No. S067394

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN LEO CAPISTRANO,

Defendant and Appellant.

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE ANDREW C. KAUFFMAN, JUDGE

MICHAEL J. HERSEK
State Public Defender

KATHLEEN M. SCHEIDEL
Assistant State Public Defender
California State Bar No. 141290

221 Main Street, Suite 1000
San Francisco, California 94105
Telephone: (415) 904-5600

Attorneys for Appellant

No. S081479

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

RONALD WAYNE MOORE
Defendant and Appellant.

Monterey County
Superior Court No.
SS 980646

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of
the State of California for the County of Monterey

HONORABLE WENDY C. DUFFY

MICHAEL J. HERSEK
State Public Defender

ARNOLD A. ERICKSON
Deputy State Public Defender
State Bar No. 148358

221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

FEDERAL RULE

STATE STATUTES

STATE RULE

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S067394
v.	)	(Los Angeles County Superior
JOHN LEO CAPISTRANO,	)	Ct. No. KA034540)
Defendant and Appellant	)	

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

This supplemental brief presents an additional argument in appellant's automatic appeal. In order to avoid confusion, this argument is numbered sequentially to the arguments in the opening brief. Consequently, the additional argument is numbered XXIV.

XXIV

THE TRIAL COURT DENIED APPELLANT HIS RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM WHEN IT PERMITTED EXPERTS WHO HAD NO INVOLVEMENT IN SCIENTIFIC EXAMINATION AND TESTING TO TESTIFY REGARDING THE RESULTS

A. Introduction

To begin, appellant acknowledges that, with regard to the DNA evidence, this claim has been rejected by this Court in *People v. Geier* (2007) 41 Cal.4th 555, 593-607 (*Geier*). For the reasons given below, appellant respectfully asks this Court to reconsider its decision in *Geier*. Appellant also makes this argument to preserve his right to pursue his claims in federal court.

B. Relevant Facts

1. DNA Testing

The most damning piece of evidence introduced against appellant regarding Counts Four through Ten (the crimes against Julia Solis and Edward Gonzalez) of the information was the testimony of prosecution witness Anjali Swienton, a staff analyst employed by Cellmark Diagnostics, relating to the DNA testing done at the request of the Los Angeles County Sheriff's Department. (6RT:2729.) Swienton testified concerning the results of tests run on various samples, including oral and vaginal swabs taken from Julia Solis at Wittier Presbyterian Hospital (6RT:2703, 2705) and blood samples from Solis, appellant, Michael Drebert, Eric Pritchard and Jason Vera. (6RT:2703-2705, 2729-2730.) Based on the test results from DQ Alpha testing and STR tests, among the four men from whom blood samples were taken, only appellant could not be eliminated as a donor of the sperm found in the oral and vaginal swabs. (6RT:2720-2785.)

Swienton, however, was not the person who conducted these tests and she had no personal knowledge regarding the manner of testing or the accuracy of the information contained in the test results. (6RT:2732.) The person who actually conducted the tests, another Cellmark analyst named Lisa Grossweiler, and who generated the notes upon which Swienton based her testimony, was never called as a witness by the prosecution. (6RT:2732-2733.) Instead, Swienton, who did not perform the laboratory work in question, was the sole prosecution witness regarding the manner in which the tests were conducted, their validity, and the meaning of the genetic profiles. Swienton testified that she could verify the results by examining the notes prepared by Grossweiler, despite the fact that Swienton had no personal knowledge regarding the accuracy of what those notes purported to represent. (6RT:2732-2733.) Appellant objected to Swienton's testimony based on Grossweiler's report on hearsay grounds, which the trial court summarily overruled. (6RT:2732.)

2. The Autopsy

Eugene Carpenter, M.D., a Deputy Medical Examiner employed by the Los Angeles County Coroner's Office, testified regarding the results of the autopsy of Koen Witters. However, that autopsy was performed by pathology fellow, Shayla Frisby, M.D., who no longer lived in Los Angeles at the time of trial. (7RT:2826-2829; People's Exhibit No. 36.) Since Dr. Frisby was a pathology fellow and not a certified pathologist, her report had been reviewed and approved by the Chief of the Medical Division of the Coroner's Office, Christopher Rogers, M.D. (7RT:2826, 2829.) The record does not reflect Dr. Rogers' unavailability at the time of trial. Dr. Carpenter opined that the cause of Witters's death was asphyxia due to ligature strangulation resulting from forceful constriction of the throat and

neck. (7RT:2825, 2830-2839.) Two large cuts on Witters's lower forearms transected one edge of the arm to the other, exposing the tendons. The lacerations did not cut through the tendons or major blood vessels. The wounds were bloody, consistent with circulation in the body at the time the cuts were made. (7RT:2831-2832.) In addition to Dr. Carpenter's testimony, photographs of Witters, made at or near the time of the autopsy, and not made under the supervision of Dr. Carpenter, were admitted into evidence. (People's Exhibits Nos. 34 and 35.)[1]

The introduction of this testimony through Swienton's and Dr. Carpenter's hearsay testimony violated appellant's Sixth Amendment right to confront and cross-examine the witnesses against him and calls for

---

[1] No objection to Dr. Carpenter's testimony was made at trial. Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later "changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.) The rule announced in *Crawford* is such a rule, and the courts of appeal have applied it retroactively to cases pending on appeal. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208, *People v. Song* (2004) 124 Cal.App.4th 973, 982; *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400; also see *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 [no waiver of confrontation challenge to hearsay evidence of a proof of service to establish service of a summons or notice, because "[a]ny objection would have been unavailing under pre-*Crawford* law"]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2 ["failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].) Before *Crawford*, the autopsy report would have been admissible since under *Ohio v. Roberts* (1980) 448 U.S. 56, 66, the confrontation clause did not bar the routine practice of admission of this type of hearsay evidence. (But see *Diaz v. United States* (1912) 223 U.S. 442, 450 [Sixth Amendment required the prosecution, absent a stipulation from a defendant, to present the findings of its forensic examiners regarding autopsy reports].)

reversal of his convictions on Counts One through Ten. It also violated appellant's rights under state law and calls for reversal for that reason as well. Finally, placing this inadmissible evidence before the jury denied appellant his Eighth and Fourteenth Amendment rights to a reliable sentencing determination.

