SUPREME COURT, STATE OF CALIFORNIA

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

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

1. Introduction

In his supplemental brief appellant demonstrated that, under *People v. Sanchez* (2016) 63 Cal.4thj 665, 204 Cal.Rptr.3d 102 and other applicable authorities, the murder, rape, and burglary convictions and the rape and burglary special circumstances must be reversed as the result of the admission of prejudicial excludable testimonial case specific hearsay. Respondent claims there was no error and no prejudice. These claims are without merit and should be rejected.[1]

2. Dr. Staub relied on case-specific facts

Respondent claims Dr. Staub did not testify to case-specific facts. (RSB 9-12.) "Case specific facts are those relating to particular events and participants alleged to have been involved in the case being tried." (*People v. Sanchez, supra,* 63 Cal.4th at 6576, 204 Cal.Rptr.3d at 111.) And, as noted in *People v. Veamatahau* (2020) 9 Cal.5th 16, 26, 259 Cal.Rptr.3d 205, 213:

> [A]n expert may not relate inadmissible "*case-specific* facts about which the expert has no independent knowledge." (*Sanchez, supra,* 63 Cl.4th at p.676, 204 Cal.Rptr.3d 102, 374 P.3d 320.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried."

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[1] Respondent agrees that the *Sanchez* claim has not been forfeited as to either the Dallas or Germantown lab. (RSB 8.)

> (*Ibid.*) Testimony relating such facts, unlike testimony about non-case-specific background information, is subject to exclusion on hearsay grounds. (*Id.* at p. 684, 204 Cal.Rptr.3d 102, 374 P.3d 320, fn.omitted ["If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, these statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception."].) The distinction between case-specific facts and background information thus is crucial – the former may be excluded as hearsay, the latter may not.

The Cellmark reports and virtually all of Dr. Staub's testimony about their contents were case specific. The reports and testimony specifically mentioned appellant and the DNA test results relating to him. The reports mentioned appellant by name. So did Dr. Staub's case-specific testimony based on those reports: "Q. [Prosecution] So here this page [of People's Exhibit 313, "a lab report from Orchid Cellmark dated January24, 2005"] that I'm showing..., does this show what an actual D.N.A. profile looks like? In particular, I'll ask you to look at the bottom line where it says 'Paul Baker.' A. [Dr. Staub] Yes it does." (20 RT 3456-3457.) Dr. Staub then testified about the results as they applied specifically to appellant. (20RT 3457-3463; see 20RT 3455-3459 ["...at the bottom row where it indicates 'Paul Baker'...]; 20RT 7460 [Q. "As for someone named Paul Baker according o the records? A. Yes.... Q. Did they match? A. Yes."]) Staub testified that he would not "expect to find someone else on the planet with the same D.N.A. profile as the defendant." (20R 3462-3463.)

From the laboratory records, Dr. Staub claimed that swabs had been

taken from appellant's mouth, that samples had been properly sent and received, that analyses had been done and that the analysts had conducted the tests. (20RT 3463-3468. He testified that "extraction...match[ed] the same profile as that of Paul Baker..." (20RT 3468.) Dr. Staub testified that "defendant's D.N.A. is a perfect match at all loci for the two components of 31." (20RT 3472.) He testified, "both the sperm fraction and the non-sperm fraction appear to match the profile of Paul Baker under both the Profile and Cofiler [tests]." (20RT 3474.) He testified regarding the testing of the pink vibrator and that appellant's DNA matched DNA on the vibrator. (20 RT 3478-3484.) Throughout his testimony, Dr. Staub testified to case-specific facts, i.e., facts "relating to the particular events and participants alleged to have been involved in this case being tried."

The above excerpts from Dr. Staub's testimony are only a few samples of the case-specific facts testified to by Dr. Staub. His testimony is replete with such testimony, which was admitted for the truth of the matter asserted. Nearly the entirety of his testimony was case-specific hearsay admitted for the truth of the matter stated in the Cellmark reports. Respondent does not claim that the evidence was not admitted for its truth.

