SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	**AUTOMATIC APPEAL**
	)	
	)	**No. S058157**
Plaintiff/Respondent,	)	
	)	
v.	)	**(Contra Costa**
	)	**Superior Court**
MICHAEL NEVAIL PEARSON,	)	**No. 951701-2)**
	)	
Defendant/Appellant.	)	
	)	

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

On Appeal From A Sentence Of Death
From The Superior Court Of California, Contra Costa County
The Honorable RICHARD S. FLIER, Judge Presiding

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DEATH PENALTY

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I. Appellant's Claim Is Preserved For Appellate Review

Respondent contends that appellant's trial counsel forfeited appellant's constitutional claims in offering only a "hearsay" objection to testimony reiterating the contents of the autopsy reports, and in remaining silent when copies of the report were later offered into evidence.

Respondent overlooks *People v. Gutierrez* (2009) 45 Cal. 4th 789, 809 (*Gutierrez)* and relies on two inapposite cases, *People v. Alvarez* (1996) 14 Cal.4th 155, 186, and *People v. Chaney* (2007) 148 Cal.App.4th 772, 777, and on a misstatement of the relevant holding in *People v. Partida* (2005) 37 Cal.4th 428.

In *Gutierrez*, this court found no procedural bar properly applicable to the Confrontation Clause claim raised for the first time on appeal. (*People v. Gutierrez*, *supra,* 45 Cal. 4th 789, 809-812.) There, only a hearsay objection was raised below, and the defendant's appellate claim required this court to determine whether a statement that the trial court erroneously admitted as a spontaneous utterance was "testimonial" under *Crawford v. Washington* (2004) 541 U.S. 36. Citing *People v. Partida*, *supra,* 37 Cal.4th 428, 436, and its progeny, this court declared that "defendant's new constitutional arguments are not forfeited on appeal." (*Id.* at p. 809.)

Like *Gutierrez* (and unlike *Chaney*) this case was tried before *Crawford v. Washington* overruled *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (Roberts), "which for 24 years provided the framework governing the admissibility of statements from witnesses who did not testify at trial." (*Crawford, supra*, 541 U.S. at pp. 61-68.) *Roberts* had permitted the admission of hearsay statements of unavailable witnesses, without violating the confrontation clause, if those statements fell within a firmly rooted hearsay exception. (*Roberts, supra*, 448 U.S. at p. 66.) "*Crawford* reshaped the confrontation landscape". (*People v. Giles* (2007) 40 Cal. 4th 833, 844 (overruled on other grounds in *Giles v. California* (2008) 128 S. Ct. 2678, 2683.) Accordingly, this court granted review in

People v. Dungo (S176886), a recent Court of Appeal decision applying *Crawford* and Melendez-Diaz to autopsy findings, on December 2, 2009.

At the time of appellant's trial, a Confrontation Clause objection would have been futile under federal as well as state case law. Indeed, although respondent now claims ignorance of "any appellate case which would have precluded appellant from making a Confrontation Clause objection at the time of trial" (RSB 12)[1] respondent's first brief, filed only two years before, submits that appellant could not have argued that his confrontation rights were violated at his trial because "such claims were expressly rejected in [*People v.*] *Beeler* [1995] 9 Cal.4th 953, 979-980." (RB 173.) Respondent's previous position was closer to correct.

It is settled that no specific objection is required when futile under controlling law. *(People v. Morton* (2008) 159 Cal. App. 4th 239, 249; cf. *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 [no forfeiture of appellate claim based on unforeseeable change in law in between trial and appeal]; *People v. Black* (2007) 41 Cal.4th 799, 810-812 [same]; *People v. Turner* (1990) 50 Cal.3d 668, 703 [same].)

