In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MICHAEL NEVAIL PEARSON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S058157

Contra Costa County Superior Court Case
No. 9517012
The Honorable Richard S. Flier, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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A. Introduction

Appellant argues that admission of expert testimony relying in part upon the autopsy reports violated his Sixth Amendment right to confront and cross-examine the doctor who had prepared the autopsy report in 1995. (Supplemental AOB (SAOB) at 5.) His claim was not preserved for appellate review, it lacks merit and, moreover, appellant has failed to show prejudice, as the evidence at issue was cumulative and relatively immaterial in proving his intent to kill.

B. Statement of Facts

1. Dr. Peterson's testimony

In the guilt phase of the trial, immediately prior to anticipated testimony from the People's forensic pathologist, appellant's trial counsel made a hearsay objection to the People's presentation of "some other doctor." Specifically, appellant was objecting on hearsay grounds to the testimony of Dr. Brian Peterson, who was proffered to testify instead of Dr. Aaron Lipton, the pathologist who conducted the autopsies of Lorraine Talley and Barbara Garcia. (XV RT 2986.) The prosecutor explained that Dr. Lipton was no longer employed by Contra Costa County and that he did not know Dr. Lipton's whereabouts. The prosecutor argued that Dr. Peterson routinely conducts autopsies and had been asked to review the record in this case, specifically People's Exhibits 23A and 25A, the autopsy reports of Talley and Garcia, respectively. In addition to reviewing the certified copies of the autopsy reports, Dr. Peterson also viewed the photographs that were taken of Talley's and Garcia's bodies during the autopsies. (XV RT 2986.) The prosecutor intended to establish Dr. Peterson's expertise in the area of pathology and the cause of death, as well

as ask him, upon review of those official records and photographs, his opinion as to the condition of the bodies and the cause of death. (XV RT 2986) Defense counsel again made a hearsay objection to the Doctor's testimony and submitted. The trial court ruled as follows: "Okay. If that's your only objection, Counsel, the objection is overruled. Experts testify from other expert's comments and reports. It's part of the expert opinion. So, if that's your only objection, your objection is overruled." (XV RT 2987). The prosecution then presented testimony from Dr. Peterson, and, without objection or further voir dire, introduced the autopsy reports (see XV RT 2991-2992), as well as certified death certificates for both victims. (XV RT 3006, 3017.)

Dr. Peterson testified that he worked as a forensic pathologist for the Forensic Medical Group which has a contract with Contra Costa County to perform all medical/legal autopsies. (XV RT 2988.) Dr. Peterson estimated that he had performed roughly 2500 autopsies, and had previously qualified as an expert over 100 times, specifically in the area of cause and manner of death. (XV RT 2989-2990.) Defense counsel was offered the chance to voir dire Dr. Peterson, but declined. (XV RT 2990.)

Dr. Peterson told the jury he did not perform the autopsy but that one of his associates did. When Dr. Peterson was asked if he knew the current whereabouts of Dr. Lipton, he replied that he believed Dr. Lipton was practicing in Washington State, and had relocated there sometime in September 1995. (XV RT 2992.) In addition to reviewing the victims' autopsies, Dr. Peterson was asked to view the autopsy photographs taken of Lorraine Talley (People's Exh. 23). (XV RT 2993.) Based on his review of both the autopsy report and photographs, he was able to determine and describe the fatal injuries to Lorrain Talley. The first was a perforating gunshot wound to the abdomen, entering near the small of her back on the left side and exiting in the front just left of the bellybutton. The other was a

perforating gunshot wound to her head. The second gunshot entered just above and behind Talley's left ear and exited on the right side of her neck. Dr. Peterson described a final superficial scrape that Talley sustained to the top of her right shoulder. (XV RT 2994.) Dr. Peterson indicated the trajectory the bullets took via the corresponding entrance and exit wounds (XV RT 2995), which he then corroborated using the autopsy photographs. (XV RT 3006-3007.) The photographs, which were admitted into evidence,[1] clearly showed the path of the bullets entering and exiting Talley's body. During the original autopsy, Dr. Lipton had placed metal probes connecting the entrance and exit points, which were visible in the photographs. (XV RT 3006-3007; see People's Exh. 23J through M.) Dr. Peterson also explained how Talley had a rectangular abrasion on her upper right shoulder, three inches away from the base of her neck. Dr. Lipton had mentioned the right shoulder of Talley's blouse had two small tears, which he thought were in the same location as the abrasion. Dr. Peterson agreed that the abrasion and the tears in the cloth were caused by the bullet exiting out of the ride side of Talley's neck. (XV RT 2996.) Dr. Peterson opined that Talley's head would have been turned to the right, with the bullet trajectory lining up from the entrance wound, to the exit wound and the abrasion on her shoulder. (XV RT 2996-2997.) This was consistent with Dr. Lipton's original conclusion.

Upon reviewing the photos, Dr. Peterson determined that the entrance wound for the shot to Talley's head was above and behind her left ear, with

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[1] Appellant objected to some of the photographs, but only on the ground that they were inflammatory. (See X RT 1936.) He did not raise questions of authenticity or confrontation, and his objection was ultimately overruled.

the larger tear on the base of her right neck being the exit wound.[2] (XV RT 2998-2999.) There were two specific regions of Talley's brain that were damaged: the cerebellum--the portion of the brain responsible for vision--and the occipital lobe. Dr. Peterson stated that these are not "critical" areas of the brain, unlike, for example, a gunshot wound to the brain stem which

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[2] This appeared to contradict Dr. Lipton's findings. In the external examination portion of his autopsy report, Dr. Lipton describes: "A suggestive entry wound is present in the right lateral neck 1-1/2 inches below the superior margin of the earlobe and measures 3/8 x 1/4 inch with charring around the medial surface. An everted type wound is present in the left posterior temporal area an inch above and 2 inches posterior to the pinna of the left ear." (People's Exh. 23A, p.3) On the next page Dr. Lipton states, "Review of the clothing reveals an area of the right shoulder showing 2 small tears consistent with the area of the abrasion noted of the right upper shoulder described above. The course of the missile to the head appears to be an entrance type wound above the left ear traversing downward at approximately 45 degree angle downward 5 degree front to back and left to right, back to front exiting the ear and the neck on the right and then creasing the right upper shoulder traversing in and out of the blouse." (People's Exh. 23A, p. 4). During cross-examination, Dr. Peterson was asked the following:

> [DEFENSE COUNSEL]: With regard to Mrs. Talley, Dr. Lipton says something about a suggested entry wound as present in the right lateral neck. Do you have any idea what he means by that?
>
> [DR. PETERSON]: Well, I'm not sure particularly because later on in the autopsy he makes it clear that that's actually the exit wound. So his use of the term suggestive is puzzling to me. All I can surmise is that based on examining of the rounds [sic] at the level of the skin surface, it wasn't clear which one was entrance, which was exit. Later on when he did the internal examination, able to examine the bones of the skull, it became clear.

