S104144

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent,

v.

JOSEPH ANDREW PEREZ, JR., Defendant and Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF AS REQUESTED IN THIS COURT'S ORDER OF AUGUST 16, 2017

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On August 16, 2017, this Court ordered the parties to "serve and file supplemental briefs addressing the effect of recent precedent on the hearsay and confrontation clause issues related to Brian Peterson's testimony that were raised in this appeal," citing *People v. Sanchez* (2016) 63 Cal.4th 665, and suggesting that it be compared with certain decisions reached by High Courts in various other States (Oklahoma, New Mexico, Indiana, Tennessee, Ohio, Arizona, West Virginia and Illinois.)[1]

The Court's order refers to Issue XVII, "trial court error in allowing inadmissible hearsay testimony from the pathologist who was not present at

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[1] This Court's order of August 25 granted an extension of time until September 11, 2017 to file the supplemental briefs.

the autopsy."[2] Appellant argues on both confrontation clause and hearsay/due process grounds. This Court's decision in *Sanchez* does not alter appellant's argument, but clarifies and further demonstrates the prejudicial error which occurred in this trial. Furthermore, the better reasoned state cases cited in the Court's order further clarify that testimony regarding the contents of the autopsy reports in this case constituted a Sixth Amendment violation and should have been excluded.

RECENT DECISIONS, INCLUDING *SANCHEZ*, PROVIDE ADDITIONAL SUPPORT FOR APPELLANT'S ARGUMENT THAT "THE TRIAL COURT ERRED IN ALLOWING INADMISSABLE HEARSAY TESTIMONY FROM A PATHOLOGIST WHO WAS NOT PRESENT AT THE AUTOPSY"

I. INTRODUCTION.

In this case, Dr. Brian Peterson testified to, and relied upon, statements and opinions contained in an autopsy report authored by a non-testifying doctor who actually performed the autopsy (Dr. Susan Hogan) to support his own opinions. Dr. Peterson's testimony violated state hearsay law, as clarified by this Court in *Sanchez*, because it recited and relied upon inadmissible case-specific hearsay evidence to support his opinions, thus implicating appellant's state and federal due process rights.

Dr. Peterson's testimony also violated appellant's Sixth Amendment right to confrontation, because the hearsay was testimonial, under the holdings of *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S. Ct. 2527 and *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 131 S. Ct. 2705. Accordingly,

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[2] AOB at pp. 244-259; Appellant's Reply Brief at pp. 94-101; the facts supporting this issue are at pp. 244-248 of the AOB. Appellant hereby incorporates by reference the arguments made in the AOB and reply brief as to Issue XVII.

this Court's holding in *People v. Dungo*, (2012) 55 Cal.4th 608, 147 Cal.Rptr.3d 527, should be disapproved.

In addition, the new rules for admission of the factual bases for expert testimony announced in *Sanchez* were not followed in this case. (*Sanchez,* 63 Cal.4th at 686: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay...If the case is one in which a prosecution expert seeks to relate testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing.")

Here, there was a totally inadequate showing of the unavailability of Dr. Hogan (*see* AOB at 256-58; reply brief at 96-97) and appellant was denied his right to confront the evidence against him when the prosecution's expert impermissibly testified to unverifiable hearsay contained in the autopsy report. As will be argued in sections 4 and 5, case specific hearsay in the autopsy report was used which could not be independently verified by the expert, and had in fact been rejected by the author of the autopsy report. Appellant will show below in section 6 of this brief that Justice Corrigan and the authorities cited therein have the better view and *Dungo* should be overruled.

Pursuant to this Court's order, this supplemental brief discusses the effect of *Sanchez* and other recent precedent on appellant's hearsay and confrontation clause arguments raised in Issue XVII of his AOB.

II. FACTUAL BACKGROUND.

According to the evidence in this case, three individuals entered the victim's house, found her alone inside, and subsequently bound, strangled, and then stabbed her. Her dead body was found later when the police investigated

her disappearance. An autopsy was conducted at 10 a.m. on March 26, 1998, in the Contra Costa County Sheriff-Coroner's Office. Present were Sergeant Sweeny, Detective Hubbard, Deputy District Attorney Bob Hole, Crime Lab Personnel S. Ojena and C. Inman. Dr. Susan Hogan performed the autopsy, assisted by S. Jagoda. (Supplemental Homicide Report by Sargent Sweeny (CT 608, 615); *see also* Death Certificate signed by Dr. Hogan. (CT 894).)

The autopsy report was written by Dr. Hogan. (CT 608, 615; 1 RT 309; 13 RT 2919, 3022.) Prior to appellant's trial, Dr. Hogan testified at co-defendant Lee Snyder's trial, that she could not rule out the possibility that the decedent had already died when stabbing wounds were inflicted. (Snyder RT 943-44.)[3] She would have expected substantially more blood in the lungs if the victim was still alive when she was stabbed . (*Id.*) This testimony contradicts Dr. Brian Peterson's testimony in Perez's trial and the cause of death listed in the autopsy report, which includes both ligature strangling and stabbing as having caused death. (13 RT 3020-21.)

The autopsy report was not admitted into evidence at appellant's trial except through the testimony of an expert, Dr. Peterson, who did not attend the autopsy, but who relied on the autopsy report to draw conclusions as to the cause of death. Dr. Peterson's only connection to the case was that he worked for a company, Forensic Medical Group of Fairfield, California, that was the former employer of the physician who actually performed the autopsy, Dr. Susan Hogan. (13 RT 3001.) Contrary to Dr. Hogan's testimony, Dr. Peterson testified that he was certain, based upon the autopsy report, that the decedent was alive at the time she was stabbed. (13 RT 3020.) As argued herein, the inconsistency between Dr. Hogan's report and her testimony, and the

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[3] The Snyder reporter's transcript was incorporated into the ROA in this case.

circumstances surrounding the autopsy should have removed her report, and Dr. Peterson's testimony, from the protections of Evidence Code section 1280.

III. LEGAL BACKGROUND OF THE ARGUMENT.

A. United States Supreme Court holdings.

Under the Sixth Amendment of the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." (U.S. Const., Amend. VI.) This protection has been incorporated into the Fourteenth Amendment and thus is applicable in state court prosecutions. (*Pointer v. Texas* (1965) 380 U.S. 400, 406-07.) The U.S. Supreme Court held that this prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36, 53–54.) While the Supreme Court left "testimonial" undefined, it did identify the "core class of 'testimonial statements' " with which the Confrontation Clause is primarily concerned: (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." (*Id.* at 51–52.)

Since *Crawford,* the Supreme Court has expanded upon the definition of "testimonial." In *Davis v. Washington* (2006) 547 U.S. 813, 822, that Court explained that statements are testimonial when the "circumstances objectively

indicate" that they are being made for the "primary purpose" of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose' " of the statement. (*Michigan v. Bryant* (2011) 562 U.S. 344, 360.) Thus, for those statements that do not clearly fall within the core class of testimonial statements as set out in *Crawford,* the "primary purpose test" has been the predominant analysis in determining whether a statement is in fact testimonial.

The Supreme Court has not addressed whether an autopsy report is testimonial in nature, but two cases have discussed the testimonial nature of a close analogy, forensic lab reports. (*Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S. Ct. 2527; *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 131 S. Ct. 2705.) As the cases cited in this Court's order indicate, other State jurisdictions have looked to both *Melendez–Diaz* and *Bullcoming* as guidance in assessing whether autopsy reports should similarly be treated as testimonial statements.

