In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA , **Plaintiff and Respondent,** **v.** **PAUL WESLEY BAKER,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S170280

Los Angeles County Superior Court
Case No. LA045977
The Honorable Susan M. Speer, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This Court ordered supplemental briefing on the admissibility of expert testimony under *People v. Sanchez* (2016) 63 Cal.4th 665. The expert testimony at trial was admissible under *Sanchez* because it was proper opinion and general background testimony that did not convey any case-specific facts that were hearsay. To the extent any case-specific facts were conveyed from the DNA reports, the reports were admissible under the business record exception to the hearsay rule. Moreover, there was no federal constitutional violation because the DNA reports were nontestimonial. Furthermore, any error was harmless under any standard based on the overwhelming evidence.

ARGUMENT

THE EXPERT TESTIMONY WAS PROPER UNDER *SANCHEZ* BECAUSE IT WAS OPINION AND GENERAL BACKGROUND TESTIMONY THAT DID NOT RELAY CASE-SPECIFIC FACTS TO THE JURY

A. The Applicable Law

In *People v. Sanchez* (2016) 63 Cal.4th 665, this Court set forth a test to determine the admissibility of an out-of-court statement: (1) whether a statement is hearsay and if a hearsay exception applies; and (2) if the "*Crawford* limitations of unavailability, as well as cross-examination or forfeiture," are not met, then whether the statement is testimonial. (*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

B. The DNA Testimony at Trial

1. Pollard's Testimony

Theresa Pollard, a criminalist for the California Department of Justice, tested the fingernail clippings from the victim and concluded that DNA found in the clippings was consistent with appellant's DNA. (21RT 3620-3631.) Pollard also concluded that sperm on a blanket from the crime scene matched appellant's profile, and his DNA was on two cigarettes. (21RT 3638-3648.) Sperm and non-sperm DNA on a "towel bootie" and a dish towel found with the victim's body also matched appellant's DNA. (21RT 3652-3656.) Cuttings from the victim's underwear showed partial profiles for sperm and non-sperm fractions that were consistent with appellant's DNA. (21RT 3660-3662.) DNA from some of the latex gloves found at the crime scene was also consistent with appellant's DNA. (21RT 3662-3668.)

2. Dr. Staub's Testimony

Dr. Rick Staub, director of the Cellmark Laboratory in Dallas, Texas, testified about DNA testing. (20RT 3425-3432.) DNA testing was also performed at the Cellmark Laboratory in Germantown, Maryland, but Dr. Staub was not its director. He was familiar with the policies at that laboratory, which followed the same protocols as the Dallas laboratory, and explained the testing procedures at both laboratories. (20RT 3433-3450.)

a. Germantown Laboratory

Dr. Staub reviewed DNA reports, explained how the chain of custody was maintained, and how the analysis was performed at the Germantown laboratory. (20RT 3449-3470.) He opined

that appellant matched both the sperm and non-sperm fractions from the rug section. (20RT 3466-3473, 3536.)

Dr. Staub also reviewed the report that analyzed the dildo and opined that appellant was a match, and that the victim's DNA was also present. (20RT 3479-3483, 3493-3497, 3534-3535.) A blood spot found in the victim's apartment matched the victim's DNA. (20RT 3483-3493.)

b. Dallas Laboratory

Dr. Staub supervised and reviewed the work of the two analysts who performed the analysis at the Dallas laboratory. (20RT 3505-3507.) He opined on the following: it was possible for appellant's DNA to be on three of the latex gloves, but the results were inconclusive (20RT 3517-3525), DNA profiles were consistent with appellant's DNA and one other man's DNA in two other gloves (20RT 3525-3528, 3532), and sperm cells found on the victim's underwear were consistent with appellant's DNA profile (20RT 3508-3511, 3528-3531).

The DNA reports were admitted into evidence under the business records exception. (48RT 7547-7558, 7596.)

C. *Sanchez* Analysis

1. The *Sanchez* Claim Is Not Forfeited

Appellant's failure to object at trial to Pollard's testimony and Dr. Staub's Dallas Cellmark testimony does not forfeit a *Sanchez* claim. Similarly, appellant's objection to Dr. Staub's Germantown testimony on foundational grounds, not on confrontation clause grounds, would not forfeit a *Sanchez* claim. (*People v. Perez* (2020) 9 Cal.5th 1, 4.)