(XV RT 3019-3020.) Dr. Peterson stated that while it was hard to speak for another pathologist, he based his interpretation on the photographs of the entrance and exit wounds. (XV RT 3020.)

could be expected to kill immediately. While the gunshot went through these "less critical areas," it nonetheless was the kind of wound that was the cause of death in this case. (XV RT 2999.)

Based on the quantity of blood found within the abdominal cavity, Dr. Peterson opined that that the injury to the abdomen occurred first. Dr. Peterson explained that the high amount of blood found in the abdominal cavity was the result of continued blood circulation and breathing, suggesting that the abdominal injury occurred first; had the order been reversed with the head injury preceding the abdominal wound, breathing and circulation would have stopped and blood would not have pooled in the abdominal cavity. (XV RT 2997.) Dr. Peterson opined that the bullet damaged three separate organs, perforating the spleen, stomach, and the liver, as it passed through Talley's abdominal wall. It was the hemorrhaging from those wounds which caused the bleeding observed in the abdominal cavity. (XV RT 2998.)

Dr. Peterson was then asked, hypothetically, if someone became aware they had been shot in the abdomen, like Talley, would they be able to continue to move? Dr. Peterson stated that, based on the type of bleeding this wound produced, there was no reason Talley could not keep moving, because there was not much blood loss associated with that wound: "And, based on that alone, I would say she would have been capable of further movement after that shot." (XV RT 3000.) On the other hand, the second gunshot wound Talley sustained to her head would have been "rapidly" debilitating. "I wouldn't expect the person shot in that fashion to necessarily drop like a stone where she was standing. Maybe have been capable of a step or two, probably not much more than that." (XV RT 3000.)

Based on his review of the reports and the photographs, Dr. Peterson opined that the cause of Talley's death was brain destruction due to a

gunshot wound to the head with a contributory gunshot wound to the abdomen. (XV RT 3001.) This opinion, again, was consistent with that originally offered by Dr. Lipton. Dr. Peterson then went over in great detail what was depicted in the autopsy photographs comprising People's Exhibit 23. (XV RT 3002.) Dr. Peterson was also asked about the damage caused to a bullet as it passes through a body. (XV RT 3003-3004, People's Exhs. 18C & D.)

Dr. Lipton had measured the trajectory of the bullets during the autopsy by connecting the entrance and exit wounds. The resulting trajectory was an approximate 45 degree angle downward and 5 degrees from the front to the back, and to the left and right sides. (XV RT 3005.) Dr. Lipton's report had described how the angle of the shot to the small of the back resulted in a wound passing from five degrees left to right, essentially almost on a level horizontal plane. (XV RT 3005.) Finally, Dr. Peterson identified the certificate of death (People's Exh. 24) listing the immediate cause of Talley's death as brain destruction from a gunshot wound of the head, with the other significant condition being a gunshot wound to her abdomen. (XV RT 3005-3006.) Dr. Peterson again described in detail the autopsy photographs (People's Exh. 23), including photographs (People's Exhs. 23-J & 23-M) that show the brain removed and a metal probe placed to connect the entrance wound to the exit wound, as well as photographs of the entrance wound (People's Exh. 23-K) and exit wound (People's Exh. 23-L). (XV RT 3006-3007.)

Dr. Peterson then gave his opinion about the death of Barbara Garcia, based on his review of the autopsy report and photographs. (XV RT 3008.) The external observation showed Ms. Garcia had sustained three separate gunshot injuries. The first was a perforating gunshot wound to the head with an entrance wound in the back of the head above and behind the left ear that exited out the right cheek. The second was a perforating gunshot

wound that entered and passed through the outside of the left arm, reentered the abdomen on the left, and proceeded across the stomach under the skin on the right side of the abdomen where the bullet was recovered. The third gunshot entered the left side of the abdomen just behind the second shot, passed through the back of the abdomen and went through the abdominal aorta, ending up in the abdominal wall where the bullet was recovered. (XV RT 3008-3009.) Approximately one quart of blood was recovered from inside the abdomen and retroperitoneum area, which "fits with the bullet passing through the aorta." (XV RT 3009.) Like Talley, the amount of blood found in Garcia's abdomen meant that either one or both abdominal shots occurred first, with the final shot being to the head. (XV RT 3009-3010.) Dr. Peterson indicated the locations of the entrance and exit wounds inflicted by the gunshots, which was corroborated by the autopsy photographs. (XV 3011-3012, 3014-3017.) He then explained how the existence of a bruise found on the abdomen confirmed that Garcia continued to live after the first shot. (XV RT 3011-3012.)

Dr. Peterson referred to pictures that showed the entrance wound to the head and described how the bullet entered above and behind Garcia's left ear, then exited below her cheek, below the right eye, "so right through the brain and out the face . . . ." (XV RT 3012.) Dr. Lipton had traced the trajectory of that shot as being a downward 45 degree angle, with Dr. Peterson adding: "[a]nd as I interpret his report, it was also passing from left to right if it entered on the left side of the head and exited on the right. So roughly 30 degrees from level to right and downward back to front." (XV RT 3012.) Dr. Peterson went on to describe how this particular shot destroyed the left temporal lobe and a large portion of the midbrain which controls breathing and heart rate, and which normally would be immediately fatal. (XV RT 3013.)