Respondent also asserts that appellant forfeited his appellate claims respecting admission of the autopsy reports themselves because his counsel failed to restate his hearsay objection, or make a Confrontation Clause

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[1] As used herein, "RSB" refers to Respondent's Supplemental Brief filed May 13, 2010. "RB" refers to Respondent's Brief filed June 3. 2008.

argument, when the prosecutor formally offered the reports into evidence after taking testimony relating their contents to the jury. (RSB 11.) This argument ignores not only the previously-cited cases excusing the failure to object when futile under controlling case law, but also the well-settled rule excusing the absence of trial court objection when it would have been futile under the trial court's prior ruling. (See, e.g., *People v. Gamache* (2010) 48 Cal. 4th 347, 373; *People v. Antick* (1975) 15 Cal.3d 79, 95; *People v. Zemavasky* (1942) 20 Cal. 2d 56, 62.) Although respondent suggests that trial counsel "may have chosen not to make a broader objection for any number of reasons" (RSB 12) respondent offers no reason why this case should be subject to a newly broadened rule of forfeiture under which the possibility that counsel failed to object for idiosyncratic reasons justifies a forfeiture of an appellate claim for failure to raise a futile objection.

Finally, none of respondent's forfeiture arguments acknowledge the legal nature of the issues raised by appellant's *Melendez-Diaz* claim and respondent's arguments on the merits. A claim raising a pure question of law on undisputed facts is properly cognizable on appeal, even where no objection was entered at trial, the futility doctrine is inapplicable, and no unforeseeable change in the law occurred after trial. *(People v. Black, supra,* 41 Cal.4th 799, 810-812.) And while respondent's presentation of the facts obscures the basis for appellant's claim, there is, in truth, no

dispute about the facts.

II. The Admission of the Autopsy Reports and Testimony Repeating Their Assertions Without Producing the Author of the Reports Violated Appellant's Sixth Amendment Right to Confrontation

A. Respondent's strawman

Respondent's brief overstates appellant's claim at the outset ("appellant argues that admission of expert testimony relying in part upon the autopsy reports violated his Sixth Amendment right ..." –RSB 1). Likewise, respondent's argument subheading apropos of appellant's claim aims at a strawman. ("Dr. Peterson's independent opinion as to the cause of death was properly received." – RSB 13.)

This case is not about the admissibility of independent opinions, or opinions that simply rely in part on autopsy findings. It is about the admissibility of an autopsy report's contents when the prosecution does not offer an opportunity to confront the author. Throughout Dr. Peterson's testimony, and in submitting the text of the autopsy reports into evidence, the prosecution presented Dr. Lipton's reported observations and conclusions in great detail, and without any suggestion that those assertions ought not be considered for the truth of the matter stated. Dr. Peterson was used as a conduit for hearsay. As detailed below, every significant

opinion that he rendered was, and had to be, prefaced by assertions from Dr. Lipton's autopsy reports. And, as explicated further on, each of those reports represented a "solemn declaration prepared for the purpose of establishing or proving some fact" ... "made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial" and were thus testimonial hearsay. (*Melendez-Diaz, supra*, 557 U.S. at p.___, 129 S.Ct. 2532.)

B. Testimony Citing and Reciting Autopsy Findings From The Autopsy Reports

In respondent's ten-page recitation of the evidence, the testifying pathologist's citations and recitations of the autopsy report's assertions are obscured. Appellant's brief isolates the evidence at issue, and explains its importance in establishing that each victim received a fatal shot, execution style, after suffering numerous gunshot wounds. (ASB 2-3.) Also, the transcript of the prosecutor's direct examination of testifying pathologist Peterson's speaks for itself, to wit:

> Q. Now, after noting both **in the report** and in the photos the external injuries, did you review that part of the report and photograph that deal with the internal damage that those wounds created?
>
> A. Yes, I did.
>
> Q. Now, after noting both **in the report** and in the

photos the external injuries, did you review **that part of the report** and photograph that deal with the internal damage that those wounds created?

A. Yes, I did.

Q. And does **Dr. Lipton first note** the existence of any blood in the area of the abdominal cavity?

A. **He described** a quantity of blood within the abdominal cavity that would be approximately a cup to a cup and a half or so.

