SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. PAUL WESLEY BAKER, Defendant/Appellant.	)	No: S170280 APPELLANT'S SUPPLEMENTAL BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPREME COURT
OF THE STATE OF CALIFORNIA
LOS ANGELES COUNTY
SUPERIOR COURT CASE NO. LA045977-01

THE HONORABLE SUSAN M. SPEER, JUDGE

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I. ARGUMENT[1]

THE ADMISSION OF PREJUDICIAL EXCLUDABLE CASE-SPECIFIC TESTIMONIAL HEARSAY REQUIRES REVERSAL.

1. Introduction

In *People v. Sanchez* (2016) 63 Cal.4th 665, 204 Cal.Rptr.3d 102, this Court held that case-specific testimony related by an expert without the requisite independent proof constituted inadmissible hearsay. To the extent such hearsay statements are testimonial, such introduction violates the Sixth Amendment right to confront and cross-examine witnesses. (*Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354.)

Here, the expert testimony of Dr. Staub[2] regarding the Germantown

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[1] This supplemental brief responds to this Court's order of May 13, 2020 asking the parties to address the following questions:

Was expert testimony that is excludable under *People v. Sanchez* (2016) 63 Cal.4th 665 admitted at defendant's trial?

If so, can the admission of such evidence be asserted as a ground for reversal in this appeal (see, e.g., *People v. Perez* (2020) 9 Cal.5th 1)

Assuming affirmative answers to the first two questions, was the admission of such evidence prejudicial to defendant with respect to any of the offenses of which he was convicted or any of the allegations found true?

[2] The prosecution called Dr. Staub to testify regarding the results of DNA testing conducted at the Cellmark laboratories in Germantown, Maryland and Dallas, Texas. Dr. Staub did not work at the Germantown lab, did not have any administrative, management, or quality control responsibilities at that lab, and did not conduct or supervise any of the DNA testing there. He had no personal knowledge as to the analyses about which he testified at the trial. (20RT 3425-3427, 3443-3427, 3541-3545; 36RT 5906, 5932-5933, 5985.) Nor did Staub personally conduct any of the DNA testing at the Dallas laboratory, although he supervised the two analysts who did. (20RT 3497-3498, 3517-3518; 36RT 5905-5907.)

and Dallas Cellmark labs violated the rules set out in *Sanchez*, as well as *Crawford*. Appellant was prejudiced. His rights to due process, a fair trial, a reliable determination of guilty and penalty, equal protection, confrontation, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their California counterparts were violated. Reversal is required.

2. Excludable expert testimony was admitted at appellant's trial.

a. Introduction

In *People v. Sanchez* (2016) 63 Cal.4th 665, 204 Cal.Rptr.3d 102, this Court discussed hearsay:

> [A] hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true. Hearsay is generally inadmissible unless it falls under an exception. (Evid.Code.sec.1200, subd. (b).) ...
>
> Documents like letters, reports, and memoranda are often hearsay because they are prepared by a person outside the courtroom and are usually offered to prove the truth of the information they contain. Documents may also contain multiple levels of hearsay. (63 Cal.App.4th at 674-675, 204 Cal.Rptr.3d at 109-110.)

(Accord, *People v. Yates* (2018) 25 Cal.App.5th 474, 482, 235 Cal.Rptr.3d 756, 763.)

An expert witness may not testify to case-specific testimonial hearsay. "Case specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at 676, 204 Cal.Rptr.3d at 111.) The expert

"cannot...present, as facts, the content of testimonial hearsay statements." (*Sanchez, supra,* 63 Cal.4th at 685, 204 Cal.Rptr.3d at 374.) This Court explained:

> Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. ...
>
> Ordinarily, an improper admission of hearsay would constitute statutory error under the Evidence Code. Under *Crawford*, however, if that hearsay was testimonial and *Crawford*'s exceptions did not apply, defendant should have been given the opportunity to cross-examine the declarant or the evidence should have been excluded. Improper admission of such prosecution evidence would also be an error of federal constitutional magnitude.
>
> ***
>
> In sum, we adopt the following rule: 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. It cannot logically be maintained that the statements are not being admitted for their truth. 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. ...(*Id.* 63 Cal.4th at 684-686, 204 Cal.Rptr.3d at 116-118.)