In addition, Dr. Peterson identified the autopsy photographs taken of Garcia's body (People's Exh. 25) as being consistent with the description of the condition of Garcia's body as indicated in Dr. Lipton's report. (XV RT 3014.) Using these photographs, Dr. Peterson described in great detail the damaged caused by the three gunshot wounds inflicted by appellant. (XV RT 3014-3017.) Based on his review of those photographs and Dr. Lipton's report, he determined the cause of Barbara Garcia's death was the gunshot wound to the head, with the two gunshot wounds to the abdomen being "contributory" causes. (XV RT 3017.)

2. Other evidence shown to the jury

Prior to Dr. Peterson's testimony, the jury heard eyewitness testimony of how the victims were shot and viewed numerous photographs depicting the gunshot wounds that were inflicted on the victims by appellant. Witnesses authenticating the photographs included coworkers who were in the room when appellant shot the victims (XIII RT 2592-2595, 2619-2622; XIV RT 2824-2825, 2828-2829), as well as the police officers, emergency personnel and evidence technicians responding to the scene. (XII RT 2044-2045, 2059-2060, 2092-2094, 2143-2144, XVI 3054.)

For example, one of the responding police officers, Officer Tak, described finding Lorraine Talley's body slumped over a chair. When he touched her neck to check for vital signs, he noticed a gunshot wound. (X RT 2058.) He confirmed that photographs taken of the conference room (People's Exhs. 8-A through K) accurately depicted its condition, as well as the condition of the victim. (X RT 2059-2060.) Officer Steve Zeppa, who took the photographs and collected evidence from the conference room, described how Talley's body was slightly "stooped" in a chair with her arms dangling at her sides and her head turned to the left. He noticed a two inch hole on the right side of her neck near her right ear lobe. (XI RT 2143-2144.) Officer James Merson described how he found a projectile

next to Garcia's head and described a photograph (People's Exh. 9-E) that was taken prior to Garcia's body being moved by emergency medical technicians. (X RT 2091-2092.) Officer Zeppa also photographed and collected evidence from the location where Garcia's body was found. (XI RT 2161; XII RT 2044-2045, 2059-2060, 2092-2094, 2143-2144, XVI 3054.)

In addition to the testimony of the responding officers, the jury also heard from percipient witnesses who where present when appellant shot the victims. Pamela Kime and Eric Spear were in the conference room and saw appellant shoot Lorraine Talley. Kime recalled appellant and Talley arguing in the hallway just before the shooting. Talley then hurriedly opened the door and came into the conference room. Kime felt Talley rush by her as the first shot was fired. Kime turned to see what had happened and saw appellant standing over Talley saying, "I ain't no joke," just as he fired his first shot. (XIII RT 2592-2924.) Kime went over to help Talley who was slumped over in a chair, still holding keys in her hand, with blood spurting out of her neck. (XIII RT 2596.)

Eric Spears, who was working in the conference room with Kime, also heard the argument between appellant and Talley. (XIII RT 2616-2818.) As Talley passed by him, appellant shot her. Spears weakly protested, but appellant just shrugged and shot Talley again, causing her to slump over in the chair. (XIII RT 2619-2624.)

Janet Robinson was hiding under a desk in the Pat Jones's office when appellant entered and shot Barbara Garcia. (XIII RT 2561-2566; XIV RT 2824.) After appellant spared Robinson's life and left the room, Robinson recalled seeing Barbara taking "her last breath." (XIII RT 2566.) Jones similarly recalled hearing three to four gunshots and then seeing Robinson come from under the desk and plead for her life. (XIV RT 2827.) Jones saw Garcia's body sprawled out on the floor with a gunshot wound in

her arm. (XIV RT 2828.) Jones identified photographs (People's Exhs. 9-A through F) showing Garcia's body as it appeared that day. (XIV RT 2828-2829.)

C. Appellant Forfeited His Sixth Amendment Claim

Appellant has forfeited his contention on appeal that either Dr. Peterson's testimony, or admission of the autopsy reports themselves, violated his Sixth Amendment right to confront and cross-examine the physician who prepared the report in 1995. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186 [to preserve a Confrontation Clause claim for appeal, there must be a "'specific'" and "'timely'" objection at trial on that exact ground]; *People v. Partida* (2005) 37 Cal.4th 428, 435 [noting that state law trial objection only preserves at most a general due process corollary, not a specific constitutional objection]; *People v. Chaney* (2007) 148 Cal.App.4th 772, 777-780; Evid. Code, § 353.) As noted previously, appellant objected only to Dr. Peterson's substitution, and only on hearsay grounds. (XV RT 2986-2987.) He did not proffer a constitutional objection to the testimony, and never objected to the autopsy reports or death certificates when the prosecutor moved them into evidence. (XV RT 2991-2992, 3006, 3017.)

It was not enough that appellant objected on hearsay grounds before Dr. Peterson testified because a Sixth Amendment Confrontation Clause analysis "is distinctly different than that of a generalized hearsay problem." (*People v. Chaney*, *supra*, 148 Cal.App.4th at p. 779.) The failure to make a Confrontation Clause objection denied the prosecutor the opportunity to respond appropriately and deprived the trial court of the opportunity to make a fully informed decision on the merits of the objection. (*People v. Partida*, *supra*, 37 Cal.4th at p. 435; see *People v. Demetrulias* (2006) 39 Cal.4th 1, 21 [finding objection under Evid. Code § 1103 encompassed §

1101 as well because § 1103 is a specific exception to that mentioned in § 1101].)

Moreover, appellant failed to object – even on hearsay grounds -- when the prosecution offered the substantive autopsy reports and victims' death certificates into evidence. (See XV RT 2991-2992, 3006, 3017.) As this Court has repeatedly stated, "Under California law, error in admitting evidence may not be the basis for reversing a judgment or setting aside a verdict unless 'an objection to or a motion to exclude or to strike the evidence . . . was timely made and so stated as to make clear the specific ground of the objection or motion.'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 353, quoting Evid. Code, § 353; see *People v. Gutierrez* (2009) 174 Cal.App.4th 515 ["As a general rule, an appellate court can reach a question a party has not preserved for review if the issue involves neither the admission nor the exclusion of evidence."].) Appellant's hearsay objection to the testimony of Dr. Peterson was not broad enough to encompass an additional objection to admission of the reports themselves. Indeed, those reports had not even been offered at the time appellant made his initial hearsay objection to the testimony of Dr. Peterson. (See *People v. Geier* (2007) 41 Cal.4th 555, 624 [objection to general admission of DNA evidence did not encompass expert's "population frequency testimony"].)