C. Testimony Of Experts Who Took No Part In Scientific Examination And Testing Of Evidence Was Admitted In Violation Of The Sixth Amendment

1. Anjali Swienton's Testimony Regarding DNA Evidence Was Admitted In Violation Of The Sixth Amendment

In *Crawford v. Washington* (2004) 541 U.S. 36 (hereafter *Crawford*), the United States Supreme Court recognized that the admission of testimonial hearsay violates a defendant's Sixth Amendment confrontation rights unless there was a prior opportunity to cross-examine the declarant and the declarant is shown to be unavailable at the time of trial. The fact that an out-of-court statement might fall within a firmly rooted exception to the hearsay rule or bear particularized guarantees of trustworthiness does not satisfy the Confrontation Clause. (*Id.* at p. 68.) The declarant in this case was Lisa Grossweiler, and the admission of her out-of-court statements–in the form of her report containing test results–via the testimony of Anjali Swienton, violated appellant's Sixth Amendment right of confrontation.

The admission of Swienton's testimony also ran afoul of state law. Permitting Swienton to testify regarding Grossweiler's test results violated the state business records act, which must be interpreted in a manner that comports with the federal right of confrontation, and also violates the state

proscription barring one expert from testifying as to the opinion of another expert.

a. Grossweiler's Test Results And Report Constitute Testimonial Evidence; *Geier* Was Wrongly Decided

Appellant had no prior opportunity to cross-examine Grossweiler and she was not shown to be unavailable at the time of the trial.[2] Thus, under *Crawford*, if the results of her testing and her report are considered "testimonial," appellant has been denied his Sixth Amendment right of confrontation. They are and he has.

The *Crawford* Court declined to provide a comprehensive definition of testimonial statements, but it recounted three potential formulations of the term:

> [Testimonial statements could be defined as] 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," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois* (1992) 502 U.S. 346, 365, 112 S.Ct. 736 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); [or] "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," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3.

(*Crawford, supra,* 541 U.S. at pp. 51-52.) The Court did not specifically adopt or reject any of these formulations.

---

[2] DNA testing was not conducted until after the preliminary hearing on counts Four through Ten. (1CT: 106-109; 6RT: 2703-2705.)

A clear focus of the *Crawford* Court in determining whether a statement is testimonial was whether the impetus for its production was supplied by officers of the government. The involvement of government officers in producing a statement can be a key factor in determining whether that statement is testimonial. (*Crawford, supra,* 541 U.S. at p. 53.) That is significant here because the sole impetus for the production of the reports regarding DNA testing was the request by the Los Angeles County Sheriff's Department.

Grossweiler's testing results and report were conducted and prepared at the behest of the government, to wit: the Los Angeles County Sheriff's Department. Under the third formulation posited in *Crawford*, this evidence was prepared with the understanding that it would be used at a later trial. Consequently, it is testimonial evidence. Since Grossweiler was not previously examined by appellant and was not shown to be unavailable for trial, appellant was denied his Sixth Amendment right of confrontation when Swienton presented this evidence to the jury.

However, in *Geier, supra*, 41 Cal.4th at pp. 603-607, this Court interpreted various authorities decided subsequent to *Crawford*, including consolidated United States Supreme Court cases *Davis v. California* and *Hammon v. Indiana* (2006) ___ U.S. ___, 126 S.Ct. 2266 (*Davis*) and held that scientific evidence memorialized in routine forensic reports are not testimonial under *Crawford* when the reports represent the contemporaneous recordation of observable events which was generated as part of a standardized scientific protocol. As explained below, however, that this Court's decision in *Geier* incorrectly renders *Crawford* nugatory when it comes to scientific testing.

After stating that it did not find any single analysis of the applicability of *Crawford* and *Davis* to the admission of DNA test results persuasive, this Court set forth a three-part test for determining whether this type of evidence is testimonial. It held that this type of evidence "is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." Failing to meet all three criteria renders such evidence nontestimonial. (*Geier, supra*, 41 Cal.4th at p. 605.) This Court went on to find that the first and third criteria were met, but the second was not; thus the DNA report was nontestimonial and not subject to the dictates of *Crawford*. (*Id.* at p. 606.)

Appellant respectfully submits that this Court reached this conclusion by misconstruing the United States Supreme Court's holding in *Davis*. This Court held that because the lab analyst recorded her observations regarding the analysis of the DNA samples while she was performing the tasks necessary to making the analysis, her actions constituted the contemporaneous recordation of observable events and was akin to the statements found nontestimonial in *Davis*. (*Geier, supra*, 41 Cal.4th at pp. 606-607.) *Davis* does not support this holding.

In *Davis*, the high Court found statements to be nontestimonial when they are 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. On the other hand, they are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (*Davis, supra*, 126 S.Ct. at pp.2273-2274.) Using this

standard, the high Court found nontestimonial a domestic disturbance victim's recorded statements during her call to a 911 emergency operator because she was speaking about events as they were actually happening, rather than describing past events; she was facing an ongoing emergency; and her call was plainly a call for help against a bona fide physical threat. Consequently, the circumstances of the victim's interrogation objectively indicated the primary purpose was to enable police assistance to meet an ongoing emergency, rather than to establish or prove past events potentially relevant to a later criminal prosecution. (*Id.* at pp. 2276-2277.)

Extracting from *Davis* that it supports the proposition that any contemporaneous recordation of an event, even when done for the purpose of future criminal prosecution, is a nontestimonial statement indicates the extent to which this Court misapplied the Confrontation Clause. This Court's opinion totally removes the "primary purpose" component of the equation that the high Court used in both *Crawford* and *Davis*. Pursuant to this Court's reading of *Davis*, a police officer's report prepared at the crime scene would qualify as a nontestimonial statement as long as it was made contemporaneously with the officer's examination of the crime scene. Likewise, an officer's contemporaneous recordation of any statements made at the crime scene would qualify as nontestimonial. *Crawford* and *Davis* simply do not support this view.

