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SUPREME COURT
FILED

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January 17, 2013

Frank A. McGuire Clerk

Deputy

Honorable Tani Cantil-Sakauye
Chief Justice, California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: *People v. Edwards*
Case No. S073316

Dear Chief Justice,

Pursuant to the Court's order dated December 19, 2012, appellant offers the following reply to respondent's letter brief dated January 7, 2013.

In *People v. Dungo* (2012) 55 Cal.4th 608, the Court held that hearsay statements by an autopsy surgeon regarding the condition of the body were not testimonial under the Confrontation Clause. Appellant believes that this was wrongly decided for the reasons set forth in the dissenting opinion. In this regard, see *United States v. Dgnasiak* (11th Cir. 2012) 667 F.3d 1217, 1232) (admission of autopsy report as a business record violates the Confrontation Clause); *State v. Kennedy* (2012) ___ W.Va. ___, ___ S.E. 2d ___, 2012 WL 5897731 (same). Nevertheless, in *Dungo*, the Court made a distinction between an autopsy surgeon's "anatomical and physiological observations about the condition of the body," and his "conclusions as to the cause of the victim's death." *Id.* at 619. In the present case, Dr. Fukumoto testified not only as to Dr. Richards' hearsay statements as to the condition of the body, but also as to Richards' hearsay expert opinions and conclusions on several subjects.¹ Thus, Fukumoto testified that Richards had made the following conclusion:

- (a) The victim died as a result of asphyxiation due to ligature strangulation. RT 2139:8-14.
- (b) The injury to the left ear drum was "incisional" and "caused by a sharp instrument or an instrument with a point." RT 2127:15-21; see also RT 2152:11-17.
- (c) The laceration to the right ankle "was caused by the wire probably coming together and inflicting the injury." RT 2130:8-13.
- (d) The victim's nose was fractured. RT 2130:25-2131; 1; 2142:6-9; 2160:20-23; 2162:11-15.

¹ Respondent's claim that Fukumoto only testified about his own opinions and conclusions (Respondent Letter at 5, fn. 2 and 6) is belied by the record.

- (e) An area from the mouth to the lower cheek contained a residual of adhesive tape. RT 2160:24-2161:2.

Id. at 619

In the second penalty phase, Dr. Fukumoto reported Dr. Richards' conclusions that:

- (a) The cause of death was asphyxiation due to ligature strangulation. RT 5196:23-5197:1.
- (b) The injury to the ear drum was caused by a sharp instrument. RT 2189:12-25.
- (c) The marks on the ankle were caused by a wire. RT 5191:24-5192:5.
- (d) In the area of the mouth there was a substance consistent with adhesive tape, a residual of adhesive tape. RT 5197:5-16.

While respondent claims that the cause of death was not at issue, the same cannot be said of Dr. Richards' other conclusions. For example, although Dr. Richards opined that the injury to the ear drum was caused by a sharp or pointed instrument, defense expert Dr. Wolfe testified that the injury was characteristic of ligature strangulation and did not indicate use of a sharp instrument. RT 2479-86. Moreover, although Dr. Richards opined that the victim's nose had been fractured, the x-rays of the nose did not confirm a fracture. RT 2142:15-24; RT 2478. Further, although Dr. Richards opined that injuries to the ankle were caused by a wire ligature, the victim's legs were not bound when the body was found, unlike the wrists which were tied with a piece of telephone wire. RT 2011, 2054, 2070. Finally, although Dr. Richards opined that there was tape residue near the mouth, no tape was found to support that opinion.

Dr. Richards' hearsay statements delivering his expert pathologist opinions as to the cause of death, the causes of several injuries, the fact of a fracture, and the nature of the substance near the victim's mouth were testimonial and subject to the Confrontation Clause. First, the expert opinions were sufficiently formal or solemn to be testimonial. In this regard, the Court has already recognized that nontestimonial statements about a pathologist's observations "are less formal than statements setting forth a pathologist's expert conclusions." *Dungo*, 55 Cal.4th at 619. A description of the condition of the body could be produced by any witness, but determinations of the cause of death, what produced certain injuries, whether a fracture had occurred, and the nature of a particular substance require the professional expertise of a pathologist giving formal forensic opinions.

Respondent relies on *People v. Lopez* (2012) 55 Cal.4th 569 to claim that the pathologist's conclusion and opinions were not formal. However, that decision is inapposite. In *Lopez*, the Court held that a notation with initials on it on a page of a laboratory report linking the defendant's name to a blood sample was not made with such formality as to be testimonial under the Confrontation Clause because the declarant

neither “signed, certified, or swore to the truth of the contents.” *Id.*, at 571. In contrast, in the present case Dr. Richards separately signed each page of the autopsy report.²

Furthermore, the primary purpose of the expert conclusions, other than as to cause of death, was clearly the investigation of a crime. In *Dungo*, the Court relied on Government Code section 27491, governing the preparation of an autopsy report, to show that the primary purpose of an autopsy surgeon’s statements about the condition of the body was not limited to criminal investigation and prosecution. *Id.* at 620. However, that section, by its terms, limits the autopsy on the issue of causation to investigation of the “cause of all violent, sudden or unusual deaths.” It does not call for the autopsy surgeon to also provide expert opinions on such additional subjects as the causes of various injuries, whether a fracture exists, or whether a substance is residue from adhesive. The primary purpose of those opinions is to aid in criminal investigation and prosecution, “to establish or prove some past fact for possible use in a criminal trial.” *People v. Cage* (2007) 40 Cal.4th 965, 984.