Q. Does **that particular finding** right there have any medical significance for you?

A. Based on that amount of blood and based on the head injury that I also know about, my opinion is that the injury to the abdomen occurred first. There is an amount of bleeding associated with that injury. And shortly following the shot to the head, circulation or breathing stops, so there was no further bleeding.

Q. In addition to that, did you note **in the report** any additional damage to any of the organs in Lorraine Talley's body and if so, what?

A. As the bullet passed through the abdomen, it actually damaged three separate organs. There is an organ sitting over on the left side of the abdomen just up underneath the lung called the spleen. It's about the size of a fist or so and is covered by a membrane. That membrane was torn by the bullet passage.

Right next to the spleen was where the stomach sits. The stomach had actually been perforated by the bullet. So the bullet entered the back wall of the stomach, went through the body of the stomach, exited the front wall of the stomach.

Additionally, the left portion of the liver, the left lobe of the liver is also across the midline, more

on the left side of the body. That had been perforated by the bullet.

Basically the bullet went through the back of the abdominal wall, crossed the spleen, went through the stomach, went through the left lobe of the liver, and then exited out the front.

Q. Was it the hemorrhage from these wounds then that would have caused the bleeding that he observed in the abdominal cavity?

A. Yes. (15RT 2997-98, emphasis added.)

* * *

Q. And as the bullet passed through the head, what specific areas did it go through?

A. There were two specific **named** portions of the brain that were damaged.... (15RT 2999.)

* * *

Q. Is it the kind of wound that in this case did cause death?

A. Yes.

Q. Now, let me ask you with respect to the first wound, is it the kind of wound that if immediate medical attention is administered it's survivable?

A. The abdominal wound?

Q. Yes.

A. Yes.

Q. Now, would a person -- assume hypothetically a person becomes aware they're just about to be shot, they turn and begin to run and moments, perhaps fractions of a

second thereafter they get shot in the back. With that kind of wound, would such a person be able to continue to move at least for a few steps, say, around a conference table?

A. Based on the type of bleeding this wound produced there would be no physiologic reason, no mechanical reason to say that she couldn't keep moving. Obviously an individual's response to being shot varies widely and some people could take more trauma than others. But there was not that much blood loss associated with the wound. And based on that alone, I would say she would have been capable of further movement after that shot. (15RT 3000.)

* * *

Q. What was the cause of death of Ruth Lorraine Talley?

A. **The cause of death is listed** as brain destruction due to a gunshot wound to the head with a contributory caused gunshot wound to the abdomen.

Q. And based upon your review of the reports that you have in front of you as well as the photographs in front of you, do you share that opinion?

A. Yes, I do. (15RT 3001.)

* * *

Q. Now, during the time of the autopsy **did Dr. Lipton actually specifically measure the angles of degrees, I guess I should say, and degrees of angle the trajectory of the bullet as it passed through the head**?

A. When he connected the entrance to the exit wound, **he stated** that the resulting trajectory was at approximately a 45 degree angle downward, 5 degrees from front to back and left to side, right.

Q. And did he make a similar kind of measurement with respect to the angle of the shot to the back?

A. Yes. **He described** that wound as passing from five degrees left to right. (15RT 3005.)

* * *

Turning to the autopsy of Ms. Garcia's body:

Q. **What were the external observations during the autopsy**?

A. In this particular case, there were three separate gunshot injuries. And I'll basically describe those from the top on down.

There was a perforating gunshot wound of the head, similar fashion this entrance was on the back of the head above and behind the left ear. The exit, however, was on the face on the right cheek. So that was the first perforating gunshot injury.

The second perforating gunshot injury was a little bit different in that it actually entered the outside of the left arm, passed on through the arm to then reentered the abdomen on the left, proceeded across the front of the abdomen on inside and ended up beneath the skin of the abdomen on the right so that bullet was recovered.