In *Davis*, the primary purpose served by obtaining the witness's statement was to address an ongoing emergency. There is no ongoing emergency when a laboratory analyst is conducting tests to be used in a future prosecution. The primary purpose in that instance is to create evidence, which is a quintessentially testimonial function. The tests are being conducted to establish or prove a past event that is potentially

relevant in a criminal prosecution; in this case the identity of the person who deposited sperm in the victim's vaginal vault. (See *Davis, supra*, 126 S.Ct. at pp. 2273-2274.) To say that this observation is removed from being the recordation of a past fact because the lab analyst makes a contemporary notation of her observations renders the holding in *Davis* virtually nonexistent.

An additional basis for finding the report nontestimonial centered on the nature of the report itself. This Court found that the report was generated as part of a standardized scientific protocol that the laboratory analyst conducted pursuant to her employment; that though the laboratory was hired for the purpose of obtaining evidence to be used in a criminal prosecution, the analyst made her notes and report as part of her job rather than to incriminate the appellant; that the report merely recounts procedures and can be either inculpatory or exculpatory; and that the accusatory opinions in the case were provided by the expert who testified. *(Geier, supra*, 41 Cal.4th at pp. 621-622.) This Court then went on to hold that because *Davis* states that the critical inquiry concerns the circumstances under which the statement was made, rather than whether it might be reasonably anticipated that a statement will be used at trial, a finding that the DNA report was nontestimonial falls within *Davis's* Confrontation Clause analysis. (*Id.* at p. 607.) This holding also misconstrues the import of both *Crawford* and *Davis*, and effectively renders them inapplicable to a large body of evidence that should otherwise be covered by the Confrontation Clause.

The holding this Court in *Geier* seems to be a mixture of theories: both a business record act finding and some form of finding that the laboratory analyst's report is not actually bearing witness against the

defendant at trial, but is merely some type of neutral recordation of facts. This holding does not logically fit within the boundaries set by *Crawford* and *Davis* for Confrontation Clause analysis.

The high Court observed in *Crawford* that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly aware." (*Crawford, supra*, 541 U.S. at p. 56, fn. 7.) A forensic report like the one at issue here falls within this class of evidence. It is a report prepared at the behest of law enforcement for use at a later trial and is offered in lieu of live testimony. (*City of Las Vegas v. Walsh* (Nev. 2005) 124 P.3d 203, 208.) This Court's own decision recognizes this. (*Geier, supra*, 41 Cal.4th at p. 605.) Yet, it exempts a forensic report from the class of testimonial evidence merely because the analyst is making a contemporary recordation of her observations. There is no logical support for this reasoning.

Nor is there support for finding some form of business record exception, which this Court adverted to by addressing the fact that the analyst prepared the report during the conduct of her business activities. The common law exception for regularly kept business records does not encompass records generated for prosecutorial use. (See *Palmer v. Hoffman* (1943) 318 U.S. 109, 113-114 [records calculated for use in litigation fall outside common law rule admitting business records].)

Nor do interpretations of the Federal Rules of Evidence permit this type of exception to *Crawford's* dictates. Under Rule 803(6), federal courts typically find documents prepared for the purpose of litigation, such as the DNA tests and report in this case, to be inadmissible as exceptions to the hearsay rule. (See *Scheerer v. Hardee's Food Systems, Inc.* (8th Cir. 1998)

92 F.3d 702, 706-707 [incident report prepared in anticipation of litigation found inadmissible]; *United States v. Blackburn* (7th Cir. 1993) 992 F.2d 666, 670 [lensometer report prepared at FBI's behest, with knowledge that information produced would be used in ongoing criminal investigation, made in anticipation of litigation and therefore inadmissible]; *Echo Acceptance Corp. v. Household Retail Services* (10th Cir. 2001) 267 F.3d 1068, 1091 [not all business correspondence constitutes business record]; *Certain Underwriters at Lloyd's London v. Sinkovich* (4th Cir. 2000) 232 F.3d 200, 204, fn.2 [documents prepared in view of litigation not admissible as business records].)

This approach mirrors the requirement that records of law enforcement investigations can neither come in under the public records exception (see Fed. Rules Evid., rule 803(8) (28 U.S.C.)), nor come in through the "back door" as business records. (See *United States v. Bohrer* (10th Cir. 1986) 807 F.2d 159, 162-63 [IRS contact card not admissible as business record of IRS in prosecution for willful failure to file income tax returns because card maintained for purpose of prosecuting defendant]; *United States v. Brown* (11th Cir. 1993) 9 F.3d 907, 911 [business records exception cannot be used as "back door" to introduce investigatory reports].)

The *Crawford* Court's choice of words in discussing testimonial evidence protected under the Confrontation Clause (viz., evidence produced with the involvement of government officers, having an eye toward trial), echoes the language of these federal cases defining and restricting the business and public records exceptions to the hearsay rule. Thus, the high Court's dicta regarding business records cannot be read as creating a blanket rule permitting the admission of scientific tests and reports. Both the

wording and rationale of *Crawford* indicate that evidence obtained by a prosecutorial branch of government for use in a criminal trial must be tested by the crucible of cross-examination. (See *United States v. Cromer* (6th Cir. 2005) 389 F.3d 662, 673-674 [*Crawford* applicable to any statement made in circumstances in which reasonable person would realize it likely would be used in investigation or prosecution of crime].)

This Court's adoption of a quasi-business record exception is also contrary to the high Court's pre-*Roberts* analysis of the Confrontation Clause. Prior to *Roberts*, the high Court's opinions implicitly recognized that scientific reports could not be introduced in lieu of live testimony from the forensic examiner. In addressing the government's use of scientific tests against a defendant, the high Court stated in a pre-*Roberts* case that the accused must be afforded the opportunity for meaningful confrontation of the government's case at trial. (*United States v. Wade* (1968) 388 U.S. 218, 227-228.) Similarly, in refusing to recognize a due process right to the preservation of breath samples, the high Court observed that there was no violation because the defendant had the right at trial to cross-examine the officer who administered the intoxilyzer test. (*California v. Trombetta* (1984) 467 U.S. 479, 490.)