(Accord, *In re Ruedas* (2018) 23 Cal.App.5th 777, 791, 233 Cal.Rptr.3d 555, 565-566.)

b. <u>The evidence was testimonial</u>

In *People v. Morales* (2020) 44 Cal.App.5th 353, 359-361, 257 Cal.Rptr.3d 502, 506-508, the Court discussed the "critical components" of testimonial evidence:

> "First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity." ...
>
> Second, a statement is testimonial if it was "given with the 'primary purpose of creating an out-of-court substitute for trial testimony' or "made with primary purpose of creating evidence for [the defendant's] prosecution." (Citation omitted.)

A report has sufficient solemnity where it has been "signed" by the analyst who conducted the test. (*People v. Lopez* (2012) 55 Cal.4th 569, 589, 147 Cal.Rptr.3d 559, 571; accord, *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 665, 131 S.Ct. 2705, 2717 [Report sufficiently solemn for testimonial purposes where results are "'formalized' in a signed document."]; *People v. Morales* (2020) 44 Cal.App.5th 353, 360, 257 Cal.Rptr.3d 502, 507 [Same.])

Regarding the primary purpose component, evidence is '"testimonial when the circumstances objectively indicate that there is no...ongoing emergency, and that the primary purpose of the investigation is to establish or prove past events potentially relevant to later criminal prosecution.'"

(*People v. Chism* (2014) 58 Cal.4th 1266, 1288, 171 Cal.Rptr.3d 347, 369.) "A document created solely for an 'evidentiary purpose' ..., made in aid of a police investigation, ranks as testimonial." (*Bullcoming v. New Mexico* (2011) 564 U.S. 647, 664, 131 S.Ct. 2705, 2717.) Here, the Cellmark DNA reports meet all requirements to be testimonial.

The primary purpose of the Cellmark DNA tests was to obtain evidence against appellant specifically. Appellant was arrested on May 24, 2004 and a felony complaint was filed against him on the same date charging him with, *inter alia,* the murder of Judy Palmer. (1CT 10-10C.) The 2005 Cellmark reports were requested by the prosecution team and generated long after appellant had been arrested and after DNA swabs were obtained from him and provided to the labs. The reports were addressed to the L.A.P.D. Scientific Investigation Division. The "Alleles Detected" charts in the March 29, 2005 Cellmark reports specifically showed appellant's alleles. The report stated, "The primary DNA profile...matches the DNA profile obtained from the swab labeled Paul Baker," and "Paul Baker cannot be excluded..." The report showed the approximate frequencies of the DNA profiles between Caucasians and appellant. The January 24, 2005 Cellmark reports also stated, "The DNA profile...matches the DNA profile obtained from the swab labeled Paul Baker" and the "Alleles Detected" charts reference appellant." Clearly, the reports were generated in aid of the ongoing prosecution and investigation of appellant with the intent to acquire evidence to be used against him at trial.

The reports were signed by the analyst who had conducted the DNA tests. Thus, the were prepared with the required degree of formality and solemnity.

The Cellmark reports have the necessary degree of solemnity and

were prepared for the purpose of providing trial evidence against appellant. The reports and Dr. Staub's testimony were testimonial.