Appellant's assertion that an objection would have been futile is unavailing. Appellant argues that our case was decided years before *Melendez-Diaz* and that, at the time of trial, admission of a substitute pathologist's testimony was governed by *People v. Beeler* (1995) 9 Cal.4th 953, 979-980. The problem with appellant's logic is that *Beeler* dealt only with the evidentiary nature of the autopsy report and pathologist's testimony; the case addressed only whether a properly authenticated autopsy report was sufficiently trustworthy to qualify as a business records exception to the hearsay rule (Evid. Code, § 1271) and whether the

testimony of a substitute pathologist exceeded the permissible scope of an expert's opinion under Evidence Code sections 801 and 802. *Beeler* did not address the constitutional underpinnings that were the basis of the *Melendez-Diaz* opinion, nor are we aware of any case which would have precluded appellant from making a Confrontation Clause objection at the time of trial. Appellant's conclusory assertion need not be credited by this Court. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.) Moreover, appellant may have chosen not to make a broader objection for a number of reasons: in order to curry favor with the court or jury; he may have thought that a substitute physician would not be as comprehensive in his testimony as the original physician; or he may simply have decided that the coroner's findings were simply not that important, particularly in light of the photographs and other testimony showing the manner in which the victims were killed. His claim has not been preserved for review. (See *Melendez-Diaz v. Massachusetts* (2009) __ U.S. __, 129 S. Ct. 2527, 2534, fn. 3 ["The right to confrontation may, of course, be waived, including by failure to object to the offending evidence . . . ."].)

D. An Expert Offering an Opinion on the Cause of Death is Entitled to Relate the Basis of His or Her Findings to the Jury, Including Factual Observations of Other Experts that Are Not Conclusions, without Violating the Sixth Amendment

1. *Melendez-Diaz v. Massachusetts*

In *Melendez-Diaz v. Massachusetts* (2009) __ U.S. __, 129 S.Ct. 2527, the Supreme Court held by a five-to-four margin that a sworn affidavit ("certificate") from a state crime laboratory, identifying a controlled substance seized from the defendant, was testimonial evidence under *Crawford v. Washington* (2004) 541 U.S. 36 that should have been subject to confrontation through "the analysts." (129 S.Ct. at p. 2532.) The *Melendez-Diaz* majority characterized the certificate at issue as

"functionally identical to live, in-court testimony," which *Crawford* had deemed the "'core class of testimonial statements.'" (*Ibid.*) The certificate in *Melendez-Diaz* was admitted without accompanying in-court testimony from a live witness.

The holding in *Melendez-Diaz* was of course limited to the issue presented. Justice Thomas, in a concurring opinion, noted that he had also joined the majority because he understood its opinion to address only the constitutional implications of "'formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).) Justice Thomas did not view the majority opinion as rendering inadmissible any "extrajudicial statements" not "contained in formalized testimonial materials . . . ." (*Ibid.*) Justice Thomas's concurrence made clear that the majority opinion did not address the situation where a pathologist or forensic science professional provides opinion testimony at trial based in part upon work done by another pathologist or forensic science professional.

Because Justice Thomas was part of the five-justice majority, and because Justice Thomas subscribed to the included yet narrower, factually limited position described in his concurrence, his concurring view established the holding of the Court. (See *Marks v. United States* (1977) 430 U.S. 188, 193.)

2. Dr. Peterson's independent opinion as to the cause of death in both cases was properly received

Dr. Peterson's opinion testimony, based in part upon the contents of the autopsy reports, was properly received. "As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused." (*People v. Page* (1991) 2 Cal.App.4th 161, 187.) The trial court did not abuse that discretion in this case.

Evidence Code section 801, subdivision (b), provides that an admissible expert opinion may be [b]ased on matter . . . made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

As this Court has explained, expert testimony may "be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*Ibid.*; see *People v. Beeler*, *supra*, 9 Cal.4th at pp. 980-981 [opinion in autopsy report regarding cause of death was properly relied upon by different medical examiner testifying at trial]; *People v. Clark* (1992) 3 Cal.4th 41, 159 [autopsy report qualified as official record within the meaning of Evidence Code section 1280, such that witness coroner who did not prepare it could testify concerning its contents]; *People v. Wardlow* (1981) 118 Cal.App.3d 375 [same]; *Commonwealth v. Nardi* (Mass. 2008) 893 N.E.2d 1221, 1230-1231 [Confrontation Clause not violated when testifying experienced pathologist based cause of death opinion on documentation and photographs in another pathologist's autopsy report].) There can be no violation of a defendant's confrontation rights where the challenged statement was not admitted for its truth, but instead forms the basis for evaluating the expert's opinion. (Cf. *Crawford v. Washington*, *supra*, 541 U.S. at p. 59, fn. 9 ["The [confrontation c]lause . . . does not bar the use of testimonial statements for

purposes other than establishing the truth of the matter asserted."].) Nothing in *Melendez-Diaz* conflicts with admission of qualified expert opinion testimony that is based in part upon standard laboratory notes and reports. Aside from the practical statute of limitations problems that this would place on homicide investigations (see *Melendez-Diaz, supra*, 129 S.Ct. at 2546 (Kennedy, J. dissenting)), the analyses employed in *Melendez-Diaz* does not apply to the testimony of a separate expert because that expert is in turn rendering his or her own opinion and is subject to cross-examination. To the extent that the subsequent doctor needs to support his current opinion by discussing information generated by a different medical expert through a prior examination, the possibility of hearsay coming before the jury has always been cured by an appropriate limiting instruction.[3] (See *People v. Ervine* (2009) 47 Cal.4th 745, 775-776.) In *United States v. Turner* (7th Cir. Jan. 12, 2010, No. 08-3109) __ F.3d __ [2010 U.S.App. Lexis 683], the Seventh Circuit considered whether Melendez-Diaz implicated the validity of Federal Rule of Evidence 703, the federal equivalent to California's Evidence Code section 801, subdivision (b). It held that "*Melendez-Diaz* did not do away with Federal Rule of Evidence 703." (2010 U.S.App. Lexis at p. *14; see also *State v. Lui* (Wash.Ct.App., Nov. 23, 2009, No. 61804-1-I) 2009 Wash.App. Lexis 2892, *29-*37.)