Nor does it does appear that Dr. Staub was ever given a hypothetical situation and asked to express his expert opinion about that situation. He testified that the results of the Cellmark DNA tests were the actual truth. He never rendered an opinion based on a hypothetical, which is the usual method of obtaining an expert opinion.

Respondent claims "Dr. Staub testified to his own opinion as an expert..." (RSB 11.) However, Dr. Staub was never asked about his opinion regarding the DNA tests. His testimony related as the truth the results reflected in the tests. Respondent also claims that Dr. Staub did "not

convey[ ] the contents of...the DNA reports prepared by other analysts." (RSB 11.) Merely reading Dr. Staub's testimony demonstrates the utter falsity of the contention. Dr. Staub did not "independently conclude[ ]" anything regarding the Cellmark DNA tests. He merely repeated the contents of the reports as if they stated the truth. His "surrogate testimony...does not meet the constitutional requirement." (*Bullcoming v. New Mexico* (2011) 564 U.S. 647, 652, 131 S.Ct. 2705, 2710.

In *People v. Mendez* (2019) 7 Cal.5th 680, 691-692, 249 Cal.Rptr.3d 49, 61, this Court discussed expert testimony post-*Sanchez*:

> What we recognized in *Sanchez* is that an expert witness may rely on hearsay in explaining the basis for his or her "general knowledge" about "matters 'beyond the common experience of an ordinary juror.'" An expert may also "rely on information with [his or her] personal knowledge" and "give an opinion based on a hypothetical including case-specific facts that are properly proven" by other admissible evidence. "What an expert *cannot* do," we held in *Sanchez*, "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." And, if, in a criminal case, 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, or forfeited that right by wrongdoing." (Citation omitted.)

Here, Dr Staub's testimony violated the above-related rules. He did not give an opinion based on a hypothetical question. He did not give an independent opinion. His testimony, given for the truth of the matter

contained in the reports, was based on reports which were not independently proven by competent evidence. The facts to which he testified to were not admissible because he did not conduct the DNA tests and had no personal knowledge of the facts stated therein which he asserted were the truth.

Respondent claims Dr. Staub's testimony was not case-specific because it supposedly included "machine-generated data." (RSB 10.) However "the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar." (*Bullcoming, supra,* 504 U.S. at 661, 131 S.Ct. at 2715; accord, *United States v. Charles* (11th Cir.2013) 722 F.3d 1319, 1330-1331.) And, the Cellmark reports and Staub's testimony included information about receipt of DNA samples and drew conclusions from the DNA test results. The reports included more than merely a machine-generated number. The April 7, 2005 report stated, "...the DNA profile provided for Judy Palmer in a facsimile from Angela Zdanowski, received March 30, 2005....The DNA profile obtained from these samples matches the DNA profile provided for Judy Palmer." The March 29, 2005 report states, "...Paul Baker cannot be excluded as a minor contributor..." The January 24, 2005 report states "...testing was performed on the following items which were received for analysis on December 30, 2004....At the request of LAPD criminalist Angela Zdanvowski...", and, "The DNA profile obtained from this sample matches the DNA profile obtained from the swab labeled Paul Baker." The reports were not limited to machine-generated data.[2]

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[2] Citing *People v. Garton* (2018) 4 Cal.5th 485, 505-506, 229 Cal.Rptr.3d

As a matter of law, Dr. Staub relied on case-specific facts regarding appellant. His testimony thus violated *Sanchez*.[3]

3. The evidence was testimonial

Respondent claims that the Cellmark reports and Dr. Staub's testimony were not testimonial because, or so respondent contends, the statements were not made with sufficient formality and their primary purpose did not pertain to a criminal prosecution. (RB 14-16.) The claim is wrong and not supported by fact or law. To the extent the hearsay statements at issue here are testimonial, they violate the Sixth Amendment right to confront and cross-examine witnesses. (*Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354.)

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, supra,* 564 U.S. at 665, 131 S.Ct. at 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.]; *People v. Hill* (2011) 191 Cal.App.4th 1104,

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624, 643-644, respondent argues that Staub's testimony was proper under *Sanchez* "because '[o]nly people can make hearsay; machines cannot." (RB 10.) But, this comment in *Garton* was made in reference to photographs and X-rays, not to DNA information. The photographs and X-rays did not contain any additional information, unlike the Cellmark reports.