In *Melendez–Diaz,* the U.S. Supreme Court addressed a confrontation clause challenge to the admission of "certificates of analysis," which showed the results of a forensic test. (557 U.S. at 308.) The certificates were sworn before a notary public by the analysts who conducted the forensic testing, but the analysts did not testify at trial. (*Id.* at 308–09.) The Court determined that the certificates fell clearly within the category of testimonial statements, as they were "quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.'" (*Id.* at 310, quoting Black's Law Dictionary 62 (8th ed.2004).) Next, the court concluded that the purpose of the certificates under state law was specifically to provide evidence of a substance's composition, quality, and net weight,

allowing the court to "safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves." (*Id.* at 311.) Thus, the Supreme Court considered that the certificates were akin to formal affidavits that fall within a traditional type of testimonial statement, and the circumstances when the testing was performed also supported the conclusion that the analyst should have been aware that the primary purpose of the forensic test would be to aid in a future criminal investigation or prosecution.

In *Bullcoming v. New Mexico,* a forensic lab report certifying the petitioner's blood-alcohol concentration was admitted, showing that his concentration level was high enough to establish an aggravated driving offense. (131 S. Ct. at 2709.) As in Mr. Perez's case, the forensic analyst did not testify at trial and was never shown to be unavailable. (*Id.* at 2709, 2714.) The Court addressed whether the report could be admitted through the testimony of another analyst who did not sign the report certification, conduct the test, or observe the testing. (*Id.* at 2710.) The analyst who performed the testing had certified that the sample was opened in the laboratory, that the report was accurate, and that certain procedures set out on the report had been followed. (*Id.*) In accordance with *Melendez–Diaz,* the Court concluded that "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution ... is 'testimonial,' and therefore within the compass of the Confrontation Clause." (*Id.* at 2713–14.) The Court asserted that a confrontation violation could still arise, even if the analyst who performed the test merely transcribed results provided by a machine. (*Id.* at 2714.) The surrogate analyst could not be cross-examined on the test used, the process followed, any misinformation in the report, or explain why the analyst who had performed the test was now on unpaid leave, *Id.* at 2715, as here the prosecution never explained why Dr. Hogan was "unavailable." The court also

reiterated that the forensic report itself was testimonial. (*Id.* at 2716–21.) Even though the report was unsworn, in all other respects the *Bullcoming* report resembled those from *Melendez–Diaz:* law-enforcement provided the sample to be tested at a laboratory required by law to assist in police investigations, the analyst conducted the test and certified the results of the analysis, the forensic report was "formalized" in a signed document, and the legend in the report referenced local court rules that allowed for the admission of these reports in court. (*Id.* at 2716–17.) Again, the formality of the document was considered, along with the primary purpose of the document in light of the circumstances.

Thus, while the U.S. Supreme Court has held twice that certificates of analysis showing the results of forensic testing and created in aid of police investigations were testimonial, the Court has yet to clearly determine whether an autopsy report, that explains the manner and cause of death, is also testimonial. More recently, the U.S. Supreme Court handed down *Williams v. Illinois* (2012) —– U.S. ——–, 132 S.Ct. 2221, 2229–33, which addressed the testimonial nature of yet another type of laboratory report, a DNA profile of a suspect in a rape case. A plurality of the court found that the lab report was not testimonial. (*Id.* at 2244.) Justice Alito's opinion held that no confrontation violation arose because the report was not admitted for the truth of the matter asserted and therefore was not hearsay. (*Id.* at 2227–28.) However, even if hearsay, the report would not be testimonial because the primary purpose of the report was not to serve as evidence against a specified individual. (*Id.*) Alternatively, Justice Thomas' concurrence relied solely upon the solemnity test, concluding that the report lacked the "solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact." (*Id.* at 2260.)

Typically, "[w]hen a fragmented Court decides a case and no single

rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds...." (*Nichols v. U.S.* (1994) 511 U.S. 738, 745, *quoting Marks v. U.S.* (1977) 430 U.S. 188, 193.) However, in some cases "there is no lowest common denominator or 'narrowest grounds' that represents the Court's holding," and thus it is not useful to engage in this inquiry. (*Nichols,* 511 U.S. at 745.) Because *Williams* presents such a situation where there is no "narrowest ground" between Justice Alito's and Justice Thomas' opinions, *Williams* is not controlling.

B. State and lower court holdings.

Due to the lack of clear Supreme Court guidance on this issue, states are split over whether an autopsy report is testimonial hearsay.

i. States that have found the reports to be testimonial.

In a case cited by this Court in its order, the New Mexico Supreme Court has addressed whether an autopsy report is testimonial, and also whether a surrogate pathologist or medical examiner could testify about the facts and conclusions of a report that the testifying pathologist was not present for nor created. (*State v. Navarette* (N.M. 2013) 294 P.3d 435, 438.) "Since *Crawford,* a majority of the United States Supreme Court has mainly focused on the primary purpose for which the statement was made," in assessing whether a statement is testimonial. (*Id.*)[4] The autopsy was performed as "part of a homicide investigation" with two police officers attending the autopsy. (*Navarette,* 294 P.3d at 440.) In addition, because state statute required medical examiners to report his or her findings to the district attorney, he or

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[4] In applying this standard, the court in *State v. Jaramillo* (N.M.App. 2011) 272 P.3d 682, had earlier found an autopsy report to be testimonial, because the autopsy report was critical to the prosecution and was "prepared with the purpose of preserving evidence for criminal litigation." (*Id.* at 682.)

she "should know that her statements may be used in future criminal litigation." (*Id.* at 440–41.)

The *Navarette* court then took the analysis from *Jaramillo* one step further to conclude .that even though the autopsy report itself was not admitted into evidence, a pathologist who did not perform or observe the autopsy could not testify about the findings and conclusions of that report without also violating the defendant's confrontation right. (*Id.* at 443.) However, the court clarified that it is "not to say that all material contained within an autopsy file is testimonial .... [w]ithout attempting to catalogue all material in a file that could be admissible, we note that an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause." (*Id.*)

In applying the primary purpose test, the Supreme Court of West Virginia has also concluded that autopsy reports can be testimonial in nature. (*State v. Frazier* (2012) 229 W.Va. 724, 735 S.E.2d 727, 731.) An autopsy was conducted on a woman who had been shot, and the medical examiner who performed the autopsy discussed the circumstances of the victim's death with police. (*Id.* at 729.) The medical examiner noted in the autopsy report what he had learned from police about the shooting, including that the suspected perpetrator had been arrested and had confessed to the shooting. (*Id.*) The court also considered state statutes, which required autopsy reports to be kept and indexed, allowed prosecuting attorneys or law-enforcement to secure copies of the records "for the performance of his or her official duties," required that reports be furnished to "any court of law, or to the parties therein to whom the cause of death is a material issue," and also required that autopsy reports be admitted into evidence. (*Id.* at 731.) The court concluded that "[i]t is clear that ... an autopsy report prepared in a homicide case has the primary purpose of establishing or proving past events (facts) potentially relevant to a

later criminal prosecution, and is therefore a testimonial statement." (*Id.* at 732.) Moreover, because the medical examiner, who had not performed nor observed the autopsy, failed to testify about his own opinions, but rather repeated the key findings from the autopsy report, the court concluded that the error was not harmless. (*Id.* at 733–34.) (*See also Com. v. Avila* (2009) 454 Mass. 744, 912 N.E.2d 1014, 1029 (holding expert testimony by a medical examiner who did not conduct the autopsy and who recited the findings within the autopsy report was inadmissible hearsay and also violated the confrontation clause); *Cuesta–Rodriguez v. State,*(Okla.Crim.App.2010) 241 P.3d 214, 228 (autopsy report is testimonial, holding that the circumstances surrounding the death "warranted the suspicion" that the death was a homicide, and because of that it was "reasonable to assume" that the medical examiner performing the autopsy was aware that his findings and opinions would be used in a criminal prosecution).)