Other jurisdictions consider DNA reports such as those involved in the instant case to be testimonial hearsay. In *Gardner v. United States* (D.C. 2010) 999A. 2d 55, DNA testing linked the defendant to a murder. The DNA report was admitted into evidence and a laboratory representative testified as to the results. However, the analyst who conducted the tests and authored the report did not testify. The Court stated that the evidence was "testimonial hearsay...admitted as substantive evidence, that is for the truth of the matter asserted." (999A 2d at 60.) The Court also said:

> The government concedes that the conclusions set forth in the DNA and serology reports were "testimonial" under *Crawford*...and *Melendez-Diaz v. Massachusetts*.... The government further concedes that the admission of these results, either through the admission of the DNA report or the expert testimony, violated appellant's rights under the Confrontation Clause of the Sixth Amendment because the scientists who actually conducted the testing were not available for cross-examination. *Crawford*.... Thus, all of the experts' explicit references to the testing analysts' conclusions violated appellant's Sixth Amendment Confrontation rights.

In *People v. Rawlins* (N.Y. 2008) 10 N.Y. 3d 136, 158-160, 884 N.E. 2d 1019, 1034-1035, the Court recognized that reports are testimonial where the DNA comparison is to a "known DNA profile," where the results "shed...light on the guilt of the accused," and the "documents prepared by the...technicians [are] directly accusatory" and "compare[ ] the DNA profile

they generated to defendant."[3] (Accord, *People v. John* (N.Y. 2016) 27 N.Y. 3d 294, 302-308, 52 N.E. 3d 1114, 1119-1124.)

In *People v. John, supra,* 27 N.Y. 3d 307-309, 52 N.E. 3d 1122-1124, the Court employed a "primary purpose" test to determine whether the DNA report was testimonial. Applying that test, the Court found the report testimonial:

> For our part, we have deemed the primary purpose test essential to determining whether particular evidence is testimonial hearsay requiring the declarant to be a live witness at trial. "[A] statement will be treated as testimonial only if it was 'procured with a primary purpose of creating an out-of-court substitute for trial testimony.'" [Citations omitted.] Adhering to the decisions of the Supreme Court, we did not declare any ironclad rule as to a definition of testimonial evidence. We have considered two factors of particular importance in deciding whether a statement is testimonial – " 'first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses defendant of criminal wrongdoing.' Furthermore, the 'purpose of making or generating the statement, and the declarant's motive for doing so,' also 'inform these two interrelated touchstones.'"
>
> Here, there was a criminal action pending against defendant, and the gun, found in the basement of a multifamily dwelling where defendant lived, was evidence seized by police for that prosecution. Swabs from the gun were then tested by an accredited public DNA crime

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[3] In *Rawlins*, these factors were not present.

laboratory with the primary (truly, the sole) purpose of proving a particular fact in a criminal proceedings—that defendant possessed the gun and committed the crime for which he was charged. The testing analysts purposefully recorded the DNA profile test results, thereby providing the very basis for the scientific conclusions rendered thereon. Under these circumstances, the laboratory reports as to the DNA profile generated from the evidence submitted to the laboratory by the police in a pending criminal case were testimonial. The DNA profiles were generated in aid of a police investigation of a particular defendant charged by an accusatory instrument and created for the purpose of substantively proving the guilt of a defendant in his pending criminal action. The primary purpose of the laboratory examination on the gun swabs could not have been lost on the OCME analysts, as the laboratory reports contain the police request for examination of the gun swabs on the basis that the "perp" handled the gun and repeatedly identify the samples as "gun swabs." In addition, certain documents in the OCME file refer to the suspect (defendant) by name.

The facts of this case fit into even the narrow primary purpose test articulated by the *Williams* plurality. On this record, the admission into evidence of the laboratory reports for their truth as to the generation of the DNA profile from the gun without a testifying analyst who performed, witnessed or supervised any portion of the testing is indistinguishable from *Bullcoming*. The fact that defendant's DNA profile was found on the gun was established by testimonial hearsay in the laboratory report, which could not be admitted as a business record without honoring the right of confrontation. We cannot

> ignore that the People did not produce the analyst who generated the DNA profile from either the gun or the exemplar in this case. As a result, these critical analysts who engaged in an independent and qualitative analysis of the data during the DNA typing tests–-none of whom was claimed to be unavailable–-were effectively insulated from cross-examination. And [the lab representative], instead, was permitted to parrot the recorded findings that were derived from the critical witnesses' subjective analyses. To be sure [the representative] merely exported the very DNA profile generated by the non-testifying analysts and agreed with the results they obtained in the actual performance of the testing, this is nothing more than surrogate testimony to prove a required fact–-that defendant's DNA was found on the loaded gun for which he stood charged.