2. All of The DNA Expert Testimony Was Properly Admitted

a. Pollard's Testimony Was Not Hearsay Because She Had Personal Knowledge and Performed the Analysis

We begin the *Sanchez* inquiry by determining whether any of the expert testimony was hearsay and if a hearsay exception applies. As appellant correctly concedes, none of Pollard's DNA testimony was hearsay and was thus properly admitted. (See AOB at 227 ["Appellant recognizes that other DNA evidence properly testified-to by Department of Justice criminalist Theresa Pollard linked appellant to the crime."].) Pollard's testimony regarding her analysis and her conclusions were not hearsay, because she personally conducted the analysis. (See *Sanchez*, *supra*, 63 Cal.4th at p. 675 [experts may testify "to matters within their own personal knowledge"].)[1]

b. Dr. Staub's Testimony Did Not Relay Case-Specific Facts To the Jury; It Was General Background and Opinion Testimony Permissible Under *Sanchez*

The portions of Dr. Staub's testimony of general background matters in the form of DNA analysis and procedures at the laboratories were the kind of background information experts have traditionally been able to rely on and relate to the

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[1] Similarly, the testimony regarding the autopsy, the rope, and the plant material found on the truck was not hearsay, and therefore not affected by *Sanchez*, because it was based on each witness's personal knowledge. (See 18RT 3038-3067; 30RT 4989-5013; 35RT 5790-5823.)

jury. (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.) For example, Dr. Staub testified about genetics, Y-STR profiling, the policies at the laboratories, and process of analyzing samples. (See, e.g., 20RT 3426-3441, 3446-3463, 3497-3503.) All this testimony, and any other general background testimony, was proper under *Sanchez*. Similarly, to the extent he conveyed information from the reports generated by the analysis, like the sequence of DNA profiles, the location of nucleotides, genetic markers, and profiler grids, this machine-generated data was permissible under *Garton*. (See, e.g., 20RT 3468-3472.) In *Garton*, this Court found testimony premised explicitly on autopsy photographs and X-rays did not constitute hearsay because "[o]nly people can make hearsay; machines cannot. (*People v. Garton* (2018) 4 Cal.5th 485, 505-506.)

Moreover, Dr. Staub's conclusions were properly admitted as opinion testimony. (Evid. Code, § 805 ["Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact"].) An expert may base his or her opinion on any "matter," 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 [or her] testimony relates . . . ." (Evid. Code, § 801, subd. (b).) "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury in *general terms* that he did so." (*Sanchez*, *supra*, 63 Cal.4th at p. 685, italics in original.) To enable the jury to "independently evaluate the probative value of an expert's testimony," an expert is allowed "to relate generally

the kind and source of the 'matter' upon which his opinion rests." (*Id*. at p. 686.)

Based on the information reflected in the DNA reports, which analyzed the items recovered from the victim and the crime scene, Dr. Staub opined whether appellant's DNA matched or was consistent with the DNA found on those items. Dr. Staub testified to his own opinion as an expert by relying on – but not conveying the contents of – the DNA reports prepared by other analysts. (See, e.g., 20RT 3460, 3468, 3472-3474, 3483-3484, 3489, 3495, 3519, 3522-3536, 3552, 3577, 3589-3592.) This is precisely what expert witnesses do, and such testimony is proper before and after *Sanchez*. (See *Garton*, *supra*, 4 Cal.5th at p. 507 ["In light of her entire testimony, it is clear that Comfort was exercising her own independent judgment to arrive at her conclusions]; *People v. Leon* (2015) 61 Cal.4th 569, 603 ["It is also clear that testimony relating the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay."]; see also *People v. Catlin* (2001) 26 Cal.4th 81, 137; *People v. Montiel* (1993) 5 Cal.4th 877, 918.)

