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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PAUL NATHAN HENDERSON Defendant and Appellant.	)	No. S098318 (Riverside Superior Court No. INF027515)

APPELLANT'S SUPPLEMENTAL BRIEF

ON AUTOMATIC APPEAL

FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Riverside

Hon. Thomas N. Douglass, Judge

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INTRODUCTION

Appellant submits this Supplemental Brief because this Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665 ("*Sanchez*") provides a new and additional argument in support of reversal of his conviction and sentence of death.

Appellant has argued that his rights guaranteed by the Confrontation Clause of the Sixth Amendment were violated when the prosecution called a pathologist, Dr. Cohen, to present the findings and conclusions from the report of the victim's autopsy because (1) Dr. Cohen did not perform the autopsy; (2) the autopsy report –the contents of which Dr. Cohen described – was "testimonial" hearsay within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 and its progeny (see *People v. Dungo* (2012) 55 Cal.4th 608, 619); and, (3) the prosecution failed to show that Dr. Garber, who actually performed the autopsy and prepared the report, was unavailable to testify. (Appellant's Opening Brief "AOB", pp. 207-229; Appellant's Reply Brief "ARB", pp. 78-108.)

Although *Sanchez* discusses the Confrontation Clause, the decision has particular relevance here because it also addresses the state law rules regarding expert reliance on hearsay evidence

generally, however that hearsay may be characterized. *Sanchez* shows that Dr. Cohen's testimony improperly conveyed to the jury case-specific hearsay evidence as to which no hearsay exception applied. For the reasons discussed below, his testimony contravened state evidence law, was prejudicial and requires reversal of the judgment. In addition, the error violated Appellant's rights to due process and a reliable judgment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

A. Dr. Cohen Improperly Conveyed To The Jury Case-Specific Hearsay Evidence From The Autopsy Report As To Which No Hearsay Exception Applied.

In *Sanchez*, this Court held that "[w]hen 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." (63 Cal.4th at p. 686.) While an "expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so . . . . [w]hat 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 [emphasis in original].) "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, fn. omitted; see also *People v. Jeffrey G*. (2017) 13 Cal.App.5th 501, 509-510; *People v. Stamps* (2016) 3 Cal.App.5th 988, 994-996.)

Dr. Cohen's testimony ran demonstrably afoul of the rule announced in *Sanchez.* Dr. Garber, the pathologist who performed the autopsy, did not testify. The prosecutor did not offer the autopsy report itself into evidence.[1] Dr. Cohen neither performed nor even attended the autopsy and therefore had no personal knowledge of the condition of the victim, Mr. Baker. Instead, Dr. Cohen's testimony was based entirely on his "review" of the autopsy report (15 RT 3231-3233) and, prior to giving his opinion, he relayed to the jury what "Dr. Garber did and what he found." (15 RT 3235, 3244.) He gave a detailed description of the various findings in the report, including the

[1]Appellant has requested judicial notice of the autopsy report. (See "Appellant's Request of Judicial Notice," filed herein on July 1, 2014.)

external and internal examinations of the body – testimony which not only conveyed the autopsy findings, but which closely tracked Dr. Garber's preliminary hearing testimony covering the same subjects. (Compare 15 RT 3235-3238 with autopsy report and 2 CT 524-526.) No witness other than Dr. Cohen testified to, and no other evidence described, Mr. Baker's underlying health condition or the cause of his death. While certain photographs of the body from the scene and the autopsy were in evidence, those photographs simply depicted the external injuries to Mr. Baker. (See People's Exhs. 13, 33, 34, 37, 90, 91, 92; 15 RT 3225-3227, 3233-3235.)

Dr. Cohen testified that, as revealed by the autopsy, Mr. Baker died of a heart attack. (15 RT 3239.) He also conveyed the autopsy findings that Mr. Baker suffered from a serious, underlying heart condition and severe atherosclerosis. (15 RT 3237-3238.) This evidence was intended to establish that Mr. Baker was "a set-up for a sudden death." (15 RT 3240.) And this testimony in turn laid the foundation for Dr. Cohen's opinion that stress from the burglary and otherwise non-fatal knife wound triggered Mr. Baker's heart attack. (15 RT 3240-3241.)

The facts contained in the autopsy report that Dr. Cohen related

to the jury were offered as truthful and essential preconditions for the opinion regarding cause of death. "[A]dmission of the out-of-court statement in this context ha[d] no purpose separate from its truth; the factfinder [could] do nothing with it *except* assess its truth and so the credibility of the conclusion it serve[d] to buttress." (*Williams v. Illinois* (2012) 567 U.S. 50, 127, dis. opn. of Kagan, J. ; see also *id*. at p. 104, conc. opn. of Thomas, J.; *Sanchez,* 63 Cal.4th at p. 686.)

