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Supreme Court of California
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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

PAUL NATHAN HENDERSON,

Defendant and Appellant.

CAPITAL CASE

Case No. S098318

Riverside County Superior Court Case No.
INF027515
The Honorable Thomas N. Douglass, Jr., Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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ARGUMENT

THIS COURT'S DECISION IN *PEOPLE V. SANCHEZ* (2016) 63 CAL.4TH 665, DOES NOT SUPPORT HENDERSON'S CLAIM THAT HIS CONFRONTATION RIGHTS WERE VIOLATED

In support of his claim that his Sixth Amendment Confrontation Clause rights were violated when, absent any objection from defense counsel, a different pathologist than the one who performed the autopsy on Reginald Baker, described the findings in the autopsy report before giving his expert opinions regarding the cause of death (see AOB 207-229), Henderson argues that "Dr. Cohen's testimony ran demonstrably afoul" of this Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665, such that reversal is required. (Supp. AOB 5-17.) Contrary to Henderson's argument, *Sanchez* does not support his claim that his confrontation rights were violated, and his claim should be rejected as meritless.

A. Factual Background

As shown in Respondent's Brief (RB pp. 2-9), during his late night home-invasion robbery of Reginald and Peggy Baker, Henderson held a knife to Reginald's throat and demanded the keys to the couple's car. Henderson put a gag on Reginald's mouth. Peggy asked Henderson not to put the gag on Reginald because he was a "mouth-breather" and she feared Reginald would have a heart attack. (2 CT 443-444, 460.)

At some point, Henderson went into the kitchen, retrieved a paring knife, and returned to the bedroom where he ordered the couple to stay.

Henderson ordered Peggy to remain in the bathroom for much of the ordeal. Despite Henderson's efforts to choke her and "crack" her neck, Peggy remained conscious. After she heard Henderson leave in the car, Peggy looked at Reginald and realized he was dead. The gag was pulled down from his face, and there was a "blood ring" on his throat. (2 CT 445-446, 461, 463.) Unable to call 9 1 1 from her home because Henderson had

pulled out the telephone cords (2 CT 461-462; XI RT 2501), Peggy went to a neighbor's house to ask them to call 9 1 1. (2 CT 445, 467.)

On June 24, 1997, Dr. Garber performed the autopsy on Reginald. (XV RT 3231.) Dr. Garber did not testify at trial.[1] During a chambers conference at trial, defense counsel, noting that Dr. Garber was not going to testify, did not object to Dr. Joseph Cohen testifying in place of Dr. Garber and instead inquired as to whether the contents of Dr. Garber's "autopsy protocol" (the autopsy report) would be admitted as a business record. Pointing out that Dr. Garber had opined in his report that the knife wound inflicted on Reginald's neck was not fatal and that Reginald died of a heart attack, *defense counsel wanted that information admitted into evidence even though Dr. Garber was not going to testify*. The prosecutor proffered that Dr. Cohen's opinion would be consistent with Dr. Garber's conclusions.[2] (XI RT 2597-2598.)

At trial, Dr. Cohen, the chief forensic pathologist for Riverside County, testified that he reviewed Dr. Garber's autopsy protocol and associated notes (XV RT 3231), Detective Wolford's police report, and photographs taken at the scene and autopsy. (XV RT 3233-3235.) Reginald had suffered from heart disease consistent with the scar that went from his neck to his pubic bone from previous bypass surgery. (XV RT 3237-3238.) Reginald had a contusion on his right upper chest; an abrasion on his left shin; and a side-to-side four-inch cut across his neck that was

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[1] The record does not reveal why Dr. Garber did not testify at trial.

[2] Henderson asserts that there were discrepancies in the autopsy report and suggests that the prosecution may have "influenced the preparation of the report," and also implies that the prosecution purposefully refused to call Dr. Garber to somehow bolster the People's case. (Supp. AOB at pp. 11-13.) These unfounded assertions should be summarily rejected.

about one-third of an inch in depth. (XV RT 3235-3236.) Dr. Cohen opined that the knife wound on Reginald's neck was consistent with having been caused by a serrated knife. (XV RT 3246.) Detective Wolford brought the knife that was found on the Bakers' bed to the autopsy. That knife had a serrated edge. (XV 3226-3227.) Dr. Cohen also stated that the knife wound would have been painful. (XI RT 3240.)