In appellant's case, many of the same testimonial touchstones are present: there was a criminal action pending against appellant; the "DNA profiles were generated in aid of a police investigation of a particular defendant charged by an accusatory instrument and created for the purpose of substantively proving the guilt of a defendant in his pending criminal action" (*id.*); the primary purpose of these tests to inculpate appellant could not have been lost on any reasonable analyst or lab personnel; and the Cellmark reports referred to appellant by name.

c. The evidence violated *Sanchez*

"In *Sanchez* this Court determined that evidence will be considered testimonial if it was prepared or obtained for the purpose of preserving and presenting facts at trial." (63 Cal.4th at 687-694, 204 Cal.Rptr.3d at 119-129; accord, *Davis v. Washington* (2006) 547 U.S. 813, 822, 126 S.Ct.

2266, 2273-2274 ["Statements] are testimonial when the circumstances objectively indicate that there is no...ongoing emergency, and the primary purpose...is to establish or prove past events potentially relevant to later criminal prosecution."].) Such is the case regarding the Cellmark DNA reports about which Dr. Staub testified. Where, as here, testimonial hearsay has been presented and declarant is not unavailable and the defendant has not had a prior opportunity to cross-examine the declarant, a Sixth Amendment confrontation violation has occurred. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54, 59, 124 S.Ct. 1354, 1364, 1368; accord, *United States v. Smith* (4th Cir.2019) 919 F.3d 825, 839; *People v. Rodriguez-Garcia* (2020) 46 Cal.App5th 123, 166, 259 Cal.Rptr.3d 600, 639.)[4]

Here, Dr. Staub's testimony regarding the DNA reports was hearsay -- the statements he relayed were "made other than by a witness testifying at the hearing and [were]...offered to prove the truth of the matter asserted." (Evidence Code sec.1200, subd.(a).) As the evidence establishes, Dr. Staub testified as an expert and related factual statements in DNA reports prepared by others for the truth of the matter asserted. Respondent agrees: "Dr. Staub testified as an expert." (RB 153); Dr. Staub was a "testifying expert" (RT 153) testifying regarding reports "prepared by other analysts." (RB 156.)

As explained in the Opening Brief and Reply Brief, the hearsay evidence related by Dr. Staub was testimonial. (AOB 216-219; Reply B. 35-36.) The hearsay evidence "was obtained for the purpose of preserving

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[4] There is no evidence that Cellmark analysts Leisy, Johnson or Benavides were unavailable to testify at appellant's trial.

facts for trial." (*In re Ruedas, supra,* 23 Cal.App.5th at 7902, 233 Cal.Rptr. 3d at 566.) The "'primary purpose'" of obtaining the DNA reports "was to creat[e] an out-of-court substitute for trial testimony.'" (*Ohio v. Clark* (2015) 576 U.S. 237, , 135 S.Ct. 2173, 2180.) Dr. Staub was testifying "simply as a conduit for testimonial hearsay." (*United States v. Smith, supra,* 919 F.3d at 837.) Clearly, the DNA reports and Dr. Staub's reiteration of the contents of those reports as the truth constituted inadmissible testimonial hearsay which violated appellant's fundamental rights to due process, a fair trial, confrontation, and fundamental fairness.

Dr. Staub's testimony and the Cellmark DNA reports constituted testimonial hearsay. In this case, the admission of the evidence violated the Sixth Amendment, *Sanchez,* and *Crawford*. As shown, *infra,* the error was prejudicial.