The Confrontation Clause exists "to ensure reliability of evidence" by exposing it to the "crucible of cross-examination." (*Crawford, supra*, 541 U.S. at p. 61.) In other words, the Confrontation Clause is satisfied if a

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[3] We recognize that although a general limiting instruction was given in this case, it was not specifically tailored to the facts supporting Dr. Peterson's opinion. To the extent such an instruction should have been given, it was never requested by appellant and has thus been waived. (See *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1293, citing *People v. Cantrell* (1973) 8 Cal.3d 672, 683 (overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684 fn.12).)

defendant can adequately test the reliability of a scientific conclusion result by engaging in cross-examination. As the Supreme Court observed elsewhere, "The central concern of the Confrontation 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.) In the context of forensic science, the identity of the person cross-examined is and should be a separate issue from the ability to challenge the scientific evidence offered against the defendant.

Melendez-Diaz did not hold that the Confrontation Clause dictates that every person who provides a link in the chain of information relied on by a testifying expert be exposed to cross-examination, or that every person who can offer information about a forensic examination be called by the prosecution. Rather, *Melendez-Diaz* recognized a defendant's right to pursue cross-examination on such matters as an analyst's lack of proper training or deficiency in judgment, what tests the analyst performed, whether those tests were routine, and whether interpreting the results required the exercise of judgment or the use of skills that the analyst may not have. (129 S.Ct. at pp. 2537-2538.) These are the core issues of concern to a defendant seeking to challenge the reliability of forensic science observations or results.

Accordingly, the Confrontation Clause is satisfied when a witness, like Dr. Peterson, who possesses sufficient qualifications and knowledge about the forensic autopsy process and who reviewed data and photographs of the autopsy in question, can be cross-examined about those matters identified in *Melendez-Diaz* which test the reliability of the scientific findings. (See *People v. Bowman* (March 23, 2010) (F058082) ___ Cal.App.4th ___, 2010 WL 1038819 [holding *Geier* not overruled by *Melendez-Diaz* and testimony of expert can be based on laboratory notes

and records of another]; but see *People v. Benitez* (2010) 182 Cal.App.4th 194.) Any deficiencies in Dr. Peterson's knowledge of the 1995 autopsy can be and were probed in cross-examination and called to the jury's attention in argument, fulfilling the confrontation right. (See *Delaware v. Fensterer* (1985) 474 U.S. 15, 22.) A defendant has no right, however, to "cross-examination that is effective in whatever way, to whatever extent, the defense may wish." (*Id.* at p. 20.)

In this respect, *Melendez-Diaz* is consistent with this Court's opinion in *People v. Geier*, *supra*, 41 Cal.4th 555.[4] One important factor cited by *Geier* to support the admissibility of the laboratory test results was that the ultimate opinions offered at trial were through a qualified testifying witness. (Id. at p. 607.) *Geier* thus distinguished between information in the report and expert opinion testimony based on such information. The in-court presence of an expert to offer opinions based on independent review of raw data and material produced by laboratory colleagues provides the opportunity for confrontation crucially missing in *Melendez-Diaz*.

Dr. Peterson's expert testimony functioned in the same manner as the DNA expert's testimony in *Geier*. Dr. Peterson rendered opinions independent of, but consistent with, those of the original physician who performed the autopsy. And Dr. Peterson properly relied upon the observations and photographs recorded in the 1995 reports to authenticate the various wounds suffered by the victims. Appellant had ample opportunity to cross-examine Dr. Peterson regarding his opinions, as well

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[4] We note that this Court has granted review in *People v. Dungo* (S176886) and *People v. Rutterschmidt* (S176213) (rev. granted Dec. 2, 2009) to determine the continued viability of *Geier* following *Melendez-Diaz*. The second issue to be decided is substantially similar to our case; whether an expert can render an opinion based in part on another expert's factual findings without violating the Confrontation Clause.

as the findings in the autopsy reports, the general procedures for performing autopsies, the documentation of results (photographic and otherwise), and the preservation of the records. Dr. Peterson was just as capable of addressing those issues as the original examiner would have been, especially because a medical examiner would not likely have an independent recollection of performing an autopsy years before, and would have had to rely upon the report to the same extent Dr. Peterson did. (See Zabrycki, Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement (2008) 96 Cal. L.Rev. 1093, 1116 ["A deviation from the medical examiner's standard procedure can be exposed by confronting another examiner from the office. Similarly, any experienced medical examiner can explain the susceptibility of physical descriptions to characterization, and how a different characterization could affect the conclusion"].)

In short, nothing in *Melendez-Diaz* precluded Dr. Peterson from relying upon the 1995 autopsy report in formulating his opinion, and Dr. Peterson's presence in court satisfied appellant's Sixth Amendment rights.

E. Autopsy Reports Are Not Testimonial Evidence

1. Autopsy reports are nontestimonial business or official records

Appellant's claim also fails on its merits because autopsy reports are not testimonial evidence within the meaning of *Crawford v. Washington*, *supra*. Autopsy reports are very different from the sworn certificates labeled "testimonial" in *Melendez-Diaz*. An autopsy report does not fall within any of the descriptions of testimonial evidence provided by *Crawford*. It is not prior testimony at a judicial proceeding. It is not generated in response to police questioning. Rather, autopsy reports are medical records—a type of business or official records within the meaning of Evidence Code sections 1271 and 1280—that are admissible absent

confrontation. Consequently, the introduction of the 1995 report in this case did not violate appellant's Sixth Amendment rights.