Other state courts and a federal court of appeals have held that autopsy reports are testimonial:

- *State v. Bass* (N.J. 2016) 132 A.3d 1207, 1222-1227 (report was testimonial and although not admitted into evidence, it was "parroted" by the testifying expert, where circumstances of the autopsy showed it was part of on-going investigation already targeting the defendant who was in custody, with the prosecutor's investigator and a police officer in attendance; reversed on other grounds) ;
- *Miller v. State* (Okla. Crim. App. 2013), 313 P.3d 934, 967-71 (also cited in this Court's order) (plain error to allow expert to relate findings from an autopsy report where he had no personal knowledge of the findings presented in the report, but harmless where defendant was able to cross examine the doctor who performed autopsy at earlier trial and no factual issues were raised at that time);

● *Commonwealth v. Carr* (Mass. 2013) 986 N.E.2d 380, 398-400 (Court states a two part test: (1) determine whether the statement was "*testimonial per se*," that is, whether it was made in a formal or solemnized form (such as a deposition, affidavit, confession, or prior testimony) or in response to law enforcement interrogation. If not, then (2) consider if it was *testimonial in fact*, that is whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting a crime; type 2 found where medical examiner was aware that the decedent suffered a violent death; error was harmless where cause of victim's death by gunshot wound to the head was not a disputed issue at trial, and four eye-witnesses identified him as the shooter);

●*West Virginia v. Kennedy*, (W.Va. 2012) 735 S.E.2d 905, 912-17 & fn. 10 (court finds that "*Williams* cannot be fairly read to supplant the 'primary purpose' test previously endorsed by the Supreme Court and established in *Melendz-Diaz* and *Bullcoming*"; because of the interplay between the prosecution and the medical examiner at the time of the autopsy and because by statute the autopsy and the autopsy report must be completed for use in judicial proceedings, there is no question that the report is testimonial);

●*United States v. Ignasiak* (11th Cir. 2012) 667 F.3d 1217, 1229-35 (Autopsy reports of five former patients who over-dosed in prosecution for illegally dispensing controlled substances, were testimonial; medical examiners who conduct autopsies required to notify appropriate law enforcement agency when beginning their examinations and required to report causes of death to state attorney; their conclusions were product of individual skill, methodology, and judgment, and were subject to risk of human error and error was not

harmless given questions of *mens rea*);

- *Wood v. Texas* (Tex. Crim. App. 2009) 299 S.W.3d 200, 208-10.
- *Massachusetts v. Nardi* (Mass. 2008) 452 Mass. 379, 893 N.E.2d 1221, 1233;
- *Rosario v. State* (Fla.App. 2015) 175 So.3d 843, 854-58;
- *North Carolina v. Locklear* (2009) 363 N.C. 438, 681 S.E.2d 293, 305.

ii. States that have found the reports to be non-testimonial.

Alternatively, several jurisdictions, including this one, *People v. Dungo*, (2012) 55 Cal.4th 608, 147 Cal.Rptr.3d 527, have held that such reports are not testimonial. Several states have agreed with this holding.

In a case cited by this Court in its order, the Illinois Supreme Court engaged in a four-part analysis to determine whether the admission of an autopsy report in a homicide case violated the confrontation clause. (*People v. Leach,* (Ill. 2012) 366 Ill.Dec. 477, 980 N.E.2d 570, 581.) The court considered: (1) whether the statement was offered for the truth of the matter asserted (hearsay); (2) If hearsay, was there an applicable hearsay exception; (3) If admissible hearsay, was the statement testimonial; and (4) If testimonial, was the admission of the statement harmless error? *Id.* The court determined that the autopsy report was admitted for the truth of the matter asserted, but the business records hearsay exception and the public records exception both applied. (*Id.,* 366 Ill.Dec. 477, 980 N.E.2d at 581–82.) The court then assessed the testimonial nature of the autopsy report. (*Id.,* 366 Ill.Dec. 477, 980 N.E.2d at 582.) Although *Crawford* provided that business records would rarely implicate the confrontation clause, the *Leach* court acknowledged that even business records could be testimonial. (*Id.,* 366 Ill.Dec. 477, 980 N.E.2d at 583.)

After examining relevant U.S. Supreme Court precedent, the *Leach*

court concluded that "whichever definition of primary purpose is applied, the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual[5] or (2) for the primary purpose of providing evidence in a criminal case." (*Id.*, 366 Ill.Dec. 477, 980 N.E.2d at 590.) "[A]lthough the police discovered the body and arranged for transport" the police did not request the autopsy, but rather "[t]he medical examiner's officer performed the autopsy pursuant to state law, just as it would have if the police had arranged to transport the body of an accident victim" (*Id.,* 366 Ill.Dec. 477, 980 N.E.2d at 591.) Therefore, the medical examiner "was not acting as an agent of law enforcement, but as one charged with protecting the public health by determining the cause of a sudden death that might have been 'suicidal, homicidal or accidental.' (*Id.,* 366 Ill.Dec. 477, 980 N.E.2d at 591–92 (citing 55 ILCS 5/3–3013 (West 2010).) Even though autopsy reports can be used in civil or criminal cases, "these reports are not usually prepared for the sole purpose of litigation." (*Id.,* 366 Ill.Dec. 477, 980 N.E.2d at 592.) Additionally, the court distinguished the autopsy report from the certificates of analysis in *Melendez–Diaz* by explaining that the autopsy report was not "certified or sworn" but "was merely signed by the doctor who performed the autopsy." (*Id.*) However, as in prior cases, the *Leach* court did not intend to make a blanket rule for all autopsy reports. Instead, the court provided that autopsy reports may be

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[5] The *Williams* plurality provides that this is the proper standard for assessing the primary purpose of a statement. (*Williams,* 132 S. Ct. at 2242.) The court explained that cases giving rise to confrontation violations have two common characteristics: "(a) they involved out-of-court statements having the primary purpose of *accusing a targeted individual of engaging in criminal conduct* and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions." (*Id.*) (emphasis added).

testimonial "in the unusual case in which the police play a direct role ... and the purpose of the autopsy is clearly to provide evidence for use in a prosecution." (*Id.*)

In another case cited by this Court's order, the Arizona Supreme Court has also found autopsy reports to be non-testimonial. (*State v. Medina* (2013) 232 Ariz. 391, 306 P.3d 48.) The court looked to *Williams* and concluded that "[n]either the plurality's 'primary purpose' test nor Justice Thomas's solemnity standard can be deemed a subset of the other; therefore, there is no binding rule for determining when reports are testimonial." (*Id.* at 63.) As such, the court applied both standards and held that the autopsy report was neither created for the primary purpose of accusing a specified individual, nor did the report satisfy the solemnity test because it did not certify the truth of the analyst's representations or arise from "a formal dialogue akin to custodial interrogation." (*Id.* at 63–64.) Accordingly, the court also held that the surrogate medical examiner could testify about the contents of the autopsy report without violating the defendant's confrontation rights. (*Id.* at 64.) (*See also United States v. James* (2nd Cir.2013) 712 F.3d 79, 97–99 [objective circumstances and examination of state statutes led to conclusion that autopsy report "was not prepared primarily to create a record for use at a criminal trial")] and in another case cited by this Court's order, *State v. Maxwell* (Ohio 2014) 139 Ohio St.3d 12, 9 N.E.3d 930, 944–52 [autopsy reports are not to serve as substitutes for trial testimony, but rather serve the purpose of documenting cause of death for public records and public health].)

Other courts that have agreed with this Court's holding in *Dungo* that autopsy reports created as part of criminal investigations are non-testimonial include:

- *State v. Hutchison* (Tenn. 2015) 482 S.W.3d 893, 905-14 (autopsy report admitted into evidence; court finds that autopsy was part of

criminal investigation, but not sufficiently solemn and no one targeted at time of autopsy);

●*State v. Maxwell* (Ohio 2014) 9 N.E.3d 930, 945-52, *cert. denied* (2015) 135 S. Ct. 1400 (expert testifies without admission of autopsy report, relies on reasoning in *Dungo*).

iii. The testimonial cases are more persuasive here.