Apart from this Court's inappropriate use of a quasi-business record act exception, the attempt to distinguish *Crawford* based on the seemingly "objective" recordation of facts reflected by the tests is also inapt. The idea that there is no Confrontation Clause violation because the analyst is merely recording neutral or objective findings runs counter to the core principle of *Crawford*. The initial problem is that it leaves to a trial judge the determination of what type of finding is a finding of fact or matter of opinion or interpretation, or what type of finding is analytical or

non-analytical. Apart from the result that the application of an essential constitutional principle will now vary from judge to judge depending on these types of findings, the principle itself is not without controversy: reasonable judgments may differ as to whether otherwise descriptive and non-analytical findings are not actually subject to differences in judgment and interpretation.

Perhaps of even greater concern regarding this view is that it is really no more than a return to the *Roberts* reliability test. This Court is really saying that these types of findings are noncontroversial, thus nothing is to be gained by cross-examination and there is no need to afford a defendant that right. Yet, *Crawford* removed that reasoning from the equation when it found fault with *Roberts* by pointing out that it permitted "a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." (*Crawford, supra*, 126 S.Ct. at p. 61.) As the high Court also observed:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

(*Id.* at p. 61.)

The test created by this Court for determining whether statements are testimonial ignores *Crawford*, misinterprets *Davis*, and refuses to apply long-established principles determined by this Court prior to *Roberts*. For the foregoing reasons, appellant respectfully request this Court to reconsider its holding in *Geier*.

b. DNA Evidence Of This Type Is Testimonial And Subject To Confrontation Clause Requirements

In addition to the general principle that evidence which has been gathered with the goal of charging a criminal act, or using the evidence at trial, cannot be admitted under the rubric of the business records act, certain types of scientific testing, and DNA testing in particular, have been found to be subject to the *Crawford* guidelines. Thus, such evidence is admissible only if the person who performed the tests testifies at trial, or is unavailable and was previously cross-examined by the defendant.

State v. Crager (Ohio Ct.App. 2005) 844 N.E.2d 390 is a direct parallel to this case. There, a DNA report was admitted without the testimony of the analyst who actually conducted the DNA testing. The court held that even though the report might otherwise constitute a business record under state evidence law, it was testimonial evidence because it was prepared as part of a police investigation and a reasonable person would have concluded that it later would be available for use at a trial. Even though an analyst who reviewed the report testified, stating he had reviewed the tester's work, that testimony lacked personal knowledge, and since there was no showing the analyst who conducted the testing was unavailable or had been cross-examined by appellant, the court found constitutional error and reversed the judgment. (*Id.* at pp. 394-398.)

Similarly, in *People v. Rogers* (N.Y.A.D. 2004) 8 A.D.3d 888, a case involving the rape and sodomy of a victim after incapacitating her by slipping a drug into her drink, the appellate court found a violation of the Confrontation Clause by the introduction, as a business record, of a report giving the results of testing on the victim's blood. Although the report was prepared by a private lab, it was requested by and prepared for law

enforcement for the purpose of prosecution. "Because the test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial." (*Id.* at p. 891.) Because of the fact that the defendant could not cross-examine the tester regarding the testing procedures, the defendant was denied his Confrontation Clause rights and the judgment was reversed. (*Id.* at p. 892.)

The reasoning as to why such results are called for in cases involving this type of evidence is set forth in *People v. Lonsby* (Mich.App. 2005) 707 N.W.2d 610. In *Lonsby*, appellant claimed his confrontation rights were violated by the admission of notes and a laboratory report prepared by a nontestifying serologist to establish that a stain on appellant's swim trunks was semen. The court noted that the report was prepared "with the ultimate goal of uncovering evidence for use in a criminal prosecution," and a person in the position of the technician who prepared the notes and report would "reasonably expect [they] would be used in a prosecutorial manner and at trial." (*Id.* at p. 619.) The court reasoned:

> [T]the evidence at issue was based on [the tester's] subjective observation and analytic standards that established a fact critical to proving the alleged offense. Because the evidence was introduced through the testimony of [another], who had no first-hand knowledge about [the tester's] observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of [the tester] and the accuracy of her observations and methodology.

(*Id.* at p. 620.) The Supreme Court of Nevada has endorsed the same philosophy expressed in *Crager*, *Rogers*, and *Lonsby*. (See *City of Las Vegas v. Walsh, supra,* 124 P.3d at p. 208 [nurse's blood-draw affidavit found testimonial, even though it documented standard procedures pursuant

to state statute, because made for use at later trial and its admission, in lieu of live testimony, violated Confrontation Clause].)

In applying *Crawford*, some courts have drawn a distinction between "routine" documentary evidence and laboratory reports containing conclusions and opinion. The Court of Appeals of North Carolina cogently set forth the difference in *State v. Cao* (N.C.App. 2006) 626 S.E.2d 301. Considering a drug content report in light of *Crawford*, the court explained that some laboratory reports are testimonial while others are not:

> [W]e hold that laboratory reports or notes of a technician prepared for use in a criminal prosecution are nontestimonial business records only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst (footnote omitted). While cross-examination may not be necessary for blood alcohol concentrations, the same cannot be said for fiber or DNA analysis or ballistics comparisons, for example.

(*Id.* at p. 305.)

To a certain extent, the *Cao* court is actually on the liberal end of the spectrum when it comes to admitting test results under a business record provision. Many courts have been careful to draw a distinction between breath machine certification documents (which typically are found nontestimonial) and breath machine test results (which typically are found testimonial). For example, in *Belvin v. State* (Fla.App. 2006) 922 So.2d 1046, the Fourth District Court of Appeal in Florida held that portions of a breath test affidavit relating to the breath test technician's procedures and observations in administering the breath test constituted testimonial evidence subject to the Confrontation Clause protections stated in *Crawford*. The things that breath test operators do that make their actions testimonial are to follow certain procedures and protocols to ensure the

reliability of the results and analyze samples. (*Id.* at pp. 1050-1051.) It is hard to believe that a breath test technician's procedures could be considered subject to *Crawford*, but a biologist's procedures in arriving at a DNA profile would not be.