2. The medical record distinction in *Melendez-Diaz*

The Confrontation Clause does not apply to nontestimonial statements. (See *Davis v. Washington*, *supra*, 547 U.S. at p. 824 [holding that the limitation with respect to testimonial hearsay is "so clearly reflected in the text" of the Confrontation Clause that it "must . . . mark out not merely its 'core,' but its perimeter"].) *Melendez-Diaz* highlighted this boundary when it emphasized that the drug certificates at issue were "testimonial" in part because Massachusetts law expressly contemplated their preparation for use as evidence at trial. (129 S.Ct. at p. 2532.) The underlying reason a document is prepared is thus a key criterion in determining its testimonial (or nontestimonial) status. (See also *id.* at pp. 2539-2540 ["Business and public records are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial"].) This is a point on which the United States Supreme Court and this Court agree. (*People v. Geier*, *supra*, 41 Cal.4th at p. 607 [in determining whether a statement is testimonial, "the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made"].)

The *Melendez-Diaz* Court emphasized the purpose-of-preparation principle when it observed that "medical reports created for treatment purposes . . . would not be testimonial under our decision today." (129 S.Ct. at p. 2533, fn. 2.) The court cited two state court opinions explaining that medical records are not testimonial in nature. (129 S.Ct. at p. 2533, fn. 2.) Both cases held that blood tests—one indicating alcohol, one indicating drugs—conducted at hospitals where impaired drivers were treated for their injuries were admissible at the subsequent trials as business records.

(*Baber v. State* (Fla. 2000) 775 So.2d 258, 260-262; *State v. Garlick* (Md. 1988) 545 A.2d 27, 34-35.) The *Baber* court's reasoning was premised upon the reliability of medical records, and it quoted with approval the following language from the *Garlick* decision:

> The blood sample was not taken for the purpose of litigation. The testing was performed in the hospital and not by a police laboratory. . . . [¶] . . . Many hospital tests and procedures are performed routinely and their results are relied upon to make life and death decisions. The examining doctor relied on these objective scientific findings for *Garlick's* treatment and never doubted their trustworthiness. Neither do we. This high degree of reliability, as we explained early on, permits introduction of the test results contained in the hospital records presented in this case without any need for showing unavailability of the technician and without producing the technician. Under these circumstances the constitutional right of confrontation is not offended.

(775 So.2d at pp. 261-262, quoting *State v. Garlick*, *supra*, 545 A.2d at pp. 34-35.) The Supreme Court in *Melendez-Diaz* cited the same passage from *Garlick* in footnote 2 as an illustration of why "medical reports" are not testimonial.

a. The nature and purpose of an autopsy report

Autopsy reports are no less medical records than the hospital records discussed in *Baber* and *Garlick*, and are prepared pursuant to statutory mandates without regard to any potential criminal prosecution. Pathologists are medical doctors. Pathology is a medical specialty, defined as "[t]he medical science, and specialty practice, concerned with all aspects of disease, but with special reference to the essential nature, causes, and development of abnormal conditions, as well as the structural and functional changes that result from the disease processes." (Stedman's Medical Dict. (24th ed. 1982) p. 1041; see also XV RT 2989.) To claim that autopsy reports, although written by physicians and documenting

physiological conditions, are nonetheless not "medical records" would be a legal fiction.

To the contrary, California law recognizes that autopsy reports are "medical reports." Government Code section 27463, subdivision (e), requires coroners to document the cause of death in an official register "with reference or direction to the detailed medical reports upon which decision as to cause of death has been based." (See also 18 C.J.S. (2008) Coroners, § 26, p. 286 ["A coroner is a medical expert rendering expert opinion on medical questions" who makes "factual determinations concerning the manner, mode, and cause of death, as expressed in a coroner's report . . . ."].)

Like medical records in other contexts, autopsy reports are prepared according to standardized medical protocols that do not change based on the potential future use of those reports. State law mandates that coroners "inquire into and determine the circumstances, manner, and cause" of many categories of death, both related to criminal activity (e.g., "gunshot, stabbing") and unrelated to criminal activity (e.g., "exposure, starvation, acute alcoholism, drug addiction, . . . sudden infant death syndrome; . . . contagious disease"). (Gov. Code, § 27491; see also Gov. Code, § 27491.41, subd. (c) [mandating an autopsy in "any case where an infant has died suddenly and unexpectedly"]; Health & Saf. Code, § 102850 [listing six circumstances of death in which the coroner must be notified, only one of which expressly involves a criminal act].) Significantly, these statutory mandates do not command, suggest, or even imply that the purpose, methods, or nature of the coroner's inquiry change depending upon whether the "circumstances, manner, and cause" of death was related to criminal activity. (See, e.g., Gov. Code, § 27491.41, subd. (d) [infant death autopsies must be conducted using a "standardized protocol"]; *People v. Leach* (Ill.App.Ct. 2009) 908 N.E.2d 120, 130 [where county code requires

the medical examiner to determine the "manner and cause" of deaths falling within 15 categories—including criminal violence, suicide, accident, disease constituting a public health threat, and death during medical procedures—the medical examiner does not perform a law-enforcement function].)

In fact, the pathologist's medical examination of a body is the condition precedent to any determination that criminal activity was involved, thus the reporting of that examination must always be from the perspective of a medical doctor, not that of a law enforcement investigator. (See *People v. Leach*, *supra*, 908 N.E.2d at p. 130.) This paradigm lies in stark contrast with the drug certificates at issue in *Melendez-Diaz*, which were prepared for the "sole purpose" of prosecuting the defendant. (129 S.Ct. at p. 2532.) Indeed, unlike the determination of whether a substance is, or is not, a prohibited narcotic, which by nature requires some scientific testing, it is not beyond the realm of comprehension for a jury to make its own determination as to cause of death, particularly in a case such as this, where there exists a plethora of other evidence showing the events in detail.

Accordingly, an autopsy is not performed for the purpose of contributing to subsequent criminal proceedings, any more so than an emergency room physician treats a gunshot victim for the purposes of contributing to subsequent criminal proceedings. The emergency room doctor's file does not change from a nontestimonial "medical record" to a testimonial "investigative record" based on the apparent cause of a patient's injuries. It would make little sense for an autopsy report to be nontestimonial in nature when it documents the postmortem condition of an accident or suicide victim (no prospect of criminal proceedings) but testimonial when it documents the postmortem condition of a homicide victim (definite prospect of criminal proceedings), when the methods,

protocols, and statutory obligations of the pathologist are identical in both scenarios.