Significantly, the jury was instructed to consider whether the facts underlying Dr. Cohen's opinion had been proven. (19 RT 4353-4354; 29 CT 10758 [CALJIC 2.80]; AOB, pp. 224-225.) But the only "proof" of those facts was the hearsay evidence offered by Dr. Cohen himself. After *Sanchez,* it is clear that permitting Dr. Cohen to testify to the truth of the case-specific facts underlying his own opinion was error.

B. The Erroneous Introduction Of Dr. Cohen's Testimony Prejudiced Appellant.

Dr. Cohen's hearsay testimony prejudiced Appellant in at least two related respects. First, and critically, because it was Dr. Cohen, and Dr. Cohen alone, who relayed the information found in the autopsy report, Appellant was precluded from cross-examining Dr.

Garber, the pathologist who conducted the autopsy and authored the report. As discussed at length in Appellant's Reply Brief, the autopsy report contained profoundly troubling irregularities as it pertained to the cause of death. (ARB, pp. 80-82, 103-108.) Second, and in any event, Dr. Cohen's testimony was essential to the prosecution's case. Without his testimony or an appropriate evidentiary basis for it, the entire prosecution would have fallen apart. For either or both of these reasons, Dr. Cohen's hearsay testimony prejudiced Appellant and the conviction must be reversed.

1. Introduction of Dr. Cohen's testimony prevented cross-examination of Dr. Garber about disturbing discrepancies in the autopsy report.

"The essence of the hearsay rule," this Court has said, "is that the witness is not in court and subject to cross-examination and is not available for the jury to judge his credibility." (*People v. Bob* (1946) 29 Cal.2d 321, 325.) This foundational reason for the hearsay rule assumes particular significance in this case because strong evidence suggests the autopsy report may have been altered to enhance the prosecution case.

The Examination Notes section of the autopsy report reveals that someone wrote "NONE" in the space reserved for "OSC" ("other

significant conditions") contributing to the death, but that *someone else* inserted the words "incised wound to neck" adjacent to the word "NONE". (Autopsy Report, "Examination Notes", p. 13.) The formal autopsy Protocol simply identifies the neck wound as an "Other Condition" which, the Opinion section states, was a "contributing factor" to the death. (Autopsy Report, "Opinion" p. 8.) The Coroner's Investigation Report concludes the death was a "homicide." (*Id.*, p. 3)

Since the prosecutor declined to offer the report into evidence, and instead introduced its contents through Dr. Cohen, the jury was denied the opportunity to hear *Dr. Garber* explain the troubling discrepancies outlined above. Who wrote "NONE," suggesting no "other significant conditions" contributed to the death, and wrote "incised wound to neck" in the Examination Notes? Were the latter words added to the Notes because someone thought evidence of Mr. Baker's heart condition was insufficient, standing alone, to link his heart attack to the crime? Did the word "NONE" mean that Dr. Garber had doubts about the impact of the neck wound on Mr. Baker's death, prompting someone else to insert reference to the neck wound as an "other significant condition"?

The addition of the words "incised wound to neck" to the Notes

thus raises the possibility that the police or prosecution team influenced the preparation of the report. As Justice Werdegar wrote in *Dungo*:

> Even without telling a witness what to say, government agents intent on building a criminal case against a suspect may consciously or unconsciously bias a witness's responses by verbal and nonverbal cues.

(*Dungo, supra*, 55 Cal.4th at 626, conc. opn. of Werdegar, J., quoting *Crawford, supra,* 541 U.S. at 52.)

Did the prosecution team insist that "incised wound to neck" be added to the Notes and the formal Protocol to ensure a link between the crime and Mr. Baker's death? Or did the mere presence of the police and prosecutors at the autopsy apply subtle or not so subtle pressure on Dr. Garber to go farther than he otherwise would have in concluding that the neck wound was a "contributing factor" to the death?

And did the prosecution call Dr. Cohen, rather than Dr. Garber, to testify because the prosecutor wanted to avoid any discussion of how the words "incised wound to the neck" found their way into both the Notes and the "Opinion" section of the Protocol? The jury deserved to hear and consider these questions. But the prosecutor's

decision to have Dr. Cohen testify to the contents of the report effectively eliminated the risk that Appellant would test Dr. *Garber's* "honesty, proficiency, and methodology" (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 321) or "expose any lapses or lies" he may have committed. (*Bullcoming v. New Mexico* (2011) 564 U.S. 647, 662.) The jury was thereby stripped of any opportunity to weigh the demeanor and credibility of the pathologist who performed the autopsy and authored the report. (*Maryland v. Craig* (1990) 497 U.S. 836, 846.)

