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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S SUPPLEMENTAL REPLY 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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Appellant hereby submits this Supplemental Reply Brief.

INTRODUCTION

In Appellant's Supplemental Brief ("ASB"), Appellant argued that this Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665 ("*Sanchez*") demonstrated that Dr. Cohen's expert testimony at trial conveyed to the jury inadmissible "case-specific hearsay." As a result, his opinion regarding the cause of death, which was dependent on that same hearsay, lacked an appropriate evidentiary basis. Respondent's Supplemental Brief ("RSB") does not dispute, nor even acknowledge, Appellant's argument. Instead, the RSB discusses the Confrontation Clause – an important issue addressed in the original briefing before this Court, but *not* the issue raised by the ASB. (See ASB, pp. 5-9; Appellant's Application to File Supplemental Brief, filed herein October 16, 2017 ["Application"].) One must assume that Respondent has gone off on this tangent because Respondent has nothing to say in response to the ASB. This Court should simply disregard Respondent's attempt to change the subject. For all the reasons expressed in the ASB and below, the erroneous introduction of Dr. Cohen's hearsay testimony prejudiced Appellant and this Court should reverse.

A. Respondent Does Not Dispute That Dr. Cohen Conveyed Inadmissible "Case-Specific Hearsay" To The Jury.

In the ASB, Appellant showed that Dr. Cohen, the expert pathologist called to testify by the prosecution, testified to "case-specific hearsay" – specifically, autopsy findings – as the basis for his opinion regarding the cause of death. (ASB, pp. 6-9.) Dr. Cohen neither performed nor even attended the autopsy; the autopsy report was not admitted into evidence; no percipient witness testified to the facts revealed by the autopsy. As such, Dr. Cohen's recitation of the autopsy findings was pure hearsay as to which no exception applied and plainly inadmissible under state law. (*Sanchez,* 63 Cal.4th at pp. 685-686; ASB, pp. 6-9.) As this Court has said, 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." (*Sanchez,* 63 Cal.4th at pp. 685-686 [emphasis in original].) Dr. Cohen did precisely what *Sanchez* holds he could not do.

Respondent has not even attempted to argue that Dr. Cohen's

testimony did not violate the principles announced in *Sanchez*. Rather than forthrightly concede the merit of Appellant's argument, the RSB takes the Court on an extended detour that is little more than an unauthorized sur-reply to the Confrontation Clause arguments in Appellant's Opening ("AOB") and Reply Briefs ("ARB") – arguments Appellant did not revisit in the ASB. (Compare RSB, pp. 7-13 with ASB, p. 5 and the Application.)

Whether the information from the autopsy report relayed to the jury by Dr. Cohen satisfied the requirements for "testimonial" hearsay under the Confrontation Clause is not the issue as to which Appellant requested supplemental briefing or which was presented by the ASB; the issue for consideration here is simply whether the information conveyed by Dr. Cohen was inadmissible hearsay under state law, nothing more, nothing less. Respondent does not, and cannot, dispute that the answer to *that* question is yes.[1]

Respondent's only nod to Appellant's argument in the ASB is

[1]Respondent's contention that the autopsy report was not "testimonial" suffers from a logical fallacy. Contrary to Respondent's argument at page 11 of the RSB, while it may be true that not every autopsy report can be considered "testimonial," it does not follow that *no* autopsy report is testimonial. Appellant has shown in the AOB and ARB that the autopsy report in this case satisfies the requirements to be considered testimonial. (See AOB, pp. 218-220; ARB, pp. 86-97.)

Respondent's sly effort to obscure the factual basis for Dr. Cohen's opinion. Respondent says that Dr. Cohen "reviewed Dr. Garber's autopsy protocol and associated notes, the toxicology report, the police report and four photographs" and that his opinion was "based on *that* information." (RSB, p. 12 [emphasis added].) Not so fast.

The critical opinion Dr. Cohen gave was that Mr. Baker died from a heart attack triggered by stress from the crime. (15 RT 3237-3241.) Contrary to Respondent's suggestion, the factual basis for this opinion did not come from the toxicology report or the police report or photographs; Mr. Baker's severe heart condition and atherosclerosis, *i.e.*, what "Dr. Garber . . . found," were revealed by the autopsy and nothing else. (15 RT 3237-3238 [describing heart condition and atherosclerosis revealed by "the internal investigation" of the body].)[2] It was Dr. Cohen's testimony, and his testimony alone, that presented these autopsy findings to the jury. (See generally 15 RT 3235-3238.) *Sanchez* holds that such boot-strapping of otherwise inadmissible hearsay "basis" evidence to support the expert's own opinion is improper. (63 Cal.4th at pp. 684, 685-686; see

[2] Notably, the photographs showed the crime scene and the external condition of the body. (15 RT 3234-3235.) The toxicology reports only showed what did *not* cause the death. (15 RT 3242.)

also *People v. Stamps* (2016) 3 Cal.App.5th 988, 998 [“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” (emphasis in original)].)

Sanchez established – and Respondent has not disputed – that Dr. Cohen presented inadmissible “case-specific hearsay” to the jury. Because his opinion rested on that hearsay, it lacked adequate foundation. (*Sanchez*, 63 Cal.4th at p. 684 [“Without independent competent proof of those case-specific facts, the jury simply had no basis from which to draw” the conclusion that the facts underlying the opinion had been proven].) Neither the autopsy findings to which he testified nor his opinion should have been admitted into evidence. (Cal. Evid. Code §§ 802, 803, 804(c), 1200.)