3. <u>The issue has not been forfeited</u>

a. <u>The *Sanchez* issue is not forfeited</u>

Appellant did not expressly object to Dr. Staub's testimony or the Cellmark DNA reports on a *Sanchez*-based ground.[5] In *People v. Perez* (2020) 9 Cal.5th 1, 259 Cal.Rptr.3d 195 in a trial held before *Sanchez* was decided, the defendant did not make a "case-specific" hearsay objection. This Court held that the issue had not been forfeited "...because *Sanchez* had not yet been decided and such an objection would therefore have been futile... *Sanchez*...expressly changed the law previously established....We therefore hold that the failure of [defense] counsel to object at trial before

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[5] Appellant objected that introduction of the evidence "would then prevent proper cross-examination." (20 RT 3465-3466.) He also objected that an insufficient foundation had been laid for introduction of the evidence. (20RT 3437-3466.)

Sanchez was decided did not forfeit a claim on appeal based on *Sanchez*. The great weight of authority...is consistent with this ruling." (9 Cal.5th at 9, 7, 259 Cal.Rptr.3d at 199, 200-201.) (Accord, *People v. Veamatahau* (2020) 9 Cal.5th 16, 25, 259 Cal.Rptr.3d 205, 212 ["...defendant was convicted two days before we issued *Sanchez*, and, as we have recently decided, the failure to object in such circumstances does not forfeit a defendant's *Sanchez* claim."]; *People v. Thompkins* (2020) 48 Cal.App.5th 676, ____Cal.App.3d ____, 2020 WL 2108883, p.25.) The *Sanchez* issue has not been forfeited and is before this Court for a decision on the merits.

b. There is no forfeiture of the *Crawford* issue as to Dallas Cellmark.

Appellant objected on Sixth Amendment grounds to the Germantown lab results and Dr. Staub's testimony about the results. (20RT 3445 ["He would just be looking at conclusions from notes and would then prevent proper cross-examination with regard to that."]) Thus, the *Crawford* issue as to Germantown Cellmark has not been forfeited. (AOB 228-229, Reply B. 32-33.)[6]

Appellant did not object on *Crawford* and Sixth Amendment grounds to the Dallas Cellmark reports or Staub's testimony as to that lab's results. But, given that Staub was in the same position vis-a-vis the Dallas lab as he was the Germantown lab, there was no reason for defense counsel to not also interpose a *Crawford*/Sixth Amendment, "prevent proper cross-examination" objection to the Dallas lab information. Under the United

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[6] In the opening and reply briefs, it was stated that the "prevent proper cross-examination" objection was at 20RT 3465-3466. The correct cite is 20 RT 3445.

States Constitution, Sixth Amendment and the California Constitution, art.1, section 15, a defendant has the right to *effective* assistance of counsel at trial. (*Strickland v. Washington* 9984) 466 U.S. 668, 684, 204 S.Ct. 2052, 2063. *In re Cordero* (1988) 46 Cal.3d 161, 179-180, 249 Cal.Rptr.342, 353-354; *People v. Ledesma* (1987) 43 Cal.3d 171, 215, 233 Cal.Rptr.404, 431; *Kimmelman v. Morrison* (1986) 477 U.S. 365, 374-375, 106 S.Ct. 2574, 2582.) There is no reason, tactical or otherwise, for counsel's failure to object on *Crawford*/Sixth Amendment grounds to the Dallas lab information. The failure to object constitutes ineffective assistance of counsel.

Where asserted error constitutes ineffective assistance of counsel which affects the defendant's substantial rights, the issue may be raised on appeal despite the issue not having been raised in the trial court. As explained in *People v. Felix* (2008) 160 Cal.App.4th 849, 858, 72 Cal.Rptr. 3d 947, 951:

> Here, appellant contends that the purported...errors at issue implicate his substantial rights; moreover, to the extent that his counsel's failure to object worked a forfeiture, he contends that his counsel rendered ineffective assistance. We address his contentions on the merits to determine whether there was an impairment of his substantial rights or ineffective assistance of counsel.

