his report, for he also made a number of representations about how the test was conducted. (*Bullcoming, supra*, 131 S.Ct. at pp. 2714-2715.) The majority opinion also indicated that the contemporaneous nature of such data recording was not significant: "Most witnesses, after all, testify to their observations of factual conditions or events, e.g., 'the light was green, 'the hour was noon.' Such witnesses may record, on the spot, what they observed." (*Id.* at p. 2714.) Noting that Caylor was on unpaid leave for undisclosed reasons, the Court added that, if Caylor had testified, "Bullcoming's counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for Caylor's removal from his work station." (*Id.* at p. 2715.)

Significantly, the Court also pointed out that the state "did not assert that Razatos had any 'independent opinion' concerning Bullcoming's BAC." (*Bullcoming, supra*, 131 S.Ct. at p. 2716.) Thus, the Court drew a distinction between an expert offering an independent opinion based on results of tests he or she did not personally conduct and a witness serving as a mere conduit for results of tests he or she did not perform.

Moreover, Justice Ginsburg, who wrote the majority opinion, could muster only four votes for a footnote defining as "testimonial" a statement having a "primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." (*Bullcoming, supra*, 131 S.Ct. at p. 2714 fn. 6.) Meanwhile, the five-vote majority opinion stated: "A document created solely for an 'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial." (*Id.* at 2717.) Thus, it appears that a majority of the Court was willing to find Caylor's report "testimonial" only because it was created "solely" for law-enforcement purposes.

In addition, Justice Sotomayor, who joined the majority in the 5-4 decision, wrote a separate concurrence in part "to emphasize the limited reach of the Court's opinion."

(*Bullcoming, supra*, 131 S.Ct. at p. 2719.) Justice Sotomayor highlighted four scenarios neither presented for consideration nor resolved by the majority's opinion: (1) where the state has "suggested an alternative purpose, much less an alternate primary purpose, for the [forensic report]"; (2) where the person testifying "is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue"; (3) where "an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence"; and (4) where the state introduced only instrument-generated data instead of a testimonial report that contained information beyond the raw data. (Id. at p. 2722, emphasis in original.)

As for the first scenario, Justice Sotomayor noted that New Mexico had not claimed that the BAC report was necessary to provide Bullcoming with medical treatment. (*Bullcoming, supra*, 131 S.Ct. at p. 2722.) She pointed to three recent Supreme Court cases which stated that medical reports and statements of physicians are not testimonial. (*Ibid.*)

As for the second scenario, Justice Sotomayor noted that Razatos "conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing." (*Bullcoming, supra*, 131 S.Ct. at p. 2722.) She also noted that the New Mexico Supreme Court "recognized Razatos' total lack of connection to the test at issue." (*Ibid.*) She added, "We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report." (*Ibid.*)

As for the third scenario, Justice Sotomayor noted that "the State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration." Instead, Razatos only read from the report that was introduced into evidence. (*Bullcoming, supra*, 131 S.Ct. at p. 2722.) "We would face a different question if asked to determine the constitutionality of allowing an expert witness to

discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." (*Ibid.*)

As for the fourth scenario, Justice Sotomayor noted that New Mexico had not attempted to introduce only instrument-generated results, such as a printout from a gas chromatograph. Instead, New Mexico had elected to present a certification which contained those results and other statements regarding the procedures which Caylor used in handling the sample. Justice Sotomayor added, "[W]e do not decide whether . . . a State could introduce (assuming an adequate chain of custody foundation) raw data generated by a machine in conjunction with the testimony of an expert witness." (*Bullcoming, supra*, 131 S.Ct. at p. 2722.)

D. *Bullcoming* and *Melendez-Diaz* Have Little Effect on This Case

Here, unlike the recent cases addressing the admissibility of forensic laboratory reports, Dr. Ribe, the testifying pathologist, offered an independent expert opinion based on a medical-type record. Further, Dr. Ribe had a personal connection to the instant case in that he personally performed the autopsy on Officer MacDonald. Moreover, the primary purpose of an autopsy report is unrelated to generating evidence for prosecution.

1. Dr. Ribe Rendered an Independent Expert Opinion

The Supreme Court observed that because forensic test evidence "is not uniquely immune from the risk of manipulation," *Melendez-Diaz* holds that confrontation is required for evidence involving scientific testing. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2535.) Confrontation "is one means of assuring accurate forensic analysis." (*Id.* at p. 2536.) But *Melendez-Diaz* did not invalidate statutes like Evidence Code section 801, subdivision (b), which provides for the admission of evidence through expert testimony. (*United States v. Turner* (7th Cir. 2010) 591 F.3d 928, 934 ["*Melendez-Diaz* did not do away with Federal Rule of Evidence 703"].) An expert may base his opinion on any material, "whether or not admissible," reasonably relied upon by experts in the field in

forming their opinions; and, if questioned, the expert may relate the basis on which he formed his opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; Evid. Code, § 801.) Such expert-opinion testimony is permissible because the expert is present and available for cross-examination. (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 154; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which Crawford condemned." (*People v. Sisneros, supra*, at pp. 153-154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; accord, *State v. Bethea* (2005) 173 N.C. App. 43, 54-58 [617 S.E.2d 687].)