Stated more broadly, courts generally agree that documents are nontestimonial when they pertain only to the foundational requirements for admitting lab test results, e.g., certifications that breath analysis equipment was calibrated when serviced by testing with a reference solution. (See *Green v. DeMarco* (N.Y.Sup. 2005) 812 N.Y.S. 2d 772, 782-783 [documents admissible under business records exception because they were not made primarily for litigation purposes and confrontation rights were preserved because defendant could cross-examine operator of the instrument as to whether test was properly administered]; *Rackoff v. State* (Ga.App. 2005) 621 S.E.2d 841, 845 [documentary evidence admissible as business record to establish foundation for admission of breath test results]; *State v. Carter* (Mont. 2005) 114 P.3d 1001, 1007 [certification reports of breath testing instrument admitted without testimony of declarants not testimonial because they did not serve as substantive evidence].) This view strikes a reasonable balance between Confrontation Clause needs and practical concerns because it differentiates between a witness who essentially is performing routine mechanical tasks where the instrument being maintained, e.g., a breathalyzer, will eventually be used in garnering evidence, and the witness who is performing tasks specifically directed toward gathering evidence. Grossweiler falls within the latter category.

There is one California case that seems to blur these distinctions, but it was not decided on Confrontation Clause grounds. *People v. Johnson* (2004) 121 Cal.App.4th 1409 concerned the admission at a probation

revocation hearing of a report from the county crime lab which determined that a substance was cocaine. (*Id.* at p. 1410.) This report was admitted based upon the testimony of a police officer, who identified the report by the appellant's name and case number, and stated that it came from the crime laboratory routinely used by the police department to test narcotics. (*Id.* at p. 1411.)

The appellate court resolved appellant's challenge under the Confrontation Clause by holding that he had only a limited right to confront witnesses at a revocation hearing, and that this limited right was grounded in the Due Process Clause of the Fourteenth Amendment rather than the Confrontation Clause of the Sixth Amendment. (*People v. Johnson*, *supra*, 121 Cal.App.4th at 1411.) Thus, *Crawford's* interpretation of Sixth Amendment principles was unavailing under these circumstances. (*Ibid.*) In other words, the court resolved appellant's Confrontation Clause challenge by holding that the Confrontation Clause did not apply in his case. The court did, however, state in dicta that even if *Crawford* were considered as persuasive authority, a laboratory report such as the one at issue did not "function as the equivalent of in-court testimony." (*Id.* at p. 1412.) Rather, it was "routine documentary evidence" and if its preparer had appeared to testify at the hearing "he or she would merely have authenticated the document." (*Id.* at pp. 1412-1413.) The court believed this type of test report fell into the same category as a laboratory invoice or receipt, where the author or custodian of the document has no actual memory of information relating to the document, but is instead only authenticating that an action was recorded on a specific date. (*Id.* at p. 1413.)

Although appellant does not agree with the *Johnson* court's dicta in this regard, it is of little moment in the context of the facts of appellant's case. There is no comparison between the type of routine chemical analysis performed in *Johnson* and the DNA profiling report prepared by Grossweiler in this case.

Here, all of the steps in the DNA testing were performed by Grossweiler alone. It was Grossweiler who performed the testing on all of the items and developed the DNA profile from the oral and vaginal swabs and all of the sample profiles obtained in the course of the investigation. (6RT:2732.) Yet it was Swienton who testified at trial. Nothing suggests Swienton personally supervised Grossweiler even came into contact with the case until she testified at trial. Swienton did not watch Grossweiler go through all the steps of the DNA testing; indeed, there is nothing in the record to suggest she observed any of the steps. Rather, she relied on the data forms and notes Grossweiler prepared and placed in the case file. (6RT:2732-2733.)

DNA evidence is not "routine documentary evidence." To the contrary, it is highly sophisticated opinion evidence and embraces conclusions based on the application of cutting-edge scientific principles. DNA evidence is highly inculpatory and is often, as here, the linchpin of the prosecutor's case for guilt on Counts Four through Ten. Moreover, the purpose of Swienton's testimony would not have been merely to authenticate her documentation; rather, it would have been to permit the jury to assess the degree of professionalism with which Grossweiler created the DNA profiles.

A person in Grossweiler's position reasonably would have expected that her testing documentation subsequently would be used at trial.

Cellmark's Forensic Department received cases from all over the country in criminal and civil matters and routinely tested evidence from crimes that have occurred and routinely "attempt[ed] to match up that biological evidence with either victims or suspects in those cases. (6RT:2706-2707.) The testing was conducted at the behest of law enforcement. (6RT:2729.) Grossweiler was the person in charge of the rigid controls and precautions that are necessary for the delicate testing being done here. (See 6RT:2727-2729.) Yet, she never testified. This is hardly a routine crime lab examination to determine whether a rock-like object is cocaine. The *Johnson* court's dicta cannot be imported into this case.

c. The Admission of Swienton's Opinion Testimony Violated Both The Federal Constitution And State Law

The admission of Swienton's expert opinion testimony also violated appellant's Confrontation Clause rights. These rights were violated by the improper use of hearsay evidence to support Swienton's opinions.

This Court established in *People v. Gardeley* (1996) 14 Cal.4th 605 that experts may give opinions based upon hearsay and, if questioned, may relate the information and sources upon which they relied. (*Id.* at pp. 618-619.) The *Gardeley* Court, however, emphasized two essential caveats to that rule: first, the hearsay must be reliable; second, the trial court must exercise discretion "to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay." (*Ibid.*) "This is because a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact." (*Ibid.* [quotations and citations omitted].)