Then the third shot entered the left side of the abdomen a little bit behind the second shot, passed through the back of the abdomen and went through the abdominal aorta, large blood vessel, and also ended up in the abdominal wall on the right. So that bullet was recovered as well.

Q. Now, jumping ahead for a moment to the internal examination, **was there a large amount of blood collected specifically in the area of the retroperitoneum**?

A. **In this case, there was approximately one quart of blood inside the abdomen and the retroperitoneum in the abdominal area or the area that runs. So that fits with the bullet passing through the aorta.**

Q. **Based upon that, similar to my question of before about 150 ccs, I think it was, in the abdominal wall of the abdominal cavity of Lorraine Talley, does this 1,000 ccs in the blood of -- area of Barbara Garcia give you any indication as to perhaps most precisely which of the three wounds, the three bullet wounds to the body, what's the last one?**

A. **Certainly. And following similar reasoning, either one or both of the abdominal shots occurred first and the final shot was the shot to the head.**

Q. Now, with respect to the -- first two shots, I don't know that I have a preference in which order you take them but the shots to the abdomen, if I can get you to approach me using me again as a dummy and show us first the shot to the back.

A. **It's more to the side than to the back, and that would have been about right here, passed through the inside of the abdominal cavity**, the bone that runs along the spine right in front of that basically is where the aorta is, big blood vessel, maybe the size of your thumb or so.

The bullets passed through the back of the abdomen, passed through that vessel, and ended up beneath the skin over on the right.

When Dr. Lipton examined the body, he could actually see a little bit of the bruise and feel the bullets there.

Q. Would the existence of the bruise tell you whether or not Barbara Garcia continued to live after that first shot was fired?

A. It confirmed. **We already know that she had circulation after the shot was fired.** (15RT 3009-3010, emphasis added.)

* * *

Q. **Does the report describe** specifically the degrees of angle downward that Dr. Lipton traced the trajectory of that shot?

A. **He described that** shot as being downward, 45 degrees.

And 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 say from level to right and downward back to the front. (15RT 3012, emphasis added.)

* * *

Q. With respect to the -- at least the first two shots of the abdominal area, including the one passing through the aorta, was that such a nature that Barbara Garcia would have been able to move at least a few steps, two or three steps after she suffered that wound?

A. Yes.

Q. Was the shot to the head of such a nature that she would have been able to move any distance at all after she suffered that wound?

A. No. (15RT 3013, emphasis added.)

* * *

C. Evidence Code section 801 and the related case law on which respondent relies are inapposite

Respondent argues at length that Evidence Code section 801, subdivision (b)[2], and related case law, authorized admission of Dr.

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[2] Evidence Code section 801 provides:

If a witness is testifying as an expert, his testimony in the form of an

Peterson's "independent opinion as to the cause of death" and thus, his testimony about the basis for his opinion. (RSB 13-15.) But as shown in the preceding section, the prosecutor did not ask Dr. Peterson to simply state an opinion about the cause of death and assert reliance on the autopsy report. In addition to putting the full text of the autopsy reports into evidence, the prosecutor had Dr. Peterson present Dr. Lipton's reported findings, not only as to the cause of death, but also the details of the wounds, the blood, the organ damage and the trajectory of the shots. Even before *Crawford* was decided, such extensive use of hearsay would be permitted to come before the jury during the direct examination of an expert only insofar as it was competent and admissible under an exception to the hearsay rule. (See *People v. Price* (1991) 1 Cal.4th 324, 416.)

Now, when the basis for an expert's opinion is testimonial hearsay is involved, the admissibility of the testimony under the Evidence Code is hardly relevant. The Confrontation Clause is now said to require exclusion

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opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him 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.

of evidence previously admitted under state evidentiary rules. (*Crawford, supra*, 541 U.S. at p. 51 ["Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."].)

In addition to suggesting that Dr. Peterson's testimony was altogether proper, respondent contends that appellant should have requested an instruction directing the jury not to accept Dr. Peterson's statements about the autopsy findings for the truth of the matter. (RSB 15.) But when this case was tried, any such instruction would have run contrary to California law rendering autopsy reports admissible for their truth under the official records exception to the hearsay rule. And given the way the contents of the reports were presented in Dr. Peterson's testimony, no reasonable juror could be expected to believe that the reports could not be considered for their truth.