In addition to being out-numbered by the testimonial cases, none of the non-testimonial cases are persuasive as shown by the circumstances of this case discussed *infra.* As Justice Corrigan said in her dissent in *Dungo:* "the autopsy report was sufficiently formal and primarily made for an evidentiary purpose, as the United States Supreme Court has explicated those terms to date. … High court authority compels the conclusion that admitting this testimony violated defendant's confrontation rights." (at p. 633).

Unlike the cases above, in *Dungo*, *supra*, 55 Cal. 4th at pp. 618-620, this Court read the plurality in *Williams* as a binding revision of *Melendez-Diaz* and *Bullcoming.* This Court found that the criminal investigation was not the primary purpose for the autopsy report's description of a body in this case, and that the pathologist's anatomical and physiological observations about the condition of the body recorded in the autopsy report were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation clause. (*Dungo* at p. 621.) Justice Corrigan dissented. (55 Cal.4th at p. 633.)

These cases show that each state considers the circumstances of that particular case in applying its understanding of the primary purpose test. In each instance, the circumstances under which the autopsy is performed and relevant state statutes strongly influence the analysis. The New Mexico Supreme Court, which has found autopsy reports to be testimonial, still acknowledged that it is "not to say that all material contained within an

autopsy file is testimonial....," (*Navarette,* 294 P.3d at 443), and the Illinois Supreme Court, which has found autopsy reports to be non-testimonial, conceded that autopsy reports may be testimonial "in the unusual case in which the police play a direct role ... and the purpose of the autopsy is clearly to provide evidence for use in a prosecution." (*Leach,* 366 Ill.Dec. 477, 980 N.E.2d at 592.) In other words, although jurisdictions appear to be split, a split may or may not exist in every case.

For example, the circumstances presented in *Frazier,* decided by the West Virginia Supreme Court, may have caused the Illinois Supreme Court to agree that the autopsy report under the facts of *Frazier* was testimonial. In *Frazier,* the medical examiner spoke to police about the circumstances surrounding the victim's death. In a summary within the autopsy report, the medical examiner noted what he had discussed with police, providing that the victim had been fighting with her boyfriend, walked into the bedroom and grabbed a gun, and the boyfriend then grabbed the gun from her and shot her. (*Frazier,* 735 S.E.2d at 729.) Even more significant, the medical examiner was aware that the boyfriend had been arrested and confessed to the shooting. (*Id.*) Thus, these circumstances would possibly support the Illinois Supreme Court in concluding that the police were directly involved, and the medical examiner was aware that the autopsy report would be aiding in a criminal investigation and prosecution. Thus, the differing conclusions reached by the states are informative.

Similarly, the U.S. Supreme Court's analyses in *Melendez–Diaz* and *Bullcoming* also emphasize that the *circumstances* under which the certificates of analysis were developed supported the conclusion that the reports had been created for the purpose of aiding a police investigation. Here the circumstances point to a holding that the autopsy report was testimonial.

IV. DR. PETERSON TESTIFIED TO AND RELIED UPON CASE-SPECIFIC HEARSAY IN VIOLATION OF STATE LAW.

A. *Sanchez* prohibits expert testimony relating case-specific hearsay statements unless they are competently proven by competent evidence or are covered by a hearsay exception.

In *Sanchez*, an expert witness testified about the defendant's gang affiliation. (*Sanchez*, *supra*, 63 Cal.4th at p. 670, 204 Cal.Rptr.3d 102.) As the court explained, expert witnesses are provided greater latitude than lay witnesses in presenting hearsay testimony, particularly with respect to generalized knowledge in their area of expertise. (*Id.* at pp. 675–676, 204 Cal.Rptr.3d 102.) Yet, the court noted, experts had "traditionally" been precluded from testifying to "case-specific" facts, defined as "those relating to the particular events and participants alleged to have been involved in the case being tried," since experts rarely have first-hand knowledge of the events underlying the cases in which they testify. (*Id.* at p. 676, 204 Cal.Rptr.3d 102.) Instead, in former times experts would be asked to apply their generalized knowledge to the case-specific facts through the use of appropriate hypothetical questions, premised on matters established through independent competent evidence. (*Id.* at pp. 676–677, 204 Cal.Rptr.3d 102.) More recently, however, "the line between [expert testimony about general background knowledge and case-specific facts] has ... become blurred" (*id.* at p. 678, 204 Cal.Rptr.3d 102), as exemplified by *Montiel*, in which the court allowed expert testimony about case-specific facts under a limiting jury instruction. The holding was premised on the conclusion that the expert's testimony was not offered for its truth and therefore did not constitute hearsay. (*People v. Montiel* (1993) 5 Cal.4th 877, 919, 21 Cal.Rptr.2d 705; *see Sanchez*, at p. 678, 204 Cal.Rptr.3d 102.)

In *Sanchez*, this Court rejected the legal fiction that an expert's

testimony about case-specific facts is not offered for its truth. Finding support in a concurring opinion of Justice Clarence Thomas in *Williams v. Illinois* (2012) 567 U.S. 50, 108, the court recognized that the validity of an expert's opinion depends on the assumption that the hearsay underlying the opinion is true, since "[i]f the hearsay that the expert relies on and treats as true is *not* true, an important basis for the opinion is lacking." (*Sanchez*, *supra*, 63 Cal.4th at pp. 682–683, 204 Cal.Rptr.3d 102.) If the underlying hearsay is not true, the opinion is rendered irrelevant to the case at hand. In acknowledgment of this conclusion, this Court held, the law regarding an expert's use of hearsay must be changed. (*Id.*) "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests.... [¶] What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at pp. 685–686, 204 Cal.Rptr.3d 102.) "Like any other hearsay evidence, [case-specific evidence considered by an expert] must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Id.* at p. 684, 204 Cal.Rptr.3d 102.)

In this case, the expert did exactly what *Sanchez* prohibits. He related case-specific facts which he gleaned from the autopsy report. He relied on descriptions of eyes, knife wounds and measurements mixtures of blood and other liquids that he could not independently verify. He drew conclusions that were contrary to those drawn by the author of the report based on incomplete and unreliable information that may have resulted from the participation of a

prosecutor during the autopsy.

B. Dr. Peterson testified to and relied upon case-specific hearsay contained in Dr. Hogan's autopsy report to support his opinions.

Dr. Peterson's testimony included a recitation of a number of case-specific hearsay statements included in Dr. Hogan's report. The following is a list of the improper hearsay presented through Dr. Peterson at Mr. Perez's trial:

A. Dr. Peterson testified: "[a]dditional findings included bleeding in the whites of the eyes. Those are call piticheal hemorrhages and swelling of the tissue around the eyes." (13 RT 3007.) Dr. Peterson's description of the damage to the eyes appears to have been based solely on the autopsy report and not on any photographic evidence. Appellate Counsel has not been able to identify any autopsy photographs or trial exhibits showing the whites of the victim's eyes.

B. Dr. Peterson testified about the depth of a wound marked as "E" in Exhibit 103. The depth of the cut cannot be determined from the photo, and Dr. Peterson expressly relates hearsay from Dr. Hogan to describe the depth of the cut:

> wound E, down there, went into the left lower lung lobe, so it's substantially a deeper injury.... Wound E went into the left lower lobe of lung. Dr. Hogan estimated the depth of that wound being two-and-a-half inches.... So, with that injury, there was blood inside the chest cavity on the left.
> (13 RT 3014.)