California courts have long held that experts may testify based on hearsay that may itself be testimonial in nature. (E.g., *People v. Thomas, supra*, 130 Cal.App.4th at pp. 1208-1210.) Even after *Melendez-Diaz*, courts continue to reach the same conclusion. (E.g., *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 634-637; *Haywood v. State* (2009) 301 Ga.App. 717, 722 [689 S.E.2d 82]; *State v. Lui* (2009) 153 Wash.App. 304, 318-325 [221 P.3d 948]; *People v. Johnson* (Ill. App. 2009) 915 N.E.2d 845, 851-854.) As the court explained in *United States v. Johnson*:

> Here . . . [the] experts [who relied on information provided by others] took the stand. Therefore, [defendant] and his co-defendants, unlike the defendant in *Melendez-Diaz*, had the opportunity to test the experts' "honesty, proficiency, and methodology" through cross-examination.

(*United States v. Johnson, supra*, at p. 636, quoting *Melendez-Diaz, supra*, 129 S.Ct. at p. 2538.)

As previously noted, the Supreme Court in *Bullcoming* found it significant that testifying witness Razatos had no "independent opinion" regarding the defendant's blood-alcohol content. (*Bullcoming, supra*, 131 S.Ct. at p. 2716.) Justice Sotomayor emphasized that "this is not a case in which an expert witness was asked for his

independent opinion about underlying testimonial reports that were not themselves admitted into evidence." (*Ibid.*) The converse is true here.

Here, it is clear from reading Dr. Ribe's testimony that he did not act as a "surrogate witness" merely parroting the Dr. Wegner's autopsy report of Officer Burrell. Over a several month period prior to trial, Dr. Ribe read and studied the autopsy report dictated by Dr. Wegner. (23RT 3576-3577.) In testifying, however, Dr. Ribe utilized five photographs taken before the autopsy and one taken the day of the autopsy, x-rays, a mannequin, and Officer Burrell's clothing to demonstrate the position of the victim when the wounds were inflicted, entrance and exit wounds, and the paths of the bullets. (23RT 3578-3607; Peo. Exhs. 84-86, 88-89, 91-95.[1]) Thus, unlike the affidavits held inadmissible in *Melendez-Diaz* and *Bullcoming*, the expert testimony here was live testimony by a medical doctor from the same office as the doctor who performed the autopsy, and who relied upon, *inter alia*, photographs, x-rays and clothing, to form his independent expert opinion. Defense counsel was able to cross-examine Dr. Ribe about his opinions. In light of Justice Thomas's concurring opinion in *Melendez-Diaz*, it is unlikely the United States Supreme Court would apply its rationale in that case to this situation which did not involve introduction of pure testimonial documents like affidavits, with no live witness. (See, e.g., *Melendez-Diaz, supra*, 129 S.Ct. at p. 2543 [Thomas, J. concurring].)

2. Dr. Ribe Had a Close Connection to this Case

In *Bullcoming*, the Court repeatedly pointed out that testifying witness Razatos had no connection to the BAC report generated by Caylor. (See *Bullcoming, supra*, 131 S.Ct. at p. 2712 [noting that Razatos "had neither observed nor reviewed Caylor's analysis"]; id. at p. 2713 [noting that Razatos "did not participate in testing Bullcoming's

blood"]; id. at p. 2715 ["surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor know or observed about the events his certification concerned, i.e., the particular test and testing process he employed"].) In her pivotal concurrence, Justice Sotomayor indicated that the result of the case might have been different if the testifying witness had been a "supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." (*Id.* at p. 2722.) In the present case, by contrast, Dr. Ribe was not only from the same medical examiner's office as Dr. Wegner, but he was intimately familiar with the doctor's "extensive experience in forensic pathology." (23RT 3575.) In addition, Dr. Ribe performed the autopsy on fellow-officer-victim MacDonald – who was murdered at the same time and in virtually the identical manner of Officer Burrell. Therefore, the information relied upon by Dr. Ribe simply takes this case outside the realm of forensic laboratory tests and affidavits that were the subject of *Melendez-Diaz* and *Bullcoming*.