D. Justice Thomas' concurring opinion in Melendez-Diaz does not aid respondent here

Citing *Marks v. United States* (1977) 430 U.S. 188, 193, respondent claims that Justice Thomas' concurring opinion "established the holding of the court" because Justice Thomas "subscribed to the included yet narrower, factually-limited position described in his concurrence" yet was part of the

five-justice majority. (RSB 13.) But the rule applied in *Marks,* i.e., that the Court's holding is the narrowest position taken by the concurring justices – is applicable only when there is no majority decision, i.e., "when no single rationale explaining the result enjoys the assent of five justices." (*Ibid.*) Mr. Justice Thomas signed the majority opinion. Neither *Marks* nor any other decision uncovered by respondent suggests importance to a concurring opinion by a justice who signed the majority opinion.

Furthermore, Justice Thomas' concurring opinion is no more supportive of respondent's arguments than the majority opinion is. His concurring opinion states that he understands the majority opinion to apply only to extrajudicial statements contained in "formalized testimonial materials" but it says nothing to suggest that autopsy reports fall outside that class. Like all the other justices who signed the majority opinion, Justice Thomas agreed that a "solemn declaration prepared for the purpose of establishing or proving some fact" and "made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial" is testimonial hearsay. (*Melendez-Diaz, supra*, 557 U.S. at p.___, 129 S.Ct. at p. 2532.)

E. Respondent's "medical record exception" argument fails because the purpose of preparation was not treatment

Respondent contends that an autopsy report is not testimonial hearsay because it is a medical report prepared according to medical protocols, and not necessarily for future prosecution of anyone. (RSB 18-25.) The argument is meritless. Although *Melendez-Diaz* indicates that a medical report prepared *for treatment purposes* is not testimonial hearsay, it says nothing to suggest that a report prepared for any purpose other than treatment is similarly exempt.

As in other states where prosecutors have argued that an autopsy report is not testimonial because autopsies are conducted and reported for reasons apart from criminal prosecution, respondent's argument should be rejected. (*See State v. Locklear* (N.C. 2009) 681 S.E.2d 293, 304-305; *Commonwealth v. Avila* (Mass. 2009) 912 N.E.2d 1014, 1027; *Martinez v. State* (Tex. App. Mar. 24, 2010) 2010 Tex. App. LEXIS 2124, 13-19; *Wood v. State* (Tex. App. 2009) 299 S.W.3d 200, 207-210.)

The purpose of an autopsy is to determine the circumstances, manner, and cause of death. (Gov. Code, § 27491; *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1277 (*Dixon*) ["It is through the coroner and autopsy investigatory reports that the coroner `inquire[s] into and determine[s] the

circumstances, manner, and cause' of criminally related deaths."].)[3] The findings resulting from the autopsy must be "reduced to writing" or otherwise permanently preserved. (*Id.*, § 27491.4.) Upon determining that there are reasonable grounds to suspect that a death "has been occasioned by the act of another by criminal means," the coroner must "immediately notify the law enforcement agency having jurisdiction over the criminal investigation."(Gov. Code, § 27491.1.) Accordingly, the Third District Court of Appeal recently concluded that "officially inquiring into and determining the circumstances, manner and cause of a criminally related death is certainly part of a law enforcement investigation." (*Dixon*, *supra*, 170 Cal.App.4th at p. 1277.)[4]

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[3] Government Code section 27491 provides, in pertinent part: "It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; . . . known or suspected homicide . . .; . . . deaths due to . . . strangulation . . .; death in whole or in part occasioned by criminal means; . . . deaths under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another . . . . Inquiry pursuant to this section does not include those investigatory functions usually performed by other law enforcement agencies."