In discussing wound E, Dr. Peterson admitted that he could not independently characterize the nature of a stab mark without physically manipulating the wound:

> These wounds are all similar in terms of their physical characteristics. They all had two sharp edges. It's a little bit harder to see here, but normally what we will do is put a piece of tape across them and pull the edges together -- just use our fingers to do that -- and that way we can tell what the edges look like.
> (13 RT 3013-14.)

C. Several times Dr. Peterson described internal injuries that were not photographed but were only reported in the autopsy report:

> And injuries F, G, H and I are right here near the top of the chest…. These wounds are interesting … F was actually the deepest. G and H were superficial. They only went into the skin and soft tissue. And then I is into the right upper lung lobe. They do have a couple of interesting characteristics, though. And if we begin with wound F over here on the corner, you will notice that's been delivered towards the back, and yet the blade passed through substantial soft tissue all way forward through the neck to -- actually caught the jugular vein, the carotid artery and the thyroid gland. The thyroid glands sit right in the front. That was a deep wound. Dr. Hogan estimated three-quarter inches. It also cut the trachea, the windpipe right in the mid line. That came all the way through the back into the front like that. The other interesting fact is -- and it's hard to see in this picture. It may be in this smaller picture.
> (RT 3016-17.) (Wounds F, G, H and I shown in Exhibit 105.)

D. A short time later, Dr. Peterson returned to wounds G and H, testifying that they were both superficial. (13 RT 3017.) Again, depth cannot be determined from the photographs, and if anything wound H appears quite similar to wound I in the same exhibit 105, which the witness described:

> And then wound I, this big one down here, was deeper. There was no abrasion, so the knife wasn't pushed all the way into the bolster. And yet, it did enter the upper lobe of the right lung about an inch into the lung itself. And just as was the case on the other side of the body, there was blood in the right side of the

chest.
(13 RT 3017.)

E. Again, Dr. Peterson testified to internal injuries which could not be independently verified:

> And as a group, beginning with wound J, those tend to be deeper. In fact, J, K and L -- J, K and L here, all went into the left lower lung lobe. And then M, N and O, over on the right side -- remember, looking at her back -- M, N and O, all into the right lower lung lobe. So, all six of those injuries were deep. All six of them entered the lung either on the right or on the left.

(13 RT 3018.) (Wounds J, K, L, M, N, O depicted in Exhibit 104.)

C. The autopsy report does not qualify as a business record under Evidence Code 1280 and hence Dr. Peterson could not testify to, and rely on, hearsay contained in that report to support his opinions.

Although the autopsy report in this case was not admitted into evidence, respondents may argue that even if Dr. Peterson's testimony had been excluded, the prosecution could still have moved to have the autopsy report admitted as a public or business record.

The critical role that autopsy reports play in a homicide prosecution weighs against its uncritical acceptance as a public record in a capital criminal prosecution. Justice Pfeifer of the Ohio Supreme Court argued: "If having no autopsy report available makes a murder conviction impossible, elevating an autopsy to a central role in a murder trial, does that not make it all the more imperative that a defendant have an opportunity to call into doubt the veracity of the report through cross examination?" (*State v. Maxwell* (Ohio 2014) , 9 N.E.3d 930 at 997) (concurring in part, dissenting in part).

Confrontation of medical examiners is essential to prevent wrongful convictions. The Supreme Court has already recognized that forensic analysts

are sometimes "incompetent" or even "fraudulent." (*Melendez-Diaz*, 557 U.S. at 319.) And recent news reports confirm that medical examiners sometimes perform flawed or fraudulent analyses. It is therefore vital that defendants have the opportunity to cross-examine the authors of forensic reports to "expose any lapses or lies." (*Bullcoming*, 564 U.S. at 662.)

Nor should it be forgotten that "[a] forensic analyst responding to a request from a law enforcement official may feel pressure-or have an incentive-to alter the evidence in a manner favorable to the prosecution." (*Melendez-Diaz*, 557 U.S. at 318.) As the National Academy of Sciences has explained, medical examiners "serve the criminal justice system as medical detectives by identifying and documenting pathologic findings in suspicious or violent deaths and testifying in courts as expert medical witnesses." National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* 244 (2009). See Radley Balko, *The Saga of Shawn Parcells, the Uncredited Forensics 'Expert' in the Michael Brown Case*, Wash. Post (Dec. 2, 2014); Campbell Robertson, *Questions Left for Mississippi Over Doctor's Autopsies*, N.Y. Times (Jan. 7, 2013); Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 Stan. L. & Pol'y Rev. 381, 401-02 (2004) ("The most obvious example of forensic fraud is the reporting of results for tests that were never performed. Ralph Erdmann, a forensic pathologist from Texas who was convicted of faking autopsies, has the distinction of being one of the foremost forensic fabricators. At least twenty death penalty convictions were obtained with the aid of his testimony.")

The hearsay statements contained in Dr. Hogan's autopsy report are not covered by the business records exception in Evidence Code 1280 because they are not worthy of trust. Here, the presence of a prosecutor, not to mention four police officers, at the autopsy undermines the appearance of independence

of the coroner. The possibility of a conflict created by the presence of the prosecution team is evidenced when the medical examiner's testimony at Snyder's trial contradicted her own autopsy report. If she thought the victim was already dead at the time of the stabbing, this Court (and jury) might wonder why she included the cuts and stabbing as part of the cause of death. The game-playing described by Justice Kagan in *Williams* is evident here, when the prosecutor presents the testimony of an expert who was not present at the autopsy, and who was basing his opinion on an autopsy report which had been repudiated by the author of the report.

D. Conclusion: Dr. Peterson's testimony violated state hearsay law.

Dr. Peterson's use of the autopsy report findings, which he could not himself verify, resulted in a fundamentally unfair trial. The error was prejudicial under any standard.

The depth of the stab wounds, the severity of the hemorrhaging of the eyes, and the amount of blood in the chest cavity could not be independently verified through any of the photographic exhibits used during his testimony, and hence the record supplies no non-hearsay source for his testimony. Thus, in this case, Dr. Peterson did exactly what *Sanchez* prohibits.

V. DR. PETERSON'S TESTIMONY ALSO VIOLATED APPELLANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT AS THE AUTOPSY REPORT WAS TESTIMONIAL AND *DUNGO* SHOULD BE DISAPPROVED.

Because, as shown supra, Dr. Hogan's autopsy report was testimonial, Dr. Peterson's recitation of and reliance on its hearsay also violated appellant's right to confrontation under the Sixth Amendment. Section III, *supra,* discussed how *Crawford* and its progeny prohibit the admission of testimonial statements. Also discussed therein was the split in the lower courts as to

whether autopsy reports are testimonial and how the more persuasive authority, in the circumstances of this case, supports the holding that the report was testimonial.

Even if the report were admissible under section 1280, as discussed above, the Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."(U.S. Const., amend. VI.) "Witnesses" are those who give testimony. Appellant's Sixth Amendment right to confrontation trumps any state evidentiary statute. (*Chambers v. Mississippi* (1973) 410 U.S. 284.) The following factors show that the report was testimonial:

A. The coroner was required to transmit the autopsy report to the district attorney and was aware that the report would be used for purposes of litigation.

In *Dungo*, this Court examined a single provision of the Government Code to determine whether a coroner's duty to investigate a murder death was any different from other deaths. (*Dungo* at p. 620-21). But that statute was an incomplete and faulty basis for such analysis. The Court should also consider the coroner's statutory duties under other sections of the California Government Code which are triggered when a decedent has died from the criminal acts of another.