Throughout his testimony, Dr. Staub personally interpreted the data from the reports and independently concluded whether appellant was a match. (See, e.g., *People v. Veamatahau* (2020) 9 Cal.5th 16, 27 ["Rienhardt's testimony about the appearance of the seized pills was not hearsay, because Rienhardt personally examined the pills and saw the imprints on them."].) Based upon his review, he then testified to the

significance of those results and was subject to extensive cross-examination. (20RT 3537-3592.) (*People v. Geier* (2007) 41 Cal.4th 555, 608, fn. 13 ["As an expert witness, [the DNA expert] was free to rely on [the analyst's] report in forming her own opinions regarding the DNA match."].) For all these reasons, Dr. Staub's DNA testimony was proper as opinion and general background testimony permitted under *Sanchez*.

c. The DNA Reports Were Properly Admitted Under the Business Record Exception

To the extent Dr. Staub relayed case-specific facts from the DNA reports (see, e.g., 20RT 3491 ["Q: What did *she* [analyst] find?; A: "*She found* that the reference specimen for Judy Palmer matches the DNA profile for the evidence for the blood spot from the wall."]) that were not his own opinion, those facts were independently proven by other admissible evidence – the reports themselves – which were properly admitted under the business record exception to the hearsay rule. (Evid. Code, § 1271.)

At trial, appellant did not contest the admission of the Dallas reports under the business records exception, but only objected to the reports from Germantown on the basis that Dr. Staub was not the proper custodian. (20RT 3442-3445.) A qualified witness need not be the custodian, the person who created the record, or one with personal knowledge in order for the business record exception to apply. (See *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 322; 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 243, p. 1108.) "Any 'qualified witness' who is knowledgeable about the documents may lay the foundation for

introduction of business records – the witness need not be the custodian or the person who created the record." (*Id*. at p. 324.) "The key to establishing the admissibility of a document made in the regular course of business is proof that the person who wrote the information or provided it had knowledge of the facts from personal observation." (*Id*. at p. 322; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 1012.)

Here, Dr. Staub testified that the reports were generated in the regular course of Cellmark's business and that the information they contained was recorded by a person with personal knowledge, at or near the time of the act, condition or event recorded. As the director of the Dallas laboratory, he was familiar with the report procedures and supervised the work of both analysts who performed the analysis. (20RT 3505-3512, 3517.) He was also familiar with the procedures at the Germantown Laboratory, testified that were similar to his own laboratory, and explained how those reports were prepared. He then explained the procedures utilized to ensure accuracy and how the analysis was performed with a defense expert present, which indicated trustworthiness. (20RT 3438, 3446-3450, 3456-3470, 3508-3512.) (*People v. Zavala* (2013) 216 Cal.App.4th 242, 246 ["Whether a particular business record is admissible as an exception to the hearsay rule . . . depends upon the 'trustworthiness' of such evidence, a determination that must be made, case by case, from the circumstances surrounding the making of the record."].) Thus, Dr. Staub was qualified to lay a business records exception regarding the reports from both

laboratories. (*Jazayeri v. Mao*, *supra*, 174 Cal.App.4th at pp. 322-324.)

Accordingly, the trial court did not abuse its discretion in admitting the DNA reports under the business records exception. (20RT 3426-3445; 48RT 7547-7558, 7596.) Moreover, because the DNA reports were properly admitted as business records, any case-specific facts related to the jury were independently proven by competent evidence and covered by a hearsay exception. (*Sanchez*, *supra*, 63 Cal.4th at pp. 683-686.) Therefore, there was no *Sanchez* error.

3. There Was No Confrontation Clause Error Because The Statements Were Nontestimonial

To the extent that Dr. Staub related hearsay, the hearsay was nontestimonial. An out-of-court statement is "testimonial" when two critical components are present: (1) the statement was "made with some degree of formality or solemnity;" and (2) the statement's primary purpose pertains in some fashion to a criminal prosecution. (*People v. Lopez* (2012) 55 Cal.4th 569, 581-58.) The statements in this case fail to meet either part of this two-pronged requirement.

The DNA reports were generated by inputting samples into a machine, which produced the report plotting the sequence of DNA profiles. This is the kind of machine-generated data found to be nontestimonial. (*Lopez*, *supra*, 55 Cal.4th at p. 583.) Even if a non-testifying technician recorded the DNA sequences and noted the locations where the profiles matched, the recordings would reflect the results of the machine-generated data. Such

observations of objective facts, like the descriptions of the physical condition of the victim's body in *Dungo*, are nontestimonial. (*People v. Dungo* (2012) 55 Cal.4th 608, 619-620.) At the very least, the recordings lack the formality of the sworn affidavits and signed reports that have been found to be testimonial. (*People v. Holmes* (2012) 212 Cal.App.4th 431, 433-439 [DNA test reports found not be testimonial hearsay because they lacked formality and recorded objective facts].) Moreover, Dr. Staub was a "supervising forensic analyst with long experience and full knowledge of the laboratory's procedures." (*Lopez*, *supra*, 55 Cal.4th at p. 587 (conc. opn. of Werdegar, J.) Thus, as in *Lopez*, "[t]he demands of the confrontation clause were properly satisfied in this case by calling a well-qualified expert witness to the stand, available for cross-examination, who could testify to the means by which the critical instrument data was produced and could interpret those data for the jury, giving [her] own, independent opinion[.]" (*Ibid*.)