[4]The issue in *Dixon* was whether coroner and autopsy reports are exempt from disclosure under the Public Records Act as "investigatory . . . files compiled by any other . . . local agency for . . . law enforcement . . . purposes." (170 Cal.App.4th at p. 1276, fn. omitted.) Noting that "[n]o one can dispute that the office of the coroner, at a minimum, is a local agency," the court indicated that "[t]he issue is whether the coroner, as part of his local agency duties, compiles investigatory files for law enforcement purposes." (*Ibid.*) In answering the question in the affirmative, the court analyzed Government Code section 27491, reasoning that "the sentence in

The People argue that "[a]lthough 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." (RSB 24.) Relying on *People v. Cage* (2007) 40 Cal.4th 965, the People assert that Dr. Lipton's autopsy report is not testimonial because it "was not generated for the primary purpose of helping the prosecution establish criminal liability."

In *Cage*, the court considered whether an assault victim's statement to a treating physician at the hospital was testimonial. (40 Cal.4th at p. 970.) To help diagnose the nature of the victim's injury (a slash wound) and determine the appropriate treatment, the physician asked the victim, "What happened?" (*Ibid.*) The court concluded that the victim's statement to his physician was not testimonial because "[o]bjectively viewed, the primary purpose of the question, and the answer, was not to establish or prove past facts for possible criminal use, but to help [the physician] deal with the immediate medical situation he faced." (*Id.*, at p. 986.) To be testimonial, a "statement must have been given and taken primarily for the purpose

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[Government Code] section 27491 that states `Inquiry pursuant to this section does not include those investigatory functions usually performed by other law enforcement agencies. . . . , implicitly recognizes that a coroner's inquiry encompasses an investigative function performed by the coroner as a law enforcement agency." (Id. at p. 1277.) The court's interpretation of Government Code section 27491 and its reasoning applies with equal force here.

ascribed to testimony--to establish or prove some past fact for possible use in a criminal trial." (*Id.*, at p. 984.)

Even assuming the standard set forth in *Cage* remains good law after *Melendez-Diaz* and applies to cases not involving emergency situations, Dr. Lipton's autopsy report satisfies that standard. As with the certificates at issue in *Melendez-Diaz,* an autopsy report constitutes a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact,'" namely the "circumstances, manner and cause" of the victims' deaths. Moreover, they were plainly "'made under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial.." (*Melendez-Diaz, supra*, 557 U.S. at p. __ [178 L.Ed.2d at pp. 321-322].) Dr. Lipton's reports were prepared in the midst of a homicide investigation, a circumstance of which he was no doubt aware given that a police officer attended the autopsy[5] and collected evidence taken from the victims' bodies. (15RT 2972-78) These undisputed facts, together with the general nature and purpose of an autopsy report, and the absence of evidence that Dr. Lipton's autopsy reports were prepared for the purpose of medical treatment, compel the conclusion that the reports at issue here were testimonial.

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[5]Government Code section 27491.4 provides in pertinent part that: "No person may be present during the performance of a coroner's autopsy without the express consent of the coroner."

F. The Confrontation Right was not satisfied by the opportunity to cross examine a doctor who was not present or involved in the autopsy nor in the authorship of the report

Respondent argues that appellant's confrontation right was satisfied insofar as appellant was permitted to, and did, cross-examine Dr. Peterson about the autopsy reports. (RSB 15-17.) No authority is cited. None presently exists.

In all of the previously-cited cases holding that an autopsy report was testimonial hearsay within the meaning of *Melendez-Diaz*, the autopsy findings were presented through the testimony of another pathologist who faced cross-examination. None of those appellate courts found that the opportunity to cross-examine the surrogate expert sufficed or even mitigated the harm. *(State v. Locklear, supra,* 681 S.E.2d 293, 304-305; *Commonwealth v. Avila, supra,* 912 N.E.2d 1014, 1027; *Martinez v. State, supra* (Tex. App. Mar. 24, 2010) 2010 Tex. App. LEXIS 2124, 13-19; *Wood v. State, supra*, 299 S.W.3d 200, 207-210.)