Dr. Cohen also testified that Reginald suffered from heart disease. Reginald's heart was "markedly enlarged," and "the arteries in the heart were significantly narrowed or occuled with atherosclerosis, i.e., the arteries were hardened. According to Dr. Cohen, "blocked arteries and a big heart together [were] a set-up for a cardiac death, a sudden death." Reginald had four bypass grafts from a previous surgery, and two of the grafts were "completely blocked." When asked about the effect of a stressful or terrorizing situation on someone with Reginald's heart condition, Dr. Cohen, *based on his own training and experience*, opined that "the individual even without any stress [would be] a set-up for sudden death." (XV RT 3237-3238.)

Based upon a hypothetical consistent with the facts of the case presented by the prosecutor, Dr. Cohen opined that Reginald died primarily of heart disease but it was more likely than not that he would have survived had it not been for the stressors of the incident, and that the neck injuries inflicted on Reginald would have been stressful on his heart. (XV RT 3239-3240.) Dr. Cohen confirmed that other than the stress of the robbery, there was no other explanation for Reginald's death, and he reiterated that Reginald died from a combination of "natural disease plus physical and emotional stressors." (XV RT 3241-3242.

B. The Confrontation Right and *Sanchez*

As outlined in Respondent's Brief (RB pp. 73-76), the confrontation clause of the Sixth Amendment provides that "[i]n all criminal

prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *Crawford v. Washington* (2004) 541 U.S. 36, 50-56, the United States Supreme Court held that a criminal defendant has the Sixth Amendment right to confront and cross-examine any witness who offers a testimonial out-of-court statement against him. In three cases decided since 2009, the high court has applied *Crawford* to the admission of forensic evidence at trial. In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 311, the court held that the defendant's confrontation rights were violated by the admission of affidavits stating that a substance connected to the defendant was cocaine. In *Bullcoming v. New Mexico* (2011) 564 U.S 647, 658-663, the court held that testimony of a laboratory analyst "parroting" the results of a blood alcohol test that he did not perform or observe, together with admission of a formalized report, violated the defendant's confrontation rights. In *Williams v. Illinois* (2012) 567 U.S. 50, 83-86, the court held that testimony by a police biologist regarding a DNA match, which relied in part on a DNA profile generated at another laboratory, did not violate the confrontation clause.

Nearly five years ago, this Court decided three cases addressing *Crawford's* application to various items of forensic evidence. (See *People v. Lopez* (2012) 55 Cal.4th 569 [blood alcohol tests]; *People v. Dungo* (2012) 55 Cal.4th 608 [autopsy reports]; *People v. Rutterschmidt* (2012) 55 Cal.4th 650 [toxicology analysis of the victim's blood].) Although the proper application of *Crawford* and its progeny remains unclear today, particularly with respect to autopsy reports, two of this Court's decisions

show that Dr. Cohen's trial testimony was permissible, and that any error in the admission of the testimony was harmless beyond a reasonable doubt.[3]

As discussed in Respondent's Brief (RB pp. 74-76), in *People v. Dungo, supra*, 55 Cal.4th at p. 621, this Court explained that statements in an autopsy report describing a nontestifying pathologist's observations about the condition of the victim's body were not testimonial because the primary purpose of recording such facts did not relate to a criminal investigation. The Court also described such statements, which "merely record[ed] objective facts," as being "less formal than statements setting forth a pathologist's expert conclusions" about the victim's cause of death. (*Id*. at p. 619.) In *Dungo*, it was unclear whether the pathologist's description of the victim's body was based solely on the autopsy photographs, solely on the nontestifying pathologist's autopsy report, or on a combination of both. (*Id*. at pp. 615.) Nonetheless, because the pathologist did not describe the conclusions of the nontestifying pathologist, this Court had no occasion to decide "whether such testimony, if it had been given, would have violated the defendant's right to confront" the nontestifying pathologist. (*Id*. at p. 619.) Justice Corrigan also noted in dissent that properly authenticated photographs are not hearsay at all, much less testimonial hearsay. (*Id*. at pp. 646-647, dis. opn. of Corrigan, J.)