Special requirements are imposed on the contents of the autopsy report which apply only when it is done as part of a criminal investigation. Under Government code § 27491.1., entitled " Report of death to police officials", the coroner was required

> [i]n all cases in which a person has died under circumstances that afford a reasonable ground to suspect that the person's death has been occasioned by the act of another by criminal means, the coroner, upon determining that those reasonable

> grounds exist, *shall immediately notify the law enforcement agency having jurisdiction over the criminal investigation. Notification shall be made by the most direct communication available. The report shall state the name of the deceased person, if known, the location of the remains, and other information received by the coroner relating to the death, including any medical information of the decedent that is directly related to the death. The report shall not include any information contained in the decedent's medical records regarding any other person unless that information is relevant and directly related to the decedent's death.* (Added by Stats.1959, c. 1537, p. 3864, § 1. Amended by Stats.1985, c. 304, § 3; Stats.2000, c. 1068 (A.B.1836), § 2.)

Under Government Code section 27521, additional duties arise when the victim is unidentified:

> …(d) (3) A coroner, medical examiner, or other agency tasked with performing an autopsy pursuant to Section 27491 shall not use an electronic imaging system to conduct an autopsy in any investigation where the circumstances surrounding the death afford a reasonable basis to suspect that the death was caused by or related to the criminal act of another and it is necessary to collect evidence for presentation in a court of law. If the results of an autopsy performed using electronic imaging provides the basis to suspect that the death was caused by or related to the criminal act of another*, and it is necessary to collect evidence for presentation in a court of law,* then a dissection autopsy shall be performed in order to determine the cause and manner of death.
>
> (e) The coroner, medical examiner, or other agency performing a postmortem examination or autopsy *shall prepare a final report of investigation in a format established by the Department of Justice. ...*
> (Added by Stats.2000, c. 284 (S.B.1736), § 1. Amended by Stats.2014, c. 437 (S.B.1066), § 6, eff. Jan. 1, 2015; Stats.2016, c. 136 (A.B.2457), § 1, eff. Jan. 1, 2017.) (Emphasis added).

More recently, the legislature has recognized that the autopsy is part of the investigation process and has added additional safeguards for the autopsy to

under Government Code section 27522:

> (f)(1) *Only individuals who are directly involved in the investigation of the death of the decedent shall be allowed into the autopsy suite.*
> (2) If an individual dies due to the involvement of law enforcement activity, law enforcement personnel *directly involved in the death of that individual shall not be involved with any portion of the postmortem examination, nor allowed inside the autopsy suite during the performance of the autopsy*.
> (g) *Any police reports, crime scene or other information, videos, or laboratory tests that are in the possession of law enforcement and are related to a death that is incident to law enforcement activity shall be made available to the physician and surgeon who conducts the autopsy prior to the completion of the investigation of the death*.
> (Emphasis added).
> *Added by Stats. 2016, Ch. 787, Sec. 7. Effective January 1, 2017.)*

In the case of violent death, California Government Code section 27504.1 requires the following:

> If the findings are that the deceased met his or her death at the hands of another, the coroner shall, in addition to filing the report in his or her office or with the county clerk, as determined by the board of supervisors pursuant to Section 27503, *transmit his or her written findings to the district attorney, the police agency wherein the dead body was recovered, and any other police agency requesting copies of the findings*….
> (Amended by Stats. 2002, Ch. 221, Sec. 36. Effective January 1, 2003) (emphasis added).

The courts of New Mexico, West Virginia and the 11th Circuit have said such statutory directives are sufficient to establish that a statement is testimonial.

In *Dungo* (at p. 619), this Court held that autopsy reports asserting that the cause of death was homicide are non-testimonial because an autopsy does not invariably support a criminal prosecution. (*See also Leach*, 980 N.E.2d at 591-92). For instance, an autopsy may be performed to rule out suicide or accident, or it might unexpectedly produce exculpatory evidence. (*Id*.) Also in *Dungo* (at p. 621), this Court held that autopsy reports are non-testimonial because medical examiners are authorized to perform autopsies in a number of situations, only one of which is when a death is potentially a homicide. (*See also Maxwell*, 9 N.E.3d at 951.) Thus, this reasoning goes, the primary purpose of an autopsy report is never to create evidence for a criminal trial. (*Id.*)

It is true that medical examiners do not invariably initiate an autopsy with a criminal investigation in mind. But when they do -- the only circumstances that matter under the question presented --an autopsy report's primary purpose is to codify evidence for a criminal prosecution. (*See*, *e.g., Bullcoming*, 564 U.S. at 663-64; *Melendez-Diaz*,557 U.S. at 310 (quoting *Crawford*, 541 U.S. at 51; *see also Michigan v. Bryant* (2011) 564 U.S. 344,365 [the testimonial inquiry hinges on the "context" of the declaration].) Notwithstanding *Dungo,* when examiners write, sign, and certify a report declaring that the cause of death was caused by criminal acts, and then forward that report directly to the district attorney or the department of justice, the report's primary purpose is to support a criminal case.

B. The findings in an autopsy report are subjective and the autopsy was conducted in circumstances which increased the risk of subjectivity.

The majority opinion in *Dungo* reasons that statements describing the pathologist's anatomical and physiological observations about the condition of the body merely record objective facts. (at p. 619) But *Melendez-Diaz*

forecloses any holding that "objective" anatomical and physiological observations in autopsy reports prepared in conjunction with homicide investigations are non-testimonial. Witnesses' statements regarding "objective" facts in the physical world -- license plate numbers, the color of getaway cars, the time a clock displayed when shots rang out, etc. -- are no less testimonial than other statements which are made to provide evidence for a criminal trial. (*See Bullcoming*, 564 U.S. at 660.)

History reinforces this testimonial analysis. As the U.S. Supreme Court has recently recognized, "coroner's reports" were inadmissible under American common law without the opportunity for prior confrontation. (*Melendez-Diaz*, 557 U.S. at 322, citing *Crawford*, 541 U.S. at 47 n. 2, *Giles v. California* (2008) 554 U.S. 353, 398-401 (Breyer, J., dissentíng), and *Evidence-Official Records-Coroner's Inquest*, 65 U. Pa. L. Rev. 290 (1917)). And long before *Crawford*, the Supreme Court explained that an autopsy report could not be admitted without the consent of the accused "because the accused was entitled to meet the witnesses face to face." (*Díaz v. United States* (1912) 223 U.S. 442, 450.)

Although the four-Justice plurality in *Williams* suggested that forensic reports should be deemed testimonial within the meaning of *Crawford* only when they "accus[e] a targeted individual," 132 S. Ct. at 2242-43, a majority rejected this suggestion. As Justice Kagan explained: "Where that test comes from is anyone's guess. Justice Thomas rightly shows that it derives neither from the text nor from the history of the Confrontation Clause." (*Williams*, 132 S. Ct. at 2273-74 (Kagan, J., dissenting) (*citing id.* at 2262 (Thomas, J., concurring).)

Justice Werdegar wrote a concurring opinion in *Dungo* in order to "detail why the anatomical and physiological observations recorded by a forensic pathologist in an autopsy report should not be considered

testimonial." (at p. 622). However, she conceded that "[a] statement should [] be deemed more testimonial to the extent it was produced through the agency of government officers engaged in a prosecutorial effort, and less testimonial to the extent it was produced for purposes other than prosecution or without the involvement of police or prosecutors." (at p. 626). She argued that the record in *Dungo* "does not show or suggest" that the doctor who conducted the autopsy was "prompted by prosecutorial agents to make any of the statements at issue…" (at. p. 627).

But the circumstances surrounding the autopsy in the case are starkly different from those contemplated by Justice Werdegar. This autopsy was conducted in an adversarial context which brings it squarely within the Confrontation Clause's protections. The record here suggests that some sort of prosecutorial influence was brought to bear during the autopsy, and then the prosecutors took further advantage by substituting a new witness.