The Sixth Amendment guarantees a defendant the right "to be confronted with *the* witnesses against him." (U.S. Const. amend. VI, emphasis added). The use of the definite article in this constitutional provision is not adventitious. Instead, it dictates that if the State decides to introduce testimonial evidence, it must afford the defendant the opportunity be confronted with the specific creator of that evidence – that is, the person

who actually made the statement or authored the document at issue. (*Crawford v. Washington*, *supra*, 541 U.S. 36, 68.)

Accordingly, the United States Supreme Court has repeatedly held that the government violates the Confrontation Clause if it introduces a witness's testimonial statements through the in-court testimony of a different person, such as a police officer. (See *id.*; *Davis v. Washington* (2006) 547 U.S. 813; *Melendez-Diaz*, *supra,* 129 S. Ct. at 2532; *id.* at 2546 (Kennedy, J., dissenting) ["The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . ."].)

Contrary to respondent's claim, *Melendez-Diaz* recognizes no exceptions for scientific evidence, no limitation of the confrontation right to a subset of liability issues that may be explored on the assumption that an autopsy report honestly and accurately states what the autopsy physician perceived while examining a body. Rather, *Melendez-Diaz* clearly requires that the defendant receive the opportunity to test the "honesty, proficiency, and methodology" of that expert, and to test all of those factors through confrontation and cross-examination. (557 U.S. at p. ___ ,129 S.Ct. at p. 2536.) Prosecutorial discretion lies in choosing whose testimonial statements to present, not in deciding whom to put on the stand for purposes of admitting a particular testimonial statement. Once the prosecution has

decided to introduce a particular person's testimonial statements (whether it is in the form of a forensic report or anything else), the prosecution must present the person who made those statements to testify live in court. (*Melendez-Diaz, supra*, 129 S. Ct. at 2532 fn. 1.)

III. The Error Was Not Harmless

Respondent's claim that the error was harmless ignores the extended emphasis the prosecutor placed on the autopsy and related expert testimony in presenting the case to the jury,[6] and asks this court to focus exclusively

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[6]As stated in appellant's supplemental opening brief, the prosecutor not only took lengthy and detailed testimony about the autopsy findings, but argued his case as follows:

During voir dire, the prosecutor declared (in a rhetorical question to a juror, no less) that the evidence of how the victims died was strong proof of appellant's intent to kill. ["[I]f somebody got shot in the head and died of arterial damage, shot in the head, back of the head, execution style. It might tell you somebody's as [sic] state of mind at the time he pulls the trigger, right?" (9RT 1892.)]

In guilt phase closing argument, the prosecutor asked the jury to view the testimony of an eyewitness to the Talley shooting "in the context of the testimony of Dr. Peterson regarding what shot was fired last because that will – altogether ... It's like a jigsaw puzzle. Does it fit? If it doesn't fit you have to come up with some other theory. Okay." (26RT 4907.) The next time he mentioned Peterson's testimony he conjoined it with the autopsy photographs in asserting "very strong circumstantial evidence of something you have to look an absolute obligation to see. And it's the intent to kill." (26RT 4913)

Further on, the prosecutor reminded the jury that Peterson talked

on its value in establishing the cause of death. Respondent's approach is not consistent with the dictates of *Chapman v. California* (1967) 386 U.S. 18, 24) and is fundamentally unfair.

Under *Chapman*, the test "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) "Consistent with the jury-trial guarantee, the question ... the reviewing court [is] to consider ... is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." (Ibid.)