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[3] To the extent Henderson relies on *People v. Jeffrey G*. (2017) 13 Cal.App.5th 501 (in post-insanity verdict proceeding, prejudicial error to permit expert witnesses to recite case-specific hearsay evidence not independently proven by admissible evidence), and *People v. Stamps* (2016) 3 Cal.App.5th 988 (admission of case-specific drug expert testimony absent independent corroboration was prejudicial) (see Supp. AOB pp. 7 & 15), these decisions are not binding on this Court, nor do they support Henderson's claim because they do not concern autopsy reports.

After briefing in this case was complete, this Court issued its decision in *People v. Leon* (2015) 61 Cal.4th 569, 602-603, and summarized its prior decisions:

> Although the Supreme Court has not settled on a clear definition of what makes a statement testimonial, we have discerned two requirements. First, 'the out-of-court statement must have been made with some degree of formality or solemnity.' ([*Lopez, supra*, 55 Cal.4th at 581].) Second, the primary purpose of the statement must 'pertain[] in some fashion to a criminal prosecution.' (*Id*. at p. 582; accord, [*Dungo, supra*, 55 Cal.4th at p. 619].)

(*Leon, supra*, at pp. 602-603.) The Court continued:

> [T]estimony relating the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay. (Evid. Code, § 801, subd. (b); *People v. Montiel* (1993) 5 Cal.4th 877, 918.) A testifying expert can be cross-examined about these opinions. The hearsay problem arises when an expert simply recites portions of a report prepared by someone else, or when such a report is itself admitted into evidence. In that case, out-of-court statements in the report are being offered for their truth. Admission of this hearsay violates the confrontation clause if the report was created with sufficient formality and with the primary purpose of supporting a criminal prosecution. (*Dungo, supra*, 55 Cal.4th at p. 619.)

(*Leon, supra*, at p. 603.)

The *Leon* Court explained that the *Dungo* majority concluded that statements which merely record objective facts "are not sufficiently formal or litigation related to be testimonial under the high court's precedents." (*Leon, supra*, 61 Cal.4th at pp. 603-604, citing *Dungo, supra*, 55 Cal.4th at pp. 619-621.) Accordingly, *Dungo* "found no confrontation clause violation when a testifying pathologist expressed forensic opinions based on the medical observations in a nontestifying pathologist's autopsy report." (*Leon, supra*, at pp. 603-604.)

Subsequently, in *People v. Sanchez* (2016) 63 Cal.4th 665, 679, 686, the Court rejected the not-admitted-for-its-truth rationale with respect to case-specific hearsay in the context of gang expert testimony. The Court again stated that testimonial statements have two critical components: "the out-of-court statement must have been made with some degree of formality or solemnity"; and, the primary purpose of the statement must be "to memorialize facts relating to past criminal activity, which could be used like trial testimony." (*Id*. at p. 689.) In *Sanchez*, the Court found that the police reports and STEP notices which the gang expert relied upon, were compiled during police investigation of completed crimes and were therefore sufficiently formal to be testimonial. (*Sanchez, supra*, 63 Cal.4th at p. 694.)

As this Court has recognized, the preparation of an autopsy report is not limited to official criminal investigations. (*Dungo, supra*, 55 Cal.4th at pp. 619-621, 624-627.) Rather, the coroner is mandated to "determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths," including deaths from known or suspected homicide. (Gov. Code, § 27491.) Thus, the medical examiner performing an autopsy has a task encompassing more than providing information to support a criminal investigation. It is thus not sufficiently formal for purposes of the confrontation clause. The Court's decision in *Sanchez* did not undermine the analysis in *Dungo* or *Leon*.