Moreover, in *Dungo*, the Court noted that the autopsy report served other purposes besides criminal investigation and prosecution, such as helping family members to decide whether to file a wrongful death action, helping insurance companies to determine if the death is covered by one of their policies, satisfying the public’s interest in the cause of death, and providing answers to grieving family members. *Id.* at 621. While those purposes may be served by the pathologist’s statutorily mandated opinion as to cause of death, they have nothing to do with his opinions as to causes of other injuries, whether a fracture exists, or the nature of the substance near the victim’s mouth. The primary purpose of those opinions is to aid in criminal investigation and prosecution.

Thus, because Dr. Richards’ professional opinions were formal and for the primary purpose of criminal investigation and prosecution, they were testimonial hearsay and were admitted in violation of the Sixth Amendment. Moreover, the error in admitting the evidence was highly prejudicial. In closing argument in the guilt phase, the prosecutor relied upon Dr. Richards’ opinions to prove the torture-murder and the torture special circumstance. For example, as to the injuries to the ear, he stated:

Now, the defense puts on a witness to say that they could have been tearing or it could have been a sharp instrument. We can’t know which.

Well, the autopsy surgeon who did the autopsy, who is experienced in violent death autopsies, says it is not. He talks about other injuries to the ear being tearing. He differentiates between the two. But he said the one injury was from a sharp instrument. Okay, again, you are going to have to determine who you believe on that.

² Appellant has filed a request that the Court take judicial notice of the report under Evidence Code section 459.


In closing argument in the second penalty phase, the prosecution cited the fact that (a) a sharp object had been rammed into the ear drum, (b) her mouth had been taped, and (c) her nose had been fractured as reasons for the jury to return a death verdict. RT 6414-15. Thus, Respondent cannot show beyond a reasonable doubt that the constitutional violation did not contribute to both the guilt and special circumstance verdicts and the death sentence. *Chapman v. California* (1967) 386 U.S. 18, 24.

Moreover, Sergeant Janssen's testimony as to what lab personnel had told him is clearly testimonial under *Crawford v. Washington* (2004) 541 U.S. 36 and its progeny. In *Crawford*, while declining to provide a comprehensive definition of "testimonial" hearsay, the Court ruled that, "[w]hatever else the term covers, it applies at a minimum . . . to police interrogations."³ *Id.*, at 68. Thus, admission of a witness's tape-recorded statement to the police, without an opportunity to cross-examine that witness, "alone is sufficient to make out a violation of the Sixth Amendment. *Id.*

This Court has also ruled that "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." *People v. Cage, supra*, 40 Cal.4th at 984; see also *People v. Nelson*, 190 Cal.App.4th 1453, 1464 ("*Davis* [*v. Washington* (2006) 547 U.S. 813] acknowledged that 'formality is indeed essential to testimonial utterance,' but stated the requisite formality and solemnity exists when a witness describes past events to an officer because deliberate falsehoods to officers constitute a criminal offense"). In *Davis*, the Supreme Court held that a witness's statements to a police officer in an interview at a possible crime scene were testimonial. 547 U.S. at 829-830.

Finally, the violation was highly prejudicial. It improperly led the jury to believe that the other suspects in the case had been definitely eliminated by forensic evidence and thus conclusively resolved any reasonable doubt which a juror might have had in that regard. Thus, Respondent cannot meet its burden of showing beyond a reasonable doubt that the constitutional violation did not contribute to the verdict. *Chapman v. California, supra*, 386 U.S. at 26.

Respectfully submitted



Quin Denvir
Attorney For Appellant

QD/dln

³ The Court made clear that "[w]e use the term 'interrogation' in its colloquial, rather than any technical legal, sense." 541 U.S. at 53, fn.4.

PROOF OF SERVICE

I am a citizen of the United States and a resident of Sacramento County. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is Rothschild Wishek & Sands LLP, 901 F Street, Sacramento, California 95814. On the below named date, I served the within

**Letter to Honorable Tani Cantil-Sakauye
Chief Justice, California Supreme Court dated January 17, 2013**

***People v. Edwards*
Case No. S073316**

on the parties in said action as follows:

XXX (By REGULAR MAIL) by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento, California, addressed as follows:

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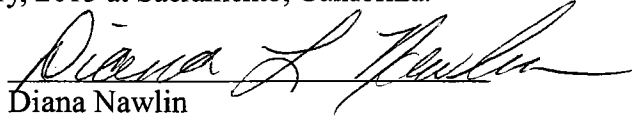
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I, Diana Nawlin, declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of January, 2013 at Sacramento, California.


Diana Nawlin