(Accord, *People v. Anderson* (2007) 152 Cal.App.4th 919, 927, 61 Cal.Rptr. 3d 903, 910.) And, as stated in *People v. Varghese* (2008) 162 Cal.App.4th 1084, 1096, 76 Cal.Rptr.3d 449, 459:

> Of course, any waiver discussion is of limited

> importance because the failure to raise an issue at trial may result in a claim of ineffective assistance of counsel. In many instances that claim necessitates us to review the merits of the underlying issue. We will do so here.

The issue of counsel's failure to object has not been forfeited.

4. Appellant was prejudiced by the introduction of the <u>case-specific hearsay</u>.

Dr. Staub's testimony regarding the DNA reports generated by Cellmark is detailed in the opening brief. (AOB 208-210.) In short, he testified that appellant's DNA had been found on a rug in Palmer's apartment, on the pink dildo, on latex gloves and on Palmer's underwear. He testified that Palmer's DNA matched blood found on the wall, carpet, and carpet padding in Palmer's apartment. In the opening brief, appellant demonstrated how appellant was prejudiced vis-a-vis the murder and rape charges and the rape special circumstance. (AOB 223-227.)

The jury requested a re-read of parts of Dr. Staub's testimony. The entire testimony was re-read. The jury's request and the re-read of Dr. Staub's DNA-related testimony was "...important to the jury's decision-making" and "...strongly suggest[s] that the inadmissible evidence was a factor in [the jury's] decision to convict..." (*People v. Quitiquit* (2007) 155 Cal.App.4th 1, 13, 65 Cal.Rptr.3d 674, 683.) The re-read request during deliberations "suggest[s] that the jury was at least partially persuaded" (*Murtishaw v. Woodford* (9th Cir.2001) 255 F.3d 926, 973) by Dr. Staub's testimony.

As to the murder and rape issues, during closing argument, the prosecutor relied on and emphasized Dr. Staub's testimony and the hearsay reports. It was argued that appellant's semen was found on the couch and

rug in Palmer's apartment (45RT 7146), "on the dildo" (45RT 7159), and in "those [latex] gloves." (45 RT 7162.) Dr. Staub testified regarding the DNA on these objects. The prosecutor mentioned Y-STR DNA testimony (45RT 7164-7165), the type of testing the Cellmark lab conducted and to which Dr. Staub testified. The prosecutor argued that, through the YSTR testing, appellant's DNA was found in Palmer's underwear: "...according to Dr. Rick Staub who heads up the Cellmark Lab in Dallas, this is a quotation, 'There was definitely a major profile that matched Paul Baker in the seat of Judy's panties.' In other words, this is the defendant's semen, we know that much, and it's in the seat of her panties. That's a bit of a problem for the defendant." (45RT 7165-7166.) The prosecutor emphasized, "Again, evidence of the rape include[s] the defendant's semen and his Y-STR partial profile. But a very strong presence of his profile, essentially is what Dr. Staub said, in the seat of her panties." (45RT 7201.) It was argued, "Only the defendant could leave his D.N.A. all over Judy's apartment..." (45RT 204.)

"A prosecutor's closing argument is an especially critical period of trial....Since it comes from an official representative of the People, it carries great weight..." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694, 273 Cal. Rptr.757, 809.) Had Dr. Staub's testimony and the Cellmark DNA reports not been introduced, the prosecutor would not have been able to make such a prejudicial argument.