Where, as here, a judge's decision violated the Confrontation Clause, "the importance of the witness testimony in the prosecution's case" is the first factor that a reviewing court should consider. *(Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

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about "blood in the upper abdominal cavity in Lorraine Talley's case. In the lower abdominal, I believe in Barbara Garcia's case. They were bleeding after they were shot. That's part of the reason why – that is other reason also why you know that Barbara Garcia's shot last in the head. Why you know that Lorraine Talley was shot last in the head." (26RT 4914.) Further still, "when you look at her injuries, the injuries to her body as testified by Dr. Peterson in conjunction in the way – placement of the bullets, you know Lorraine Talley was shot somewhere in here. Probably ducking away, trying to turn away from this murderous assault that she's then suffering." (26RT 4916.)

The prosecutor, who had an opportunity to judge the demeanor and other factors affecting the credibility of his witnesses, saw the autopsy evidence as very important to his case. "There is no reason why the reviewing court should treat this evidence as any less crucial than the prosecutor -- and so presumably the jury -- treated it." *(People v. Cruz* (1964) 61 Cal.2d 861, 868.)

Further, respondent argues that this court should look at "all the available evidence" i.e., testimony that the prosecutor never presented but could have presented, as though assessing an ineffective assistance of counsel claim. (RB 28.) Naturally, the authorities cited in favor of that analysis are decisions assessing ineffective assistance of counsel claims. They do not apply here. When the defendant presents an ineffective assistance of counsel claim, no violation of the constitution may be found unless the defendant proves prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 692-696.) But when a judge denies a defendant his Confrontation Clause rights, the defendant need not show that he was prejudiced, and the State is limited to the evidence actually adduced at trial in persuading this court that any error was harmless. "The inquiry into harmless error focuses on the impact of the error in the trial that actually occurred, not on whether the same verdict would have been reached in a different trial in which the error was avoided. [Citations.]" (*Washington v.*

United States (D.C. App. 2009) 965 A.2d 35, 45, fn. 30, citing *inter alia*, *Sullivan v. Louisiana, supra*, 508 U.S. 275, 279.)

Likewise, the proper analysis does not turn on whether a reasonable jury would have returned the same verdicts with no autopsy evidence at all. When evidence was admitted in violation of the federal constitution, the proper focus is on the role that the improper evidence actually played in the case as it was tried, not the viability of a case lacking that evidence. Thus, in *Arizona v. Fulminante*, the Court held that admission of an illegally obtained confession was not harmless after focusing primarily on two factors: 1) the prosecutor had manifested his belief that the confession was important for conviction; and 2) the evidence was such that the jury *could* have relied in part on the confession to convict. (*Arizona v. Fulminante* (1991) 499 US 279, 297-300.)

Finally, focusing on the importance that the prosecutor himself placed on the erroneously-admitted evidence is fair, just, and reasonable. The prosecutor pushed incompetent evidence to the trial court, over defense objection. The State now claims that the evidence was (only) cumulative evidence viz the contested intent element of the crime. But that evidence was pushed by a very experienced and successful homicide prosecutor who knew his case (and his jury) better than we do. Observing a similar scenario 100 years ago, this court observed:

> The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous facts supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met with the stereotyped argument that it is not apparent [that] it in anywise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the prosecution which resulted in the verdict of guilty. (*People v. Glass* (1910) 158 Cal. 650, 659, quoting *Miller v. Territory of Oklahoma* (8th Cir. 1906) 149 F. 330, 339.)

CONCLUSION

The judgment of conviction should be reversed.

DATED: May 28, 2010

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The foregoing supplemental opening brief on appeal was produced in 13 point proportional Times Roman typeface. Exclusive of tables and this certificate, it contains 6,356 words as counted by WordPerfect 12.

JEANNE KEEVAN-LYNCH

PROOF OF SERVICE BY MAIL

RE: People v. Michael Pearson, No. S058157

I, Jeanne Keevan-Lynch, declare under penalty of perjury as follows: I am over the age of 18 years, and I am not a party to the within action. My business address is P.O. Box 2433, Mendocino, California, 95460. On the date indicated below, I served a copy of the attached supplemental reply brief on the persons indicated below, by depositing same in the mail with postage thereon fully prepaid.

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Executed under penalty of perjury under the laws of the State of California and the United States of America on May 28, 2010.

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