Had Appellant been able to show that Dr. Garber harbored doubts about what may have caused or contributed to the death and/or that the prosecution influenced or tampered with the report to improve its case, the jury would have been much more likely to entertain a reasonable doubt about Appellant's guilt. As it was, the jury struggled to reach a verdict. (e.g., AOB, p. 174.) Plainly, the prosecution's decision to put Dr. Cohen on the witness stand and relate hearsay to the jury prejudiced Appellant.

2. Dr. Cohen's testimony was essential to the prosecution case.

Without regard to Appellant's inability to cross-examine Dr.

Garber, the hearsay evidence introduced through Dr. Cohen resulted in prejudice to Appellant. If the case-specific hearsay conveyed by Dr. Cohen is excluded, his opinion regarding cause of death lacks any evidentiary support.

As noted above, in order for the jury to credit Dr. Cohen's opinion about the cause of death, it had to find that the predicate facts underlying that testimony had been proven. (19 RT 4353-4354; 29 CT 10758 [CALJIC 2.80]. But those predicate facts had not been independently proven. "Without independent competent proof of those case-specific facts, the jury simply had no basis from which to draw such a conclusion." (*Sanchez*, 63 Cal. 4th at p. 684.)

Indeed, in the absence of admissible evidence to provide a factual basis for the opinion regarding cause of death, Dr. Cohen's testimony should have been excluded and, in any event, could not constitute substantial evidence to support the jury's verdict. (Evid. Code §§ 802, 803 804(c); *Ballard v. Workers' Comp. Appeals Bd.* (1971) 3 Cal.3d 832, 839.) Other than the hearsay to which Dr. Cohen himself testified, the evidence before the jury showed only that Mr. Baker had been loosely bound and gagged, had some kind of wound to his neck and had died. There was nothing to show a

causative link between the circumstances of the crime and Mr. Baker's death. The conviction should be reversed on this ground alone. (See *Stamps*, *supra*, 3 Cal.App.5th at p. 998.) [2]

Moreover, the importance the prosecutor attached to Dr. Cohen's testimony underscores the prejudice to Appellant. The prosecutor returned to Dr. Cohen's testimony time and again during closing argument. Her felony murder theory, and her arguments for why the special circumstances should be found true, all rested on Dr. Cohen's opinion, which in turn rested on the case-specific hearsay he conveyed to the jury. (See 19 RT 4234 ["Dr. Cohen told you that Mr. Baker died primarily of a heart attack, and that heart attack was due to the stress, the extreme terror and fright that he suffered because in his own home he was invaded, he was tied up, his throat was cut, and he died of a heart attack, so is there any doubt in this case that a killing occurred[?]"]; 19 RT 4239-4240 ["[I]t was the fear that was caused by all of these actions, by the binding, by the gagging, by the ransacking, by the cutting of the throat that caused Mr. Baker to die,

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[2] And even if there had been other evidence regarding the cause of death, "cycling hearsay through the mouth of an expert does not *reduce* the weight the jury places on it, but rather tends to *amplify* its effect." (*Stamps*, *supra,* 3 Cal.App.5th at p. 998 [emphasis in original].)

so was this killing committed in order to carry out the crime? Obviously."]; 19 RT 4251 ["The taking was accomplished by either force, hands-on force or fear. And we know that absolutely because that's what ultimately killed Mr. Baker. He was terrorized to death."]; 19 RT 4338 ["[H]e so terrorized Mr. Baker that Mr. Baker had a heart attack. The defendant . . . terrorized him to death."].)

"The evidence in question, consisting solely of [Dr. Cohen's] unfiltered and unvarnished recapitulation of what [he read in the autopsy report], was case-specific, did not come within any hearsay exception, was not personally known to the witness as a fact, was treated as true by [Dr. Cohen], and was inadmissible under *Sanchez*." (*Stamps*, *supra*, 3 Cal.App.5th at 998.) Because that testimony was "central to conviction" (*id*.) on the first degree murder count and the special circumstance finding, this Court should reverse.

CONCLUSION

Dr. Cohen's testimony conveyed to the jury hearsay made inadmissible by state evidence law. That testimony also violated Appellant's rights to due process and a reliable judgment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. The error was prejudicial and requires reversal of

Appellant's conviction and sentence of death.

Dated: October 16, 2017

/s/ Martin H. Dodd
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 8.630(b)(1)(A) of the California Rules of Court. This brief uses a proportional typeface and 14-point font, and contains 2,524 words.

Dated: October 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman Dupree Dodd Croley Maier LLP, 601 Montgomery St., Suite 333, San Francisco, CA 94111. I am over the age of 18 and not a party to the within action. I am readily familiar with the business practice of Futterman Dupree Dodd Croley Maier LLP for the collection and processing of correspondence.

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APPELLANT'S SUPPLEMENTAL BRIEF

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 16, 2017, at San Francisco, California.

/s/ Gabrielle Van Vleck
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