As argued in Respondent's Brief (pp. 77-78), as was the case in *Dungo*, here, Dr. Cohen did not relay to the jury Dr. Garber's opinion as to the cause of death, but rather merely described the condition of Reginald's body, both externally and internally, after having reviewed the autopsy report and photographs from the autopsy and crime scene (XV RT 3235, 3237-3238), before giving his own opinion as to the cause of death. (XV RT 3239-3240, 3242.) In other words, Dr. Cohen testified at trial that,

as the chief forensic pathologist for the county of Riverside, he reviewed Dr. Garber's autopsy protocol and associated notes, the toxicology report, the police report and four photographs. (XI RT pp. 3229-3234.) And based on that information, as well as his training and experience, he arrived at his own expert opinion as to the cause of Reginald's death. (XI RT pp. 3229-3234.)

For instance, after having reviewed the photographs, and Dr. Garber's autopsy report and Detective Wolford's police report, Dr. Cohen described what the external and internal examinations of Reginald's body revealed. Dr. Cohen described the cut on Reginald's neck as "relatively superficial," but explained that Reginald suffered from heart disease. (See XV 3235-3238.) When asked about the effect of a stressful or terrorizing situation on someone with Reginald's heart condition, Dr. Cohen, based on his own training and experience, opined that "the individual even without any stress [would be] a set-up for sudden death." (XV RT 3238.) Because those statements were not testimonial, Henderson did not have a constitutional right to confront and cross-examine Dr. Garber about his observations. (See *Dungo*, *supra*, 55 Cal.4th at p. 619 [observations by examining pathologist about the condition of the victim's body "are not testimonial in nature"].)

Then, based upon a hypothetical presented by the prosecutor, Dr. Cohen rendered his independent expert opinion that Reginald died primarily from his heart disease. (XV RT 3239-3240, 3242.) Here, the requirements of the confrontation clause were satisfied by calling "a well-qualified expert witness to the stand, available for cross-examination, who could testify to the means by which the critical . . . data was produced and could interpret those data for the jury, giving his own, independent opinion as to" the results of the analysis. (*Lopez*, *supra*, 55 Cal.4th at p. 587 (conc. opn. of Werdegar, J.).)

Contrary to Henderson's argument (Supp. AOB pp. 9-10), as argued in Respondent's Brief (RB pp. 78-79), any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 22.) This is especially true in light of the fact that defense counsel did not object to Dr. Cohen testifying and sought to ensure that, as Dr. Garber opined in his report, the evidence showed that Reginald died of a heart attack and that the knife wound inflicted by Henderson was not fatal. (XI RT 2597-2598.) Additionally, the evidence at trial established that based on Peggy's pleas and warning during the incident, Henderson was well aware of Reginald's fragile condition. (2 CT 444-445, 460.) Henderson admitted in his police interview that Peggy had warned him that Reginald had a heart problem (XV RT 3375), and that at one point he thought Reginald was having a heart attack (XV RT 3379). And, at trial, Henderson testified that he was aware that Reginald started to have a heart attack during the home invasion robbery. (XVIII RT 3955.) Under these circumstances, it is clear that even if Dr. Garber's opinions were found to have been improperly conveyed to the jury in contravention of Henderson's right of confrontation, there is no reasonable possibility that absent Dr. Garber's opinions, the jury would have reached a different verdict as to either guilt or penalty.

As for Henderson's argument that Dr. Cohen's testimony was critical to the prosecution's case (Supp. AOB pp. 13-16), such argument ignores the fact that it was equally critical to the defense to the extent Dr. Cohen conveyed to the jury that the knife wound Henderson inflicted on Reginald's neck was not fatal.

Based on all of the above, because there was no error or any prejudice, this claim remains meritless.

CONCLUSION

Accordingly, Respondent respectfully requests that the judgment be affirmed.

Dated: November 27, 2017

Respectfully submitted,

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I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 3,109 words.

Dated: November 27, 2017

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