Thus, while an expert may explain the reasons for her opinions, including the matters she considered in forming them, "prejudice may arise

if, under the guise of reasons, the expert's detailed explanation [brings] before the jury incompetent hearsay evidence." (*People v. Catlin* (2001) 26 Cal.4th 81, 137 [quoting *People v. Montiel* (1993) 5 Cal.4th 877, 918, additional quotations omitted].) That is exactly what happened here, when the essence of Swienton's testimony was the placement before the jury of Grossweiler's hearsay test results.

This is also the factor that distinguishes this case from *People v. Thomas* (2005) 130 Cal.App.4th 1202. In *Thomas*, the appellant claimed his Confrontation Clause rights were violated by the admission of expert testimony resting on hearsay, viz., statements from appellant's cohorts that appellant was a gang member. The court determined the expert testimony was admissible under *Crawford* because the materials on which the expert based his opinion were not elicited for the truth of their contents; they were elicited to assess the weight of the expert's opinion. (*Id.* at p. 1210.) Consequently, the statements were admitted for purposes "other than establishing the truth of the matter asserted," and the Confrontation Clause did not apply even if the statements were testimonial. (*Ibid.*)

Here, the hearsay evidence – Grossweiler's DNA profiles and testing results – clearly were admitted for their truth, not merely to show the basis of Swienton's opinion. Swienton recited the evidence in great detail, both in her testimony and her report, and used the notes and data prepared by Grossweiler while giving her opinion to the jury. In this scenario, the evidence was submitted for a hearsay rather than a non-hearsay purpose, and *Crawford* applies. Further, in *Thomas* the hearsay statements were but a small part of the basis for the expert's opinion, but in this case Grossweiler's test results and notes were the sine qua non of Swienton's expert testimony. The rule relied upon by the court in *Thomas* does not

withstand scrutiny here, where Swienton served merely as the conduit for Grossweiler's unsworn statements.[3]

---

[3] A New York case mentioned in *Thomas* illustrates the distinction very well. The court in *Thomas* cited, as an example that *Crawford* was inapplicable to hearsay statements as the basis for an expert's opinion, the decision in *People v. Goldstein* (N.Y.S. 2004) 786 N.Y.S.2d 428. That decision was reversed on appeal, when the state high court came to realize that the hearsay had been offered for its truth rather than merely to help the jury evaluate the expert opinion. (See *People v. Goldstein* (N.Y. 2005) 6 N.Y.3d 119, 843 N.E.2d 727.) In *Goldstein*, the prosecution's psychiatric expert witness testified about statements from third-party interviewees that provided the basis for his opinion on how the defendant's schizophrenia affected his behavior. On appeal, the defendant claimed the introduction of the third-party statements violated his Confrontation Clause rights under *Crawford*. The prosecution argued *Crawford* was inapplicable because the interviewees' statements were not offered for a hearsay purpose. (*Id.* at p. 127.) The court disagreed:

> We find the distinction the People make unconvincing. We do not see how the jury could use the statements of the interviewees to evaluate [the expert] opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress [the expert's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true. . . The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context. (See Kaye et al., The New Wigmore: Expert Evidence section 3.7, at 19 [Supp. 2005] ["(T)he factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition."].) We conclude that the statements of the interviewees at issue here were offered for their truth, and are hearsay.

(*Id.* at pp. 127-128.) The court further found the interviewee statements

The manner in which the hearsay statements were used, as discussed above, also violates the principle that one expert cannot testify based on the opinion of another expert. Swienton's testimony was not really that of an expert providing an opinion based upon information supplied to her by another person, but was actually the testimony of one expert acting as a conduit for the opinions of another expert. California law makes clear that it is improper for one expert to testify to an out-of-court opinion of another expert, because to permit this approach denies the other party the chance to cross-examine the expert who actually did the work to formulate the essential opinion. (*People v. Campos* (1995) 32 Cal.App.4th 304, 308; *Hope v. Arrowhead & Puritas Waters, Inc.* (1959) 174 Cal.App.2d 222, 230.) This took place when Swienton testified from Grossweiler's report, and constitutes a separate basis for reversal.

2. Dr. Carpenter's Testimony Regarding The Autopsy Report Of Koen Witters Was Introduced In Violation Of The Sixth Amendment

a. The Autopsy Report Is Testimonial Evidence

To date, this court has not ruled on whether the admission of testimony from a pathologist who took no part in the autopsy of a decedent is admissible under *Crawford* and its progeny in a criminal prosecution. For the reasons stated above, appellant argues that to the extent *Geier's* principles would lead to the conclusion that such evidence was not testimonial, it was wrongly decided. For the reasons set forth above and in

---

were testimonial under *Crawford* and their admission violated the defendants' confrontation rights. (*Id.* at p. 129.)

the argument that follows, the evidence was testimonial and its admission prejudicially denied appellant his state and federal rights.

It is not subject to dispute that the Drs. Frisby and Rogers prepared the autopsy report, that neither had been cross-examined about the report,[4] and there was not showing made as to the unavailability of either doctor except for the assertion, meaningless in the context of any discussion of "unavailability" under *Crawford*, that Dr. Frisby no longer lived in the city of Los Angeles. Thus, as discussed above, if the testimony is properly categorized as testimonial, it was inadmissible under *Crawford*.

Autopsy reports such as that relied upon by Dr. Carpenter are testimonial hearsay within the meaning of *Crawford*. First of all, such reports are classic hearsay. "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200, subd. (a).) In appellant's case, the report was a record offered for the truth of the matters in the record.

