

SUPREME COURT COPY

Supreme Court No. S176213

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

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Frederick K. Chlrich Clerk

Deputy

-----) S176213
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) Court of Appeal No. B209568
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)
)
THE PEOPLE,)
Plaintiff and Respondent,)
v.)
OLGA RUTTERSCHMIDT et al.,)
Defendants and Appellants.)
_____)

**DEFENDANT'S RESPONSE TO SUPPLEMENTAL BRIEF
FILED BY PLAINTIFF AND RESPONDENT**

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THE PEOPLE OF THE STATE OF CALIFORNIA,)	S176213
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Plaintiff and Respondent,)	Court of Appeal No. B209568
)	
vs.)	
)	
HELEN GOLAY,)	
)	
Defendant and Appellant)	
_____)	

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FILED BY PLAINTIFF AND RESPONDENT**

I

INTRODUCTION

On July 13, 2011 the Court requested the parties to serve and file within 30 days Supplemental Briefs addressing the significance, if any, of the United States Supreme Court’s decision in Bullcoming v. New Mexico, decided on June 30, 2011. Defendant and Appellant Helen Golay filed her Supplemental Brief on August 4, 2011, but exceeded the word limit of Rule 8.520 (d) for which Golay apologizes. On or about August 20, 2011 the Attorney General submitted her Supplemental Brief also in excess of the word limit of Rule 8.520 (d). Golay has no objection to the Attorney General’s Brief. Since Golay’s brief is longer than the Attorney Generals, Golay will keep this brief very short.

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II

ARGUMENT

A. THE BULLCOMING DECISION SUPPORTS GOLAY AND REQUIRES REVERSAL OF HER CONVICTION

The Attorney General has conceded that Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705 (2011) undermines the rationale of this Court's decision in People v. Geier, 41 Cal.4th 555 (2007).

After this Court issued its order on July 13, 2011 directing the parties to file supplemental briefs regarding Bullcoming v. New Mexico, *supra*, and after both sides filed their supplemental briefs, this Court filed its Opinion on August 25, 2011 in People v. Blacksher, ___ Cal.4th ___, 2011 DJDAR 13029 (August 25, 2011) a case involving a death penalty which this Court affirmed unanimously in a decision authored by Justice Corrigan. This Court dealt specifically with the Sixth Amendment confrontation issue and noted that the principal evil at which the Confrontation Clause was directed was the procedure by which *ex parte* examination of witnesses was employed in criminal procedure.

This Court noted in the Blacksher case that what was the subject of the Confrontation Clause were "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." In footnote 27 this Court referred specifically to the Bullcoming decision along with Melendez - Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527 (2009) and noted that "both involved forensic laboratory reports written by analysts employed at a state laboratory required by law to assist in police investigations, and, in both cases, the high Court concluded the analysts' statements were testimonial."

Accordingly, this Court in People v. Blacksher, *supra*, answered and refuted the contentions of the Attorney General in the Attorney General's supplemental brief.

The Attorney General argues at page 6 of the Attorney General's supplemental brief that the instant case involving Defendant Helen Golay is not like the Bullcoming case, where the forensic report was introduced into evidence whereas in this Golay case the toxicology reports were not admitted.

This distinction is meaningless. In this case Mr. Muto essentially placed the reports into evidence by reading the reports on the witness stand. The reading of a report by a witness on the witness stand or the summarizing of such a report is the functional equivalent of submitting the reports into evidence. This, indeed, is a distinction without a difference.

The Attorney General argues that the toxicology reports in the instant case "were not prepared for the sole or even primary purpose of providing prima facie evidence of the charged offense at trial. . . ." See page 6 of Attorney General's supplemental brief .

The Attorney General continues by stating at the bottom of page 6 and the top of page 7 of the supplemental brief :

". . . Here, the primary purpose of the autopsy, which produced the toxicological samples, was unrelated to any criminal proceeding."

This contention is not true. Victim Ken McDavid was found in an alley and was obviously the victim of a some crime. It may be that initially the police thought he was the victim of a hit and run, not a deliberate murder. However, McDavid was still considered to be the victim of an unlawful killing. For purposes of the Confrontation Clause it is irrelevant that McDavid was considered initially to be the victim of a felony hit and run, but

not necessarily the victim of a murder. The autopsy was performed for the purpose of gathering evidence for a criminal prosecution. The autopsy was clearly done “in order to identify the perpetrator.” It did not matter that at the time McDavid’s autopsy was conducted the identity of the perpetrator was not known.

If the Attorney General is correct no autopsy report would ever be subject to the Confrontation Clause .

B. THIS COURT SHOULD NOT AWAIT THE DECISION OF THE U.S. SUPREME COURT IN WILLIAMS v. ILLINOIS WHERE CERTIORARI WAS GRANTED ON JUNE 28, 2010, WILLIAMS v. ILLINOIS, NO. 10-8505

In her motion for calendar preference Golay pointed out that she was born on February 3, 1931 and is 80 years old. She cannot afford to wait longer for the Supreme Court of the United States to act in this area. As Golay pointed out in her Supplemental Brief, the United States Supreme Court granted certiorari on June 29, 2009 in Briscoe v. Virginia, 129 S.Ct. 2858 (2009). After granting certiorari and conducting oral argument, the Supreme Court on January 25, 2010 vacated the judgment of the Supreme Court of Virginia and remanded the case for further proceedings. The Supreme Court of the United States did not reach the merits in Briscoe v. Virginia. This Court had waited for Briscoe v. Virginia before calendaring the Golay case for oral argument.

This Court then delayed this Golay case further by waiting for the Supreme Court of the United States to decide Bullcoming v. State of New Mexico. The Supreme Court granted certiorari in the Bullcoming case on September 28, 2010.

Now, after waiting so long for the Bullcoming case the Attorney General wants this Court to wait until the United States Supreme Court decides Williams v. Illinois. This will

take a while. The Court of Appeal in People v. Canizalez, ___ Cal.App.4th ___ (August 18, 2011) noted in footnote 14 that Williams v. Illinois is now before the Supreme Court. In footnote 14 the Court of Appeal stated that the United States Supreme Court is likely to address the expert witness issue raised by Justice Sotomayor's concurring opinion.

In the instant case, Mr. Muto essentially reported statements made by the non testifying, out of court, unsworn toxicologists who conducted the tests.

This Honorable Court is respectfully requested to set this matter for oral argument as soon as possible. If this Court should get it wrong the Attorney General can petition for writ of certiorari. There is no need to wait. Justice delayed is justice denied.

III

CONCLUSION

For the foregoing reasons and for the reasons expressed in prior briefs Defendant and Appellant Helen Golay respectfully asks this Honorable Court to reverse her conviction.

Respectfully submitted,



ROGER JON DIAMOND
Attorney for Defendant and Appellant