[3] Although respondent claims that Dr. Staub did not testify regarding any case-specific facts (RSB 9-12), he tacitly recognizes the contrary. (RSB 12 ["To the extend Dr. Staub relayed case-specific facts from the DNA reports..."]; RSB 14 ["any case-specific facts related to the jury."]; RSB 17 ["any allegedly case-specific hearsay testimony by Dr. Staub."])

1134 120 Cal.Rptr.3d 251, 277 ["a statement need not be sworn to be testimonial."]; *People v. Valadez* (2013) 220 Cal.App.4th 16, 33, 162 Cal. Rptr.3d 722, 735-736.) Here, all of the Cellmark reports were signed by the analyst who performed the tests.

Respondent claims the Cellmark reports are not testimonial because they "lack the formality of...sworn statements." (RB 15.) But, as shown above, a sworn statement is not necessary. And, the Court in *Bullcoming* rejected the argument that only sworn statements are testimonial. Any such construction "would make the right to confrontation easily erasable." (564 U.S. at 664-665, 131 S.Ct. at 2717.) Indeed, in *Bullcoming*, the analyst's certificate was testimonial because it was "'formalized' in a signed document....The absence of notarization does not remove his certification from Confrontation Clause governance." (*Id.*)

Respondent cites *People v. Holmes* (2012) 212 Cal.App.4th 431, 433-439, 150 Cal.Rptr.3d 914, 918-919 in support of his "sworn statement" argument. (RB 15.) There, the Court found the DNA reports not to be testimonial because they were not "an affidavit or other formalized testimonial material" and were not sworn under oath. But, as the above-cited cases hold, an affidavit or statement sworn under oath is not a requirement for a document to be found testimonial. And, the rules espoused by *Holmes* "would make the right to confrontation easily erasable." (*Bullcoming, supra*.) To the extent that *Holmes* requires a sworn statement or affidavit before a document can be deemed testimonial, it is wrong and should be disapproved by this Court.

In his dissent in *People v. Lopez, supra,* Justice Liu stated, "the proper determination of a statement's formality for purpose of the confrontation clause is closely intertwined with the nature and purpose of

the process that produced the statement." (55 Cal.4th at 594, 147 Cal.Rptr. 3d at 567.) Here, because the purpose of the Cellmark DNA tests was to obtain evidence to be used against appellant at trial (see Appellant's Supplemental Brief (ASB 10-11), the reports are sufficiently formal so as to be testimonial.

Respondent claims the primary purpose of the Cellmark DNA testing was not to further the criminal investigation into appellant because the analysts "had no way of knowing whether the results of the test would be inculpatory or exculpatory, and Dr. Staub's opinion was subject to extensive cross-examination." (RB 15.) But, the very fact that the tests were conducted for inculpatory or exculpatory purposes *ipso facto* establishes that their purpose was to further the criminal investigation. The 2005 Cellmark tests and reports had been requested by the prosecution team and were generated long after appellant had been arrested. And, the reports establish that the analysts who conducted the tests knew that appellant was a suspect: they knew that genetic material had been collected from him, i.e., DNA from sperm samples, and Palmer. Thus, they could readily infer that appellant was the prime suspect. Also, the results of the test were sent to the L.A.P.D. Scientific Investigation Division. Further, merely because Dr. Staub was cross-examined has nothing to do with the primary purpose of conducting the D.N.A. test.

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. Mexico, supra,* 564 U.S. 647, 664, 131 S.Ct. 2705, 2717.) Here, the Cellmark DNA reports meet all requirements to be testimonial. (See ASB 10-15.)

4. The D.N.A. reports were not business records of Cellmark.

Respondent claims the Cellmark reports were admissible under the business records exception to the hearsay rule. (RSB 12-14.) Respondent is wrong.[4]

Evidence Code section 1271 states:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
> (a) The writing was made in the regular course of a business;
> (b) The writing was made at or near the time of the act, condition, or event;
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Contrary to respondent's claim, Dr. Staub was not a custodian of records nor a qualified witness for purposes of the business records exception. There is no evidence that Staub was the custodian of records at the Cellmark lab in Dallas. And, he was not the custodian of records at the Germantown lab. As the trial court stated, "But, he's not a custodian for Germantown." (20RT 3442.)