In addition, even with regard to so-called "objective" findings, forensic pathology involves a significant amount of subjectivity and judgment -- far more than that involved in the drug or alcohol testing the Supreme Court analyzed in *Melendez-Diaz* and *Bullcoming*. (*See,* George M. Tsiatis, *Putting Melendez-Diaz on Ice: How Autopsy Reports Can, Survive the Supreme Court's Confrontation Clause Jurisprudence*, 85 St. John's L. Rev. 355, 383 (2011) ["Autopsies are also much more complex than the identification of a narcotic, and are more prone to shades of gray, as their outcome is a diagnosis, not a chemical compound match."] ; *see also,* National Association of Medical Examiners, *Forensic Autopsy Performance Standards*, Section B (2006), available at <http.//www.mtf.org/pdf/name_standards_2006.pdf> [describing processes for arriving at "interpretation and opinions," as well as exercising "the discretion to determine the need for additional dissection and laboratory tests"].)

VI. THESE ARGUMENTS ARE PRESERVED FOR REVIEW AS OBJECTION AT THE TIME OF TRIAL WOULD HAVE BEEN FUTILE.

Defense counsel did not raise an objection under *Crawford* in connection with the expert's testimony. However, at the time of Mr. Perez's 2001 trial, this Court's binding precedent held that hearsay statements testified to by an expert as a basis for his or her expert opinion are not offered for the truth of the matter asserted. (*See People v. Gardeley* (1996) 14 Cal.4th 605, 619.) In 2001, that conclusion was binding on the trial court and thus, even if the statements were deemed to be testimonial, the confrontation clause would not bar their admission given they were not offered for their truth. Because the complained of evidence was admitted as a basis for the expert's opinion and not for the truth of the statements, it would have been futile to object. (*See People v. Sanchez* (2014) 223 Cal.App.4th 1, 21,24, review granted and opn. superseded by *People v. Sanchez* May 14, 2014 [expressly disapproving *Gardeley*].)

It is clear that *Sanchez* materially changed the law governing expert testimony in effect at the time of Perez's trial. The *Sanchez* court expressly disapproved six prior Supreme Court decisions, noting, in particular, "We also disapprove *People v. Gardeley* [(1996)] 14 Cal.4th 605 [59 Cal.Rptr.2d 356, 927 P.2d 713], to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13, 204 Cal.Rptr.3d 102.)

" [R]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence.' " (*People v. Brooks* (2017) 3 Cal.5th 1, 92, 219 Cal.Rptr.3d 331.) In addition, parties are generally not required to anticipate rulings that significantly change the prevailing law. The

Supreme Court has consistently entertained claims premised on *Crawford v. Washington*, *supra*, 541 U.S. 36, 124 S. Ct. 1354, despite a defendant's failure to object on that ground, if the hearing occurred prior to *Crawford*'s issuance. As this Court explained in *People v. Banks* (2014) 59 Cal.4th 1113, 176 Cal.Rptr.3d 185, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3, 188 Cal.Rptr.3d 328, "[b]ecause *Crawford* 'was a dramatic departure from prior confrontation clause case law,' a defendant's failure to raise a *Crawford* claim in a pre-*Crawford* trial 'is excusable because defense counsel could not reasonably have been expected to anticipate this change in the law.' " (*Banks*, at p. 1167, 176 Cal.Rptr.3d 185; *see similarly, People v. Harris* (2013) 57 Cal.4th 804, 840, 161 Cal.Rptr.3d 364; *People v. Kitchens* (1956) 46 Cal.2d 260, 263 ["A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal. Moreover, in view of the decisions of this court ..., an objection would have been futile, and 'The law neither does nor requires idle acts.' "].) While *Sanchez* might not have been as dramatic a departure from prior law as *Crawford*, it certainly was a significant change. (*See also, People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 2 ("Respondent argues appellants forfeited this issue by failing to object on confrontation clause grounds in the trial court. Any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert 'basis' evidence does not violate the confrontation clause. (*See, e.g., People v. Hill* (2011) 191 Cal.App.4th 1104, 1128-1131, 120 Cal.Rptr.3d 251. We will therefore address the merits of this claim.")

Even if defense counsel had interposed appropriate hearsay objections to Dr. Peterson's testimony, the objections would undoubtedly have been

resisted by the prosecution and overruled by the court, which would have left the testimony unchanged and lacking the foundation required by *Sanchez*. Only if the trial court had refused to follow applicable precedent would the prosecution have been forced to lay a *Sanchez*-appropriate foundation.

VII. THE ERRORS, WHETHER ANALYZED AS STATE HEARSAY VIOLATIONS OR AS CONFRONTATION CLAUSE VIOLATIONS, OR BOTH, WERE PREJUDICIAL AND REQUIRE A NEW TRIAL.

Prejudice resulting from the allowance of expert testimony in violation of *Sanchez* is evaluated under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 299 P.2d 243, which requires reversal if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id.* at p. 836, 299 P.2d 243; *see also People v. Ochoa* (2017) 7 Cal.App.5th 575, 589, 212 Cal.Rptr.3d 703.)

However, because the autopsy report was testimonial hearsay that violated appellant's federal Constitutional rights under the Sixth, Eighth and Fourteenth amendments, *Chapman v. California* (1967) 386 U.S. 18, 87 S. Ct. 824 applies. However, under any standard, the error was prejudicial and requires a new trial.

Against this background, we cannot conclude the improperly admitted evidence was harmless beyond a reasonable doubt. (*Sanchez*, *supra*, 63 Cal.4th at pp. 698–699, 204 Cal.Rptr.3d 102, 374 P.3d 320; *Chapman, supra*.)

A. Prejudice as to the jury's findings on causation.

When Dr. Hogan's testimony in the Snyder case is compared to that of Dr. Peterson's in Perez's, it can be seen that Dr. Peterson minimized the evidence of strangling as the sole cause of death and exaggerated the likelihood that the stabbing wounds were inflicted while the victim was alive. Had Dr. Hogan testified, her actual observations during the autopsy would

have been explored. Her written conclusions were based on observations not fully set out in the autopsy report. As a result, defense counsel was deprived of the opportunity to raise doubts as to who, among the three entrants into the Dahers' house, was responsible, or primarily responsible, for the death of Mrs. Daher.

At Perez's trial, Dr. Peterson testified that there was evidence of ligature strangulation accomplished by a phone cord. (13 RT 3007.) In his opinion, death was caused by a combination of ligature strangulation and stabbing. (13 RT 3021.) There was no way to tell whether Mrs. Daher was conscious or unconscious when she was stabbed (13 RT 3025) but "*unequivocally*, based on the blood inside her chest....*her heart was still beating at the time those stab wounds were delivered.*" (13 RT 3020.) (Emphasis added). Thus, the cause of death was primarily due to the stab wounds, not strangulation, according to Dr. Peterson.

As for the strangulation, Dr. Peterson testified that

> ligature strangulation was accomplished with a phone cord. Specifically, it was the coiled part of the phone cord that was wrapped around the neck with sufficient force to actually leave a furrow in the skin....So, there had been...there was a cord wrapped around the neck as the body was received. There was a ligature furrow associated with that cord.
> (13 RT 3007.)

Yet at co-defendant Snyder's trial, Dr. Hogan, who actually performed the autopsy, testified that

> For the extent of these injuries, I would expect more blood in the chest. So, I can't say definitively, but my opinion is that the strangulation occurred first and that *her heart may not have been beating when these stab wounds occurred*, based on the you know, I would expect about a thousand milliliters [of blood] with these kind of injuries.
> (Snyder RT 943-944.) (Emphasis added).

Describing the strangling at co-defendant Snyder's trial, she was emphatic:

> She didn't just have petechial, she had hemorrhages. The whites of her eyes were bright red from big edges, and she had a lot of hemorrhages from the periorbital soft tissue, so they had even broken larger vessels. So, there was a tremendous force applied ….
> (Snyder RT 933.)