The conclusion that a pathologist examines a body from a medical and not a law enforcement perspective is supported by additional statutory mandates that define a coroner's role independently of any law enforcement consequences the work may entail. In fact, a comprehensive summary of California law related to the functions and duties of coroners states that "[t]he coroner must inquire into the cause of some deaths in order to prepare death certificates." (15 Cal.Jur.3d (2004) Coroners, § 15, p. 18.) Health and Safety Code section 102860 requires coroners to document on death certificates "the disease or condition directly leading to death, antecedent causes, other significant conditions contributing to death and other medical and health section data as may be required on the certificate, and the hour and day on which death occurred." (See also Health & Saf. Code, § 102875 [describing contents of death certificate without reference to potential law enforcement consequences of autopsy], 102795 [coroner's obligation to certify medical and health section data on death certificates], 102800 [same].) Further, "[t]he coroner shall specifically indicate the existence of any cancer . . . of which he or she has actual knowledge." (Health & Saf. Code, § 102860.) These are statutory obligations required of medical doctors performing primary duties irrespective of their law enforcement implications, not duties required of law enforcement investigators.

Many courts have recognized that the mode of creation of autopsy reports distinguishes them from testimonial writings prepared in anticipation of criminal proceedings. The U.S. Court of Appeals for the First Circuit summarized the prevalent reasoning as follows:

> An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to

> memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*.

(*United States v. De La Cruz* (1st Cir. 2008) 514 F.3d 121, 133; see also *United States v. Feliz* (2d Cir. 2006) 467 F.3d 227, 236-237 [autopsy reports are kept in the course of regularly conducted business activity and are nontestimonial under *Crawford*]; *Manocchio v. Moran* (1st Cir. 1990) 919 F.2d 770, 778 [autopsy reports are business records akin to medical records, prepared routinely and contemporaneously according to "statutorily regularized procedures and established medical standards" and "in a laboratory environment by trained individuals with specialized qualifications"]; *State v. Craig* (Ohio 2006) 853 N.E.2d 621, 639 [autopsy reports admissible as nontestimonial business records under *Crawford*]; *Denoso v. State* (Tex.Ct.App. 2005) 156 S.W.3d 166, 182 [same]; *State v. Cutro* (S.C. 2005) 618 S.E.2d 890, 896 [same]; *Campos v. State* (Tex.Ct.App. 2008) 256 S.W.3d 757, 762-763 [same]; *State v. Russell* (La.Ct.App. 2007) 966 So.2d 154, 165 [relying on Louisiana statute making reports admissible to prove death and cause of death, and singling out "routine, descriptive, non-analytical, and thus, nontestimonial" information in the autopsy report].)

Although a medical examiner may reasonably expect that an autopsy report will be used in a criminal prosecution when the deceased appears to be the victim of foul play, that circumstance alone does not make the report testimonial. (See *United States v. Feliz, supra*, 467 F.3d at p. 235 ["Certainly, practical norms may lead a medical examiner reasonably to expect autopsy reports may be available for use at trial, but this practical expectation alone cannot be dispositive on the issue of whether those

reports are testimonial"]; *United States v. Ellis* (7th Cir. 2006) 460 F.3d 920, 926 ["the mere fact a person creating a business record (or other similar record) knows the record might be used for criminal prosecution does not by itself make the record testimonial"].) This Court stated that, in determining whether a statement is testimonial,

> [T]he proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality which, *viewed objectively*, are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial.

(*People v. Cage* (2007) 40 Cal.4th 965, 984, fn. 14, italics in original.) As discussed, the primary purpose of conducting an autopsy is to fulfill the statutory duty of generating cause of death information for death certificates, and most fundamentally involves the neutral and objective recordation of medical facts based on a medical examination without respect to criminal justice consequences.

In sum, nothing in the record in this case indicates that the autopsy report was other than a nontestimonial medical record. To the contrary, Dr. Peterson testified that autopsy reports are created contemporaneously with the examination (XV RT 2991), and are produced as part of the ordinary course and scope of the business. (XV RT 2991.) Admission of the autopsy report in this case did not violate the Confrontation Clause.

F. Any Error in Admission of the Evidence was Harmless

Even assuming arguendo that Dr. Peterson's testimony was wrongly admitted, or alternatively that the autopsy reports should not have gone to the jury, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Davis* (2009) 46 Cal.4th 539, 620 [applying *Chapman* to *Crawford* claim].) The primary relevance of the testimony and autopsy reports was to establish the cause of death. But the

cause of death was simply not an issue in the trial. Appellant fired multiple gunshots, at relatively close range, into two separate victims, in two separate rooms. There was absolutely no doubt that he was the assailant, and, given his lengthy history of threats to the Richmond Housing Authority (RHA) staff – threats for which he was ultimately fired – that the shooting was part of an elaborate plan of retaliation.

Appellant suggests that the Dr. Peterson's testimony was also utilized to show the order in which the shots were fired and appellant's position in relation to his victims, thereby establishing an intent to kill. (SAOB at 8-9.) However, there was overwhelming other evidence, outside of Dr. Peterson's testimony, showing the timing of the shots, the cause of death, and ultimately appellant's intent to kill. Indeed, appellant's counsel even admitted during trial that "There is no dispute about where Lorraine Talley was shot, how she was shot, or anything like that. It's not an issue in this case." (X RT 1938.) There were numerous photographs admitted showing the nature of the wounds and the positioning of the bodies. The trial court, in overruling appellant's Evidence Code section 352 objection to admission of some of the photographs, specifically found they were relevant to prove appellant's mens rea; that inferences drawn from viewing the photographs could be used by the jury to determine whether appellant had committed a first degree murder. (X RT 1938-1939.) Numerous witnesses – including those who observed the shootings firsthand and officers and emergency personnel responding to the scene -- testified to the events occurring on that fateful day.