Respondent tacitly concedes the prejudicial nature of Dr. Staub's hearsay testimony and the Cellmark reports. In claiming that sufficient evidence supported a murder during the commission of rape respondent relied on that evidence. Respondent stated, "forensic evidence found in Judy's apartment also established that a sexual assault had occurred,

including semen matching the DNA of appellant. The jury could reasonably have inferred from this evidence that appellant wished to injure and humiliate Judy before killing her by brutally assaulting her." (RB 126.) In claiming that sufficient evidence supported the rape charge, respondent again relied on Dr. Staub's hearsay evidence: "Thus, the combination of the blood and semen found at Judy's apartment, the dildo with appellant's semen on it, her underpants with traces of his semen, and the presence of physical restraints on Judy's body provides substantial evidence that a forcible rape occurred in that apartment and appellant harbored the intent required. (See, e.g., 20RT 3498-3510...)" (RB 116.) Respondent also argued that Dr. Staub's hearsay testimony helped alleviate the prejudice from the introduction of the evidence of uncharged offenses: "forensic evidence found in Judy's apartment also established that a sexual assault had occurred, including semen matching the DNA of appellant." (RB 136.) By using Dr. Staub's inadmissible hearsay evidence to bolster the case against appellant, respondent implicitly recognizes its prejudicial effect.

Dr. Staub's hearsay evidence was also prejudicial as to the burglary charge and the burglary special circumstance. The jury was instructed that burglary could be based on an entry with intent to commit rape. (6CT 1356-1357.) The prosecutor argued that burglary required "entry with the intention to commit a felony" (45RT 7154) and that it could be based on an entry "with the intention to commit rape..." (45RT 7199.) To show this intent, the prosecutor argued, "We have the defendant's semen all over Judy's apartment and we have a dildo with his semen..." (45RT 7200.) Dr. Staub's inadmissible testimony, which was the basis for this argument and which showed some sort of sexual conduct in Palmer's apartment, lent support to this theory, upon which the jury could readily have based the

burglary conviction and the true finding on the burglary special circumstance.

Further, the very fact that the case-specific testimonial hearsay evidence concerned D.N.A. is in itself prejudicial. DNA evidence has an exaggerated effect on a jury. DNA evidence is "powerful...evidence." (*District Attorney's Office, Etc. v. Osborne* (2009) 557 U.S. 52, 62, 129 S.Ct. 2308, 2316) and is "persuasive[ ]...in the eyes of the jury." (*McDaniel v. Brown* (2010) 558 U.S. 120, 136, 130 S.Ct. 665, 675.) "[J]urors place great emphasis on DNA evidence -- so much so that the evidence has long enjoyed a status of 'mythic infallibility' for juries." (*People v. Marks* (Colo. App.2015) 374 P.3d 518, 525; accord, *Whack v. State* (Md.2013) 433 Md.738, 732, 73A.3d 186, 188 ["DNA is a powerful evidentiary tool....Not surprisingly, jurors place a great deal of trust in the accuracy and reliability of DNA evidence."]) In *Duncan v. Commonwealth* (Kentucky 2010) 322 S.W.3d 81, 91, the Court recognized the "aura of conclusiveness that surrounds DNA evidence." The inordinate weight a jury gives to DNA evidence adds another layer of prejudice.

In *People v. John, supra,* 27 N.Y. 3d 294, 52 N.E. 2d 1114, the Court reversed the defendant's conviction, noting that:

> There is no dispute that DNA evidence is powerful forensic evidence in determining the guilt or the innocence of the accused. The DNA profile evidence in this case was used as substantive evidence to prove defendant's guilt, as it directly linked him to the loaded gun....As the accused in a criminal prosecution, the defendant has the right to be confronted with the witnesses "who bear testimony against him." (27 N.Y. 3d at 303, 52 N.E. 3d at 1119.)

The non-DNA evidence as to the murder, rape, and burglary convictions and the rape and burglary special circumstances was weak. The evidence of sexual conduct -- rape under the prosecution's theory -- can readily be explained by appellant's and Palmer's romantic relationship. They had had consensual sex. (See AOB 155-162; Reply B. 14-19.) Other than an incident on April 5, 2004 (17RT 2887-2912), which was at least 12 days prior to Palmer's demise, there is no evidence that appellant ever forced his way into her apartment. On the 5th, the door did not appear to be damaged. When a locksmith opened the door to Palmer's apartment on April 18, 2004, the door appeared to have been previously damaged and repaired. When Detective Rains went to Palmer's apartment on April 26, 2004 he did not see any sign of forced entry. Thus, evidence of a rape and a burglary/murder is lacking.