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[4] In his Reply Brief, appellant also refuted the claim. (Reply B. 38-39.)

Citing 20RT 3505-3512, respondent claims there is evidence satisfying the "qualified witness" requirement. But, Staub did not testify as to how the Dallas Cellmark reports were prepared. He testified only that analysts Johnson and Bevavides conducted analyses and kept records. He did not testify as to how the records were kept or filed. He did not testify as to "the mode of preparation."

Nor are the DNA reports properly considered to be "made in the regular course of...business. "When a record is not made to facilitate business operations, but, instead, is primarily created for later use at trial, it does not qualify as a business record." (*People v. Sanchez, supra,* 63 Cal. 4th at 695, fn.21, 204 Cal.Rptr.3d at 127, fn.21; accord, *People v. McVey* (2018) 24 Cal.App.5th 405, 415, 233 Cal.Rptr.3d 915, 922-923.) A document is not a business record where, as here, it has been "prepared in contemplation of litigation." (*People v. Khaled* (2010) 186 Cal.App.4th Sup. 1, 8, 113 Cal.Rptr.3d 796, 801.) A document such as a DNA report is not a business record for purposes of Evidence Code section 1271 "if the regularly conducted business activity is the production of evidence for use at trial." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 321, 129 S.Ct. 2427, 2538.)

The DNA reports, which were prepared solely for use in the prosecution of appellant, and with defense experts present (RSB 13), are not business records for purposes of Evidence Code section 1271. They were hearsay, not subject to any exception, and were therefore inadmissible.

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

As argued in appellant's supplemental brief, appellant was prejudiced as a result of the admission of the case-specific testimonial

Cellmark DNA evidence. (ASB 20-26; and see AOB 223-227.) Respondent contends otherwise. (RB 16-17.) Respondent is wrong.

Respondent claims that, through analyst Pollard's testimony, the jury heard "compelling DNA evidence." But, Pollard's evidence is not so compelling when it is considered that further testing was needed after she completed her tests. The prosecution would not have requested additional DNA testing at Cellmark had it been satisfied with Pollard's results. The fact that additional testing was needed calls into question the reliability and accuracy of her work.

Respondent's claims that Pollard found appellant's DNA on latex gloves found at the crime scene. Not so. She testified that "very low level D.N.A. was found" and that she could not make a determination as to whose DNA it was. (21 RT 3662-3664.) Pollard testified that the sperm fraction from Palmer's underwear "were two low levels," merely consistent with appellant. (21RT 3661.) She did not testify that the low level DNA was from appellant, but only that he could not be excluded. (21 RT 3725.) Thus, Pollard's testimony is not as convincing as respondent would have the Court believe.

Respondent argues that other, non-DNA circumstantial evidence "overwhelmingly establishes appellant's guilt of the rape and murder." (RSB 16-17.) But, this evidence is certainly not conclusive of appellant's guilt and, without the Cellmark DNA evidence, is subject to various non-crime-related explanations. For example, the fact appellant may have stolen Palmer's car and sold it readily shows he needed money, not that he killed her. His statement that he had "beat the pussy up" could be explained as having had rough sex. Although items related to appellant may have been found with Palmer's body, this does not mean that he had anything to do

with her demise. The holes in the prosecution's case were filled in by the case-specific testimonial, hearsay Cellmark DNA evidence.

6. Conclusion

Appellant was prejudiced by the admission of the Cellmark DNA reports and Dr. Staub's case-specific testimonial hearsay testimony. This Court cannot say beyond a reasonable doubt that a result more favorable to appellant would not have occurred in the absence of the *Sanchez* error. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824.) The murder, rape, and burglary convictions and the rape and burglary special circumstance findings must be reversed.

II. CONCLUSION

For the reasons stated above, and in appellant's supplemental brief, reversal is required.

Dated: June 16, 2020

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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 Reply Brief contains 3,175 words.

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Dated: June 16, 2020

/s/
John F. Schuck

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