Finally, the primary purpose of DNA testing is not to further criminal investigations. The analysts, who generated the reports using standard procedures, had no way of knowing whether the results of the testing would be inculpatory or exculpatory, and Dr. Staub's opinion was subject to extensive cross-examination. Thus, the primary purpose requirement was not met. (*Williams v. Illinois* (2012) 562 U.S. 50, 57, 81-86 [finding Cellmark DNA report nontestimonial]; *People v. Barba* (2013) 215 Cal.App.4th 712, 742-743.)

Therefore, none of the expert testimony violated the confrontation clause.

4. Any Error Was Harmless Under Either Standard

There was no federal constitutional violation because, to the extent that hearsay statements were erroneously admitted under *Sanchez*, the statements were nontestimonial. Therefore, the standard for state law error under *People v. Watson* (1956) 46 Cal.2d 818, applies. (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) Even under the standard for federal constitutional violations, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18; *Sanchez*, *supra*, 63 Cal.4th at p. 698.)

Even without Dr. Staub's DNA testimony, the jury heard evidence from Pollard finding appellant's DNA on the victim's fingernail clippings, cigarettes, and his sperm on a blanket and towel booties. Pollard also found sperm on the victim's underwear that was consistent with appellant's DNA, and his DNA on latex gloves found at the crime scene. Because this evidence was not within the scope of *Sanchez*, the jury would still have the benefit of compelling DNA evidence.

Other evidence also overwhelmingly established appellant's guilt of the rape and murder, as the prosecutor explained during closing argument. (See 45RT 7133 ["Even without [DNA evidence], as compelling as you may find it, you can easily, easily convict this defendant."].) Before the crimes, appellant broke into the victim's apartment, was arrested, and had a restraining order filed against him by the victim. Appellant was released a few

days before the victim's disappearance, stole her car, and sold it. Appellant also planned his crimes by visiting the victim's storage unit and purchasing supplies to bind and dispose the victim's body. Extensive evidence also established appellant's intent to kill the victim, and the victim's fear that appellant would kill her.

Appellant's behavior after the murder also provided substantial corroboration. The night of the murder, appellant made highly incriminating statements about breaking into the victim's apartment and raping her, and had fresh scratches on his face. As the investigation continued, appellant dumped belongings that could connect him to the victim, including selling the truck the victim was driving when she disappeared. Appellant also appeared increasingly suicidal, and told friends that "he will be on the news," and not to worry about the stolen vehicle because "no one will show up in court." Items found near the body, including documents with appellant's signature, written messages to the victim from appellant, and a photograph of appellant with his dog, also linked appellant to the crime. Finally, powerful testimony was presented regarding appellant's violent treatment of women, including physical and sexual abuse in the form of rape and forced sodomy.

Taken together, overwhelmingly established appellant's guilt, and any allegedly case-specific hearsay testimony by Dr. Staub concerning DNA reports was harmless under either standard.[2]

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[2] The DNA evidence was only relevant to the rape and murder of Judy Palmer and the special circumstance of murder in the

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: June 3, 2020

Respectfully submitted,

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commission of rape and burglary. Any alleged error in admitting this evidence had no bearing on the remaining offenses: counts 3 (burglary), 4 (grand theft), 5 (auto theft), 6 (rape of Kathleen S.), 7 (forced sodomy of Kathleen S.), 10 (forced sodomy of Lorna T.), 14 (auto theft), and the finding of multiple victims.

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13-point Century Schoolbook font and contains 2796 words.

Dated: June 3, 2020

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No.: S170280

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 3, 2020, at Los Angeles, California.

Lupe Zavala	/s/ Lupe Zavala
Declarant	Signature

LA2009505317

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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