The report relied on by Dr. Carpenter was testimonial hearsay because it was made by a law enforcement official (Dr. Frisby) who prepared it with the express purpose of the report being offered at a criminal prosecution. By statute a coroner is a "peace officer" (Pen. Code, § 830.30; Govt. Code, § 27419) and the statement was obviously made by the pathologist to help prepare a case against the person who was eventually apprehended in the killing of Koen Witters. As a statement made by a law enforcement official in preparation for litigation, the statement implicates the core concern of *Crawford*, *i.e.*, the preparation of evidence against a

---

[4] Counsel stipulated to the content of Dr. Frisby's report for the purposes of the preliminary hearing only. (2CT:529-530.)

defendant by the government without the opportunity for the defendant to cross examine the witness who prepared that evidence. The *Crawford* opinion is consistent with a holding that the coroner's report is testimonial. One of the cases cited by *Crawford* in support of the holding that testimonial hearsay is not admissible is the nineteenth century case *State v. Campbell* (1844) 1 S.C. 124. In *Campbell*, the state court held that a statement obtained by a coroner was inadmissible because the witness had died and had not been cross examined.

The issue of the testimonial character of scientific reports has been hotly debated across the country and has split state courts. (See, e.g., *State v. Caulfield* (Minn. 2006) 722 N.W.2d 304 [forensic examiner's report testimonial]; *City of Las Vegas v. Walsh* (Nev. 2005) 124 P.3d 203 [nurse's affidavit testimonial]; *State v. Miller* (Or. Ct. App. 2006) 144 P.3d 1052 [uranalysis and drug residue reports testimonial]; *People v. Rogers* (N.Y. App. Div. 2004) 780 N.Y.S. 2d 393 [blood test testimonial]; *Martin v. State* (Fla. Ct. App. 2006) 936 So.2d 1190 [drug analysis report testimonial]; *People v. Lonsby* (Mich. Ct. App. 2005) 707 N.W.2d 610 [test for semen testimonial]; *State v. Crager* (Ohio Ct. App. 2005) 844 N.E.2d 390 [DNA test testimonial]; *State v. Cao* (N.C. Ct. App. 2006) 626 S.W. 301, 305 [laboratory reports testimonial unless testing is mechanical]; but see *Commonwealth v. Verde* (Mass. 2005) 827 N.E.2d 701 [drug analysis nontestimonial]; *State v. Dedman* (N.M. 2004) 102 P.3d 628 [blood test nontestimonial]; *State v. Forte* (N.C. 2005) 629 S.E.2d 137 [drug analysis]; *People v. Jambor* (Mich. Ct. App. 2007) __ N.W.2d __, 2007 WL 29698 * [latent fingerprint reports nontestimonial].)

The Minnesota Supreme Court's opinion in *State v. Caulfield, supra*, 722 N.W.2d 304 is representative of these cases. *Caulfield* considered the

admissibility of a laboratory report when the person who prepared the report was not called as a witness. The court identified the three general categories of testimonial statements,[5] and found that the laboratory report in that case bore characteristics of each of the generic *Crawford* categories. (*Id.* at p. 309.) The findings by the *Caulfield* court are equally applicable to the coroner's report: it functioned as the equivalent of testimony and it was prepared at the request of law enforcement.

The court in *Caulfield* also addressed a claim that the person who prepared the report would have played a minor role, merely authenticating the document. In discounting the persuasiveness of this assertion, the *Caulfield* court noted the observation made by the majority in *Crawford* that "'The Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.'" (*State v. Caulfield, supra*, 722 N.W.2d at p. 309, quoting *Crawford supra*, 541 U.S. at p. 66.)

In this case, the coroner's report contained crucial remarks about the cause of death and descriptions of the wounds, which were critical to the prosecution's theory regarding appellant being the perpetrator of the sole homicide in this case. There were also photographs made of the wounds to

---

[5] These are: (1) 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; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) 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. (*State v. Caulfield, supra*, 722 N.W.2d at p. 308, citing *Crawford supra*, 541 U.S. at pp. 51-52.)

the victim. The defense could not cross examine on the accuracy of these pictures because the person who witnessed them was not present in court.

The philosophy expressed in *Caulfield* comports with United States Supreme Court law on scientific evidence. In addressing the government's use of scientific evidence against a defendant, the Court stated that the accused must be afforded the opportunity for meaningful confrontation of the government's case at trial. (*United States v. Wade* (1967) 388 U.S. 218, 227-228.) Similarly, in refusing to recognize a due process right to the preservation of breath samples, the Court observed that there was no violation because defendant had the right at trial to cross-examine the officer who administered the intoxilyzer test. (*California v. Trombetta*, *supra,* 467 U.S. at p. 490.) These principles are applicable here. A report prepared by a medical official employed by the state to further a criminal investigation constitutes quintessentially testimonial evidence. This is exactly the involvement of government officers in the production of testimony with an eye toward trial that the *Crawford* Court warned against.

b. Whether The Report Qualifies As A Business Record Is Irrelevant Under The Sixth Amendment

The autopsy report itself was admitted as business record, over appellant's hearsay and Evidence Code section 352 objections. (8RT: 3175-3176.) The admission of the report was error under *Crawford.*

The reference to business records in the *Crawford* case clearly is not meant as a bright-line rule since a footnote immediately following this text augurs against the mechanical use of any statutory hearsay exception. (*Id.* at p. 56, fn. 7.) First, Justice Scalia was at best referring to a record under the federal rules of evidence. He obviously did not have in mind all the

different state laws on business records. Second, immediately after the reference to the business records, Justice Scalia wrote, [t]he "involvement of government officers in the production of testimony with an eye toward trial" makes a record testimonial. (*Ibid.*) This is true whether or not it also qualifies as a business record.

The Court of Appeal has recognized that the aside in *Crawford* does not exempt documents that could be classified as business records from the constitutional imperatives of the Confrontation Clause. In *People v. Mitchell* (2005) 131 Cal.App.4th 1210, the court observed that the dicta in *Crawford*, if applied literally, would eviscerate the decision's rationale:

> Classification as a "business record," however, does not alone determine whether this type of evidence is admissible as non-testimonial under *Crawford*. In *Crawford*, the Supreme Court noted business records were one example of hearsay statements "that by their nature were not testimonial." By this the court could not have meant all documentary evidence which could broadly qualify in some context as a business record should automatically be considered testimonial.

(*Id.* at p. 1222.)