Thus, Dr. Hogan attributed the primary cause of death to strangulation in Snyder's trial. This opinion would have been much more favorable to Perez than what his jury heard from Dr. Peterson, that the victim was still breathing after the strangulation and the primary cause of death was the stabbing. This is because the main State's witness, Maury O'Brien, attributed the stabbing solely to Perez at his trial:

> Q. When you handed the knife to Mr. Perez, what did you see him do?
>
> A. I saw him walk over to the victim and stab her many times.
>
> (11 RT 2488-89.)

Mr. O'Brien, as a co-defendant who testified against Mr. Perez in hopes of avoiding the death penalty, was the State's most important guilt phase witness. He was the lynchpin of the State's case for Perez's guilt as the only witness to directly tie Perez to the murder of Mrs. Daher. Because O'Brien testified inconsistently at Perez's trial and at co-defendant Lee Snyder's trial as to what he allegedly saw of the victim's murder, the guilt phase question of who-did-what was very much in issue.

At Snyder's trial, O'Brien testified that he saw *both* Snyder and Perez put their hands on the decedent while she was being strangled. (4 Snyder RT 717). But at Mr. Perez's later trial, O'Brien changed his story dramatically in order to make it appear that Mr. Perez was the sole or the main perpetrator of the murder. (11 RT 2484.)

Regarding the strangulation of the victim by means of the phone cord, O'Brien testified in the Snyder case as follows:

> Q. At that point did you see the phone cord?
> A. Yes.
> Q And where was the phone cord?
> A. Tied around her feet, kind of like hogtied, and her neck...
> Q. Were they using the phone cord to pull her back, if you remember?
> A. No. No.
> Q. So the phone cord was around her neck and she was tied on her stomach and they were both pulling her head back?
> A. Yeah that's what I remember.
> (Snyder RT 717-718.)

Yet at Perez's trial, O'Brien was asked by prosecutor Sequeira:

> Q. Could you see the cord wrapped around the victim's neck?
> A. I wasn't that close to see it. I remember seeing the cord around her back as well so that...I can't remember seeing it around her neck.
> (11 RT 2484-2485.)

There was testimony at Perez's trial that Snyder, not Perez, did the stabbing. O'Brien's girlfriend Layce Harpe was called as a defense witness. (14 RT 3340.) She testified that O'Brien had talked to her about a murder case before he was arrested. (14 RT 3344.) Harpe testified that O'Brien said that he and Lee Snyder and another guy had gone inside an open garage into a lady's house and killed her for her car and $20. (14 RT 3346.) Ms. Harpe was not sure who O'Brien said strangled the victim but O'Brien told her that Lee Snyder stabbed the woman many times. (14 RT 3348.) O'Brien kept changing his story. (*Id.*) Harpe was uncomfortable talking to the police and did not tell them that O'Brien had said Lee Snyder stabbed the lady. (14 RT 3350.)

At trial, Harpe also admitted that about nine months or a year after the crime, a defense investigator talked to her. (14 RT 3351.) Harpe told the investigator that O'Brien told her that Lee Snyder stabbed the lady. (14 RT

3353.) O'Brien also told the investigator that he was downstairs in the house and then went upstairs to give Lee Snyder the knife. (14 RT 3358.) Harpe claimed that the only difference between what Harpe told the police and what she told the investigator was that O'Brien said Snyder asked for a knife and that he watched Snyder stab the victim. (14 RT 3377.) O'Brien said that Snyder and the other person killed her. (14 RT 3379.)

The prosecutor had to attack Harpe as an unreliable witness as her testimony did not fit with that of O'Brien:

> Her big chance in this case was Lee Snyder did the stabbing as opposed to the defendant. She doesn't know who the third person was. Maury O'Brien never told her.. That's what her testimony was. But it seemed to be...the big difference was that Lee did the stabbing and not the defendant. She was hardly a reliable witness...So Lacy (sic) Harpe is hardly the type of witness that is going to raise a reasonable doubt in your mind and negate the testimony of [the State's witnesses] and 115 some odd People's exhibits.
> (15 RT 3588-89.)

O'Brien's attribution of the stabbing to Perez, along with Dr. Peterson's testimony exaggerating the stabbing as a cause of death and minimizing the strangling, resulted in the jury having a warped view of the evidence and prevented appellant from being able to effectively confront the untrustworthy evidence for both guilt and penalty phase purposes.

B. Prejudice as to the jury's consideration of circumstantial evidence of *mens rea*.

The prosecutor admitted that the stab wounds were relevant to prove *mens rea.* "I'm highlighting every stab wound. *Every stab wound is further evidence of intent to kill, express malice."* (8 RT 1969) (emphasis added.) The prosecutor also wanted all the pictures in evidence and, to support that argument,

stated that there will be an expert who will give an opinion based on the photos. (8 RT 1969.)

Mens rea was also stressed at the State's guilt phase final arguments. The prosecution told the jury that

> [t]he killing was done with malice aforethought or occurred during the commission of a robbery or burglary...What is malice aforethought? Intent to kill. Intent to kill or do a dangerous act knowing it's dangerous and with disregard for consequences...consequences of human life.
> ...the additional facts that elevate it from second degree to first degree murder, the killing was willfully, deliberate and premeditated.
> (15 RT 3543, 3545.)

However, a jury could have believed that the stab wounds were inflicted with the knowledge that the victim was already dead, and it would have caused the jury to more closely examine the evidence as to what role Mr. Perez played in the crime. It cannot argued that this error was harmless beyond a reasonable doubt.

C. Prejudice as to the jury's consideration of evidence to establish aggravating circumstances of the crime during penalty phase deliberations.

Similarly, had Dr. Hogan testified that strangulation, allegedly performed by both Snyder and Perez, was the main cause of death, rather than Dr. Peterson's testimony that death was mainly due to the stab wounds, allegedly inflicted solely by Perez, this could have been used at the punishment phase as a rationale for a punishment of less than death. However, Perez's jury was left with the testimony of O'Brien that Perez was primarily responsible for the victim's death. The ambiguity and uncertainty created by the differing versions of events renders appellant's sentence of death unreliable under the Eighth and Fourteenth Amendments.

VIII. CONCLUSION

For the reasons discussed herein, appellant respectfully requests that as to Issue XVII, this Court hold that the trial court erred in allowing inadmissible hearsay testimony from the pathologist who was not present at the autopsy (AOB at pp. 244-259; appellant's reply brief at pp. 94-101); and that the error was harmful and prejudicial and, as a result, the judgment and sentence of death must be reversed.

DATED: September 11, 2017.

Respectfully submitted,

/s/ A. Richard Ellis

_____

A. RICHARD ELLIS
ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I am the attorney appointed by this Court to represent appellant Joseph Perez, in this direct appeal. I conducted a word count of this brief using my office's computer software (WordPerfect X8). On the basis of that computer-generated word count, I certify that this brief, excluding tables, exhibits, and certificates is 11,563 words in length.

Dated: September 11, 2017.

/s/ A. Richard Ellis

_____

A. Richard Ellis
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

I, A. RICHARD ELLIS, hereby declare that I am a citizen of the United States, over the age of eighteen, an active member of the State Bar of California, and not a party to the within action. My business address is 75 Magee Ave, Mill Valley, California 94941.

On September 11, 2017 I served the within

APPELLANT'S SUPPLEMENTAL BRIEF AS REQUESTED IN THIS COURT'S ORDER DATED AUGUST 16, 2017

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Mr. Joseph Perez
T-42655
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San Quentin, CA 94974

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Mill Valley, California, on September 11, 2017.

/s/ A. Richard Ellis

_____

A. RICHARD ELLIS

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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