And again, there was absolutely no doubt that appellant fired the shots, and that he did so with an expressed intent to kill. Indeed, appellant's prior threats to kill were the very basis for his termination from the RHA, which

in turn inspired his subsequent decision to carry out his plan to "do a 101 California Street here."[5] (XIII RT 2538-2539.) After the shooting, appellant even gave a lengthy interview with police in which he recounted the murders in detail and admitted that he killed Lorraine Talley and Barbara Garcia because they "screwed with him." (XXIV RT 4678; Defense Exh. 41 [time marker 9:33:45-9:35:45].) The order in which the shots were fired, and the positioning of the victims' bodies, were of lesser significance in light of the evidence showing appellant intentionally fired multiple shots into two separate victims, went hunting for a third, and then confessed to the killings as part of a plan to exact retaliation against those who wronged him. Thus, even if Dr. Peterson's testimony, as well as the information in the autopsy report, may have allowed for some inference of intent, it was merely icing on a very substantive cake. (See *People v. Burney* (2009) 47 Cal.4th 203, 232 ["[I]f the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless."], quoting *People v. Anderson* (1987) 43 Cal.3d 1104, 1129.)

Moreover, in addition to the numerous photographs depicting the victims' wounds and positioning, the autopsy reports and death certificates of Talley and Garcia were admitted without any objection whatsoever. As noted previously, autopsy reports are not testimonial (see section E, *supra*), but even if they were, appellant did not object to their admission and thus, they were properly brought to the jury's attention. (See *Melendez-Diaz, supra*, at 129 S. Ct. 2527, 2534, fn. 3.) The information of which appellant now complains, as brought in through Dr. Peterson, was properly brought

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[5] Referring to the infamous 1993 murders of numerous employees in an office building at 101 California Street in San Francisco by Gian Luigi Ferri, a disgruntled client of the law firm where the shootings took place.

in front of the jury in another format; Dr. Peterson's testimony was thus cumulative to other properly admitted evidence.

And finally, had appellant actually rendered the appropriate objections, and prevented Dr. Peterson from testifying, the facts proving the manner of Talley's and Garcia's deaths could have been brought in through other percipient witnesses. The proper means of measuring harmless error does not simply omit the questioned evidence and consider whether the jury would have reached the same verdict as appellant suggests. (See SAOB 8-9.) Instead, the question is somewhat broader, with the reviewing court being asked to determine what would have happened given all the available evidence. (See *Wong v. Belmontes* (2009) ___ U.S. ___, 130 S.Ct. 383, 386; see also *Neder v. United States* (1999) 527 U.S. 1, 17-18; *People v. French* (2008) 43 Cal.4th 36, 53 ["The failure to submit a sentencing factor to a jury may be found harmless if the evidence supporting that factor is overwhelming and uncontested, and there is no 'evidence that could rationally lead to a contrary finding.'"], quoting *Neder*, *supra*, at p. 19.) In *Belmontes*, the defendant had been convicted of capital murder. At trial, his counsel chose to forego presentation of certain evidence because the People's anticipated rebuttal would show that the defendant committed a second murder. In reversing the Ninth Circuit's opinion that had found ineffective assistance of counsel, the Court expressly stated that the anticipated rebuttal evidence must also be considered in assessing questions of prejudice:

> In evaluating th[e] question [of prejudice], it is necessary to consider all the relevant evidence that the jury would have had before it if [defense counsel] Schick had pursued the different path-not just the mitigation evidence Schick could have presented, but also the Howard murder evidence that almost certainly would have come in with it. See *Strickland*, *supra*, at 695-696, 700, 104 S.Ct. 2052. Thus, to establish prejudice, Belmontes must show a reasonable probability that the jury

> would have rejected a capital sentence after it weighed the entire body of mitigating evidence (including the additional testimony Schick could have presented) against the entire body of aggravating evidence (including the Howard murder evidence). Belmontes cannot meet this burden.

(*Ibid.*; see also *Stanley v. Schriro* (9th Cir. 2010) ___F.3d ___, 2010 WL 816940; *Reed v. Secretary, Fla. Dept. of Corr.* (11th Cir. 2010) 593 F.3d 1217, 1246.) As noted above, many of the pertinent facts depicting the injuries suffered by Talley and Garcia were also brought in through testimony of numerous police officers that responded to the crime scene. Pamela Kine and Eric Spear recounted the manner in which appellant executed Lorraine Talley and Janet Robinson was able to provide some picture of Barbara Garcia's murder, describing her observations as she emerged from underneath the desk where she had been hiding. To the extent more detail could possibly have been needed to show appellant's intent, each of the witnesses could have been asked additional questions pertaining to their observations. And, as appellant recognizes, there was no actual showing of unavailability as to Dr. Aaron Lipton. Had Dr. Peterson's testimony been precluded, it is likely the prosecution could have made arrangements to have Dr. Lipton testify.

But even assuming such evidence could not be considered, and that the autopsy reports are somehow precluded by *Melendez-Diaz*, the evidence still overwhelmingly showed that appellant intended to kill Lorraine Talley and Barbara Garcia, and that he premeditated and deliberated the murders. There was simply no dispute that Talley and Garcia were executed by shots to the head, fired by appellant. There was no dispute that appellant fired multiple shots at each of them, and that they died at the scene. There was no dispute that after shooting Talley and Garcia, he then told a stunned and scared Janet Robinson he was choosing not to kill her. There was no

dispute that after his arrest appellant confessed killing those who "screwed with him," that he had talked about the murders for months preceding the day they actually happened (see XIII RT 2544-2545, 2659), that he rejoiced in going to the shooting range on the night prior to the murders (XIII RT 2553), that he left his apartment in such a manner as to preclude anyone from reentering (XI RT 2168, XXVII RT 5027), and that he left in the apartment a book titled "Madness in Criminal Law." (XI RT 2168-2169, 2171-2174.) Any error in admitting Dr. Peterson's testimony, or the autopsy reports, was harmless.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: April 12, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains9,353 words.

Dated: April 12, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Michael Nevail Pearson**
No.: **S058157**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 12, 2010, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 12, 2010, at San Francisco, California.

Nelly Guerrero
Declarant

N. Guerrero
Signature

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