Both the wording and rationale of *Crawford* indicate that evidence obtained by a prosecutorial branch of government for use in a criminal trial must be tested by cross-examination. (See *United States v. Cromer* (6th Cir. 2005) 389 F.3d 662, 673-674 [*Crawford* applicable to any statement made in circumstances in which reasonable person would realize it likely would be used in investigation or prosecution of crime]; see also *People v. Hernandez* (N.Y. 2005) 794 N.Y.S.2d 788, 789 [latent fingerprint report testimonial because it described maker's methods and conclusions, degree of care taken in lifting prints, and report prepared with ultimate goal of apprehending and successfully prosecuting a defendant] .)

California recognizes this approach to *Crawford*. In *People v. Taulton* (2005) 129 Cal.App.4th 1218, the appellate court found the determinative issue to be whether the statement under consideration was prepared for the purpose of potentially using it in a criminal trial or determining if a criminal charge should issue. The evidence at issue in *Taulton* were prison records, and they were deemed non-testimonial because they were not created for the purpose of using them at a criminal trial. (*Id.* at pp. 1224-1225.)

Here, it is beyond dispute that the autopsy report was prepared as part of the anticipated litigation against the perpetrator of Witters's murder. No reasonable person would dispute that everyone understood that if a criminal charge was brought the report would play a part in the litigation. In *Davis supra*, 126 S.Ct. at pp. 2273-2274 , the high court held that a report prepared pursuant to a police inquiry intended to be used in a criminal prosecution was testimonial. (See *State v. Miller*, *supra*, 144 P.3d at p. 1058 [urine test report testimonial because primarily produced to prove presence of controlled substance at criminal proceeding].) Consequently, the report was a document prepared in anticipation of a criminal trial are, therefore, testimonial.

Even if the business record issue were determinative, it would not control the outcome in this case. In this case, the autopsy was not admissible as a business record. In order for a record to be admissible as a business record there must be testimony as to the reliability of the procedures under which the document was generated. (Evid. Code, § 1280, subd. (c).) There was no evidence that the autopsy was conducted under reliable conditions. Moreover, for the opinions in an autopsy report to be admissible there must be expert qualifications of the person making the

report. (*People v. Terrell* (1955) 138 Cal.App.2d 35, 57.) In this case, there was no such evidence. (Cf. *People v. Clark* (1992) 3 Cal.4th 41, 158-159 [deceased coroner had previously testified as an expert so trustworthiness was shown on the record].) In *People v. Beeler* (1995) 9 Cal.4th 953, 978-981, the autopsy report was deemed an admissible business record. (RB 105.) However, in that case, there was testimony about the reliability of the autopsy procedures followed by the deceased pathologist. (*Ibid.*) Here there was not. In fact, Dr. Frisby was so inexperienced, review of her work was required, and the reviewer did not testify regarding the quality of her work. As such, the record does not support a conclusion that the report was a business record.

D. Appellant Was Prejudiced By The Admission Of This Evidence

The prejudice flowing from the admission of this evidence is obvious. The only direct evidence connecting appellant to the crimes involving victims Solis and Gonzalez was Swienton's testimony. Without it, appellant's guilt of those crimes could not be proven beyond a reasonable. Neither victim could identify appellant. His anatomical features did not match that described by Solis to be the perpetrator of Counts Six through Nine. (9RT:3318-3319, 3332.) The fact that he associated with other perpetrators of the crimes was insufficient to convict him of the instant crimes. Because of the denial of appellant's rights under the Confrontation Clause, the state must prove the admission of the evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) This simply cannot be done. Even if this Court were to determine that there was no federal violation, but only a state violation, it is equally clear that reversal is warranted under the

standard set forth in *People v. Watson* (1956) 46 Cal.2d 218, 236. Appellant's convictions on Counts Four through Ten must be set aside.

Likewise, the testimony of Dr. Carpenter supplied the only evidence of the cause of death of Witters, evidence which arguably corroborated Joanne Santos's account of appellant's alleged admission to the crime.[6] Without that evidence, the jury would not have believed Santos's account of appellant's alleged admission. And without that admission evidence, the state cannot carry its burden under *Chapman*.

The error attendant to the admission of this evidence also calls for reversal of appellant's death judgment. When the jurors in this case were assessing the propriety of a death sentence on the capital charges before them, they were considering appellant's presumed guilt of inflammatory sex crimes and other acts of violence that never should have been placed before them at all. It is inconceivable that these acts would not have weighed heavily in the death determination. Placing this inadmissible evidence before the jury denied appellant his Eighth and Fourteenth Amendment rights to a reliable sentencing determination.

//

//

---

[6] However, appellant continues to maintain that, to the extent her testimony was corroborated by the crime scene and pathology evidence, it is only because Santos's learned the details of the crime from codefendant and perpetrator of the crime, Michael Drebert.

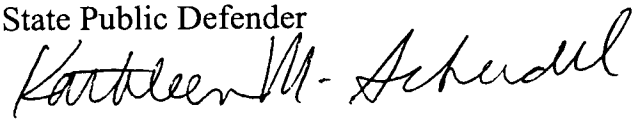
CONCLUSION

For all of the reasons stated in appellant's Opening Brief, his Reply Brief, and this Supplemental Opening Brief, appellant's convictions and death judgment must be reversed.

DATED: December 7, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



KATHLEEN M. SCHEIDEL
Assistant State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 36(b)(2))

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant John Capistrano in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 9134 words in length.

Kathleen M. Scheidel

KATHLEEN M. SCHEIDEL
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. John Leo Capistrano* No.: KA 034540
Calif. Supreme Ct. No. S067394

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; and that on December 7, 2007 I served a true copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
Margaret Maxwell, D.A.G
300 South Spring St., 5th Floor
Los Angeles, CA 90013

Addie Lovelace
Death Penalty Coordinator
Los Angeles County Superior Court
210 West Temple, Room M-3
Los Angeles, CA 90012

John L. Capistrano
(Appellant)

Each said envelope was then, on December 7, 2007, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2007, at San Francisco, California.

Glenice Fuller
DECLARANT