Regarding the charge of murder, Dr. McCormick, who conducted Palmer's autopsy, could not state the cause of death. The evidence did not show the day or time of Palmer's death. There were no witnesses to the incident. No one saw who placed Palmer's body in the desert. Appellant's "beat the pussy up" statement was equivocal. Daniel Mengoni and Juan Calhoun testified against appellant. (See AOB 42-48.) However, Mengoni was an alcoholic and both he and Calhoun had felony convictions. Thus, their testimony is problematic. Virtually the entirety of the prosecution's case was based on circumstantial evidence.

Given the mixed, uncertain, relatively tenuous nature of the circumstantial evidence, it is likely that the DNA evidence from the Cellmark labs and Dr. Staub's testimony was the deciding factor for the jury. The Germantown lab tests showed appellant's DNA on cuttings from the rug in Palmer's apartment and on a dildo. Palmer's DNA matched

blood found in her apartment. The Dallas lab tests showed appellant's DNA on cuttings from latex gloves and Palmer's underwear. The jury readily could have used this evidence to close the substantial gaps in the circumstantial evidence. Appellant was prejudiced as a result of the introduction of the Cellmark DNA evidence.

Respondent can be expected to play down or minimize the prejudicial effect on the jury of Dr. Staub's evidence. But, "[e]xpert evidence can be... powerful ..." (*Daubert v. Merril Dow Pharm. Inc.* (1993) 509 U.S. 579, 595, 113 S.Ct. 2786, 2798) and misleading. (*United States v. Frazier* (11th Cir.2004) 387 F.3d 1244, 1263 ["the powerful and potentially misleading effect of expert evidence."]) And, as stated in *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1185, 22 Cal.Rptr.2d 545, 554:

> Notwithstanding the Attorney General's effort in this proceeding to minimize the importance of [the expert's] trial testimony, we note expert witnesses often have a significant impact on juries. "[J]uries tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." ... "'[S]cientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury...'" (Citations omitted.)

Indeed, respondent recognizes the significant weight that juries accord expert witnesses by arguing there was no prejudice from Dr. Staub's evidence because "[h]e testified as an expert witness..." (RB 157.)

As to the murder, rape, and burglary convictions and the rape and burglary special circumstances, appellant was prejudiced by the introduction of Dr. Staub's case-specific testimonial hearsay.

5. Conclusion

Appellant's constitutional rights were violated by introduction of the hearsay testimony of Dr. Staub and the hearsay Cellmark DNA reports. Given the major importance that this evidence played in the prosecution's case in chief, respondent cannot demonstrate beyond a reasonable doubt that this error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824.) The improper introduction of Dr. Staub's testimony and the Cellmark DNA reports and related documents prejudicially violated appellant's fundamental rights to due process, confrontation, a reliable determination of guilt and penalty, and a fair trial. Reversal of the murder, rape and burglary convictions and the rape and burglary special circumstances is required.

II. CONCLUSION

For the reasons stated above, and in the opening and reply briefs, reversal is required.

Dated: June 2, 2020

Respectfully submitted,
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By /s/
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(Appointed by the Court)

CERTIFICATE OF WORD COUNT

In reliance on the word count of the computer program used to generate this brief, I, John F. Schuck, hereby certify that this Appellant's Supplemental Brief contains 5,132 words.

I declare under penalty of perjury that the above is true and correct.

Dated: June 2, 2020

/s/
John F. Schuck

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Los Angeles County Superior Court
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Los Angeles, CA 90012-3210

Paul Wesley Baker
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STATE OF CALIFORNIA
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/s/John Schuck
Signature

Schuck, John (96111)
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