3. The Primary Purpose of Autopsy Reports Are Unrelated to Generating Evidence for Prosecution

As Justice Sotomayor noted, 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.) Autopsy reports are prepared for specific medical purposes, set forth by state law, that exist independently of any law enforcement accusatory function. (See *Noguchi v. Civil Service Commission* (1986) 187 Cal.App.3d 1521, 1529.) Accordingly, the fundamental reason an autopsy is generated is to medically "develop . . . accurate and adequate information about the death of each and every human being, whenever

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(...continued)

[1] Several of these exhibits were lodged with this Court on from the superior court (continued...)

possible." (*People v. Roehler* (1985) 167 Cal.App.3d 353, 374.) This purpose far exceeds the much narrower and incidental function of detecting evidence of a crime. Even the secondary reasons for collecting data at autopsies similarly do not relate exclusively to the criminal justice system, but rather, "range from beliefs about the fundamental dignity of man to such practical concerns as control of disease, the keeping of statistics, and of course, the detection of negligent or intentional wrongdoing." (*Ibid.*) As another court observed, "'a medical examiner, although often called a forensic expert, bears more similarity to a treating physician than he does to one who is merely rendering an opinion for use in the trial of a case.'" (*Manocchio v. Moran* (1st Cir. 1990) 919 F.2d 770, 777, quoting State v. Manocchio (R.I. 1985) 497 A.2d 1, 7.) Accordingly, because there was an alternate purpose for the toxicological report here, the events in the instant case are not covered by the *Bullcoming* holding.

E. Any Error is Unquestionably Harmless

Even if this Court decides not to address the legal issue of whether Dr. Ribe's use and explanation of the autopsy report violated appellant's Sixth Amendment rights, any error in admitting the evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) There is absolutely no dispute as to how Officer Burrell died. The autopsy report's conclusion that he died of multiple gunshots, was supported by overwhelming independent evidence. Even without the autopsy report, no one can dispute that Officer Burrell suffered an execution-style murder. Margarita Gully saw a man who looked like appellant straddling Officer Burrell's legs, pointing a gun about three to four feet from Officer Burrell's head. She then heard additional shots fired. (13RT 1811-1812, 1814-1823, 1828-1836, 1840, 1842; 17RT 2626; Peo. Exhs. 24,

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(...continued)

on May 20, 2011.

35, 37-38, 62.) Alicia Jordan saw a man who appeared to be appellant holding a gun and moving around the officers. While Officer Burrell was face down on the curb, the man walked to Officer Burrell's body, stood between the waist and shoulder area and shot downward in the area of Officer Burrell's head. (15RT 2251-2256, 2260-2262; 16RT 2311, 2315, 2320-2323; 17RT 2475-2476, 2491-2492; 20RT 3041-3042.)

Officer Reynolds testified that blood had been located on Officer Burrell's clothing, and a bullet hole was present in the bottom of his boot. (17RT 2603-2605; Peo. Exh. 59.) Deputy Sheriff Dwight Van Horn, a firearms examiner, testified that a bullet had been removed from Officer Burrell's boot. (23RT 3680.) He also testified to the presence of holes in Officer Burrell's jacket and that gun residue on the jacket demonstrated that the gun which inflicted the wound to the chest was fired from a distance between two and three feet. (23RT 3686-3688; Peo. Exh. 92.)

Additionally, as previously noted, Dr. Ribe did conduct the autopsy of Officer MacDonald, whose body was found along with Officer Burrell's body and who suffered a very similar fate. (15RT 2175-2183, 2189-2190, 2196; 17RT 2543, 2589-2590, 2594, 2597-2598; 20RT 3042; 23RT 3614-3625, 3630-3649, 3675-3686; Peo. Exhs. 32, 97, 100-107, 109-111.)

Based on the foregoing, it did not take expert coroner's testimony to demonstrate that Officer Burrell's murder was deliberate and premeditated. Any error was therefore harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

CONCLUSION

Based on the foregoing, and the arguments put forth in the respondent's brief, appellant's claim should be rejected.

Respectfully submitted,

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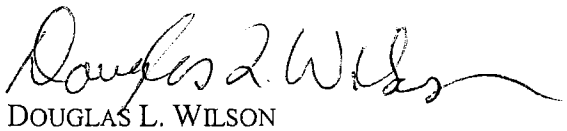
CERTIFICATE OF COMPLIANCE

I certify that the attached LETTER BRIEF (RESPONSE TO APPELLANT'S SUPPLEMENTAL LETTER BRIEF) uses a 13 point Times New Roman font and contains 4,495 words.

Dated: November 29, 2011

KAMALA D. HARRIS
Attorney General of California



DOUGLAS L. WILSON
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **The People of the State of California v. Regis Deon Thomas**
No.: **S048337**
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; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On November 29, 2011, I served the attached (**CAPITAL CASE**) - **RESPONSE TO APPELLANT'S SUPPLEMENTAL LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope with the **ON TRAC**, addressed as follows:

The Honorable Edward A. Ferns, Judge
Los Angeles County Superior Court
Central District, Stanley Mosk Courthouse
111 North Hill Street
Department 69, Room 621
Los Angeles, CA 90012
(courtesy copy)

The Honorable Steve Cooley
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Mary K. McComb
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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 November 29, 2011, at Los Angeles, California.

M. Louie
Declarant

Signature

DLW:ml
LA1996XS0003
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