B. Dr. Cohen’s Inadmissible Testimony Prejudiced Appellant.

Because Dr. Cohen’s opinion lacked an adequate factual basis, it cannot provide substantial evidence to support the jury’s verdict. This is fatal to the conviction and sentence of death because Dr. Cohen’s expert testimony was at the very heart of the prosecution’s case. (See *Stamps*, *supra*, 3 Cal.App.3d at p. 998 [“Because [the expert’s inadmissible case-specific hearsay testimony] was central to

conviction . . . we must reverse"].)

Absent Dr. Cohen's opinion that stress from the crime caused Mr. Baker's fatal heart attack, there was no causative link between the crime and the death. (See 15 RT 3242 ["combination of natural disease plus physical and emotional stressors" only explanation for Mr. Baker's death].) Without his testimony, the evidence would have shown only that a robbery and burglary occurred and Mr. Baker died somehow during the time the crime was in progress. Those two facts alone would have been insufficient to prove that Appellant was guilty of "unlawfully kill[ing]" Mr. Baker "during the commission or attempted commission of robbery and/or burglary." (19 RT 4361-4361.) Similarly, those two facts alone would have been insufficient to prove that a "murder was committed" either while Appellant was engaged in robbery and/or burglary or "to carry out or advance the commission of the crime of robbery and/or burglary or to facilitate the escape therefrom or to avoid detection" for purposes of the special circumstances findings. (19 RT 4366.)

Little wonder then that the prosecution hammered home the significance of Dr. Cohen's testimony during closing argument. (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, 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."].)

Despite the centrality of Dr. Cohen's testimony to the prosecution, Respondent would have the Court believe that his testimony was little more than a makeweight. (RSB, p. 13.) Thus, Respondent makes the truly puzzling claim that Appellant's argument that "Dr. Cohen's testimony was critical to the prosecution's case . . . ignores the fact that it was equally critical to the defense [that] Dr. Cohen conveyed to the jury" that the knife wound "was not fatal."

(*Id*.) But Dr. Cohen's testimony about the knife wound and its superficiality also came from the autopsy report. (15 RT 3236-3237.) That evidence was as inadmissible as the rest of the "case-specific hearsay" to which he testified. Even more important, if Dr. Cohen's testimony about Mr. Baker's heart attack had been excluded and the testimony about the knife wound had been admitted – which is presumably what Respondent is suggesting in making this argument – the grounds for reversal would be even stronger. In those circumstances the record would have reflected no evidence of the actual cause of death, while including only evidence of what *did not* cause the death.[3]

Respondent even goes so far as to argue there was no prejudice from Dr. Cohen's testimony because Appellant knew Mr. Baker had a "heart problem" and "was aware" that he was having a heart attack. (RSB, p. 13.) It need hardly be said that Appellant was not a medical expert qualified to testify about whether Mr. Baker was having a heart attack. And even if Appellant properly intuited that Mr. Baker was having a heart attack, nothing Appellant said established either 1) that the heart attack actually caused Mr. Baker's death or 2) that stress

[3] The same could be said for the toxicology reports which showed "no contribution" by alcohol or drugs to Mr. Baker's death. (15 RT 3242.)

from the crime caused the heart attack. To the contrary, the evidence was that Mr. Baker "even without any stress [was] a set up for sudden death." (15 RT 3238.) *Why* he had a heart attack and *whether* he died from the heart attack both required expert testimony and only Dr. Cohen gave that testimony.

In addition to the importance of Dr. Cohen's testimony to the prosecution, the prosecutor's decision to substitute Dr. Cohen for Dr. Garber also prejudiced Appellant. "The essence of the hearsay rule 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.) As demonstrated in the ASB and the ARB, someone altered Dr. Garber's autopsy notes, perhaps with the intent to enhance the prosecution's case. (ASB, pp. 10-13; ARB, pp. 80-82, 101-108.) Whether, how and why that alteration occurred could not be explored without the person who conducted the autopsy and authored the report, *i.e.*, Dr. Garber, on the witness stand.

Respondent asks the Court to "summarily reject" Appellant's argument that the mysterious handwritten notes in the autopsy protocol raised legitimate questions about whether the prosecution influenced preparation of the report as well as the integrity and

veracity of Dr. Garber's work product and conclusions. (RSB, p. 6, fn. 2.) Respondent protests far too much. Even a cursory review of the autopsy protocol reveals a wealth of questions about Dr. Garber's conduct of the autopsy and his preparation of the report – questions that were foreclosed because only Dr. Cohen testified to the contents of the report. (*Bullcoming v. New Mexico* (2011) 564 U.S. 647, 662; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 321; *Maryland v. Craig* (1990) 497 U.S. 836, 846.)

Dr. Cohen's testimony effectively inoculated the report from the kind of searching inquiry that having Dr. Garber on the stand would have permitted. Indeed, one must ask whether the whole point to the prosecution's decision to call Dr. Cohen to testify was to avoid a difficult, and potentially fruitful, cross-examination of Dr. Garber about the alteration of the autopsy notes.

Finally, Respondent argues that Dr. Cohen's testimony did not prejudice Appellant because "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." (*Id*.) This facile argument is no more persuasive now than when Respondent

first made it in Respondent's original briefing. Here's why: it ignores that trial counsel wanted *Dr. Garber* to testify (11 RT 2597) and presupposes that substitution of Dr. Cohen for Dr. Garber was a mere trifle. That presupposition is flatly wrong.

Consistent with the law at the time of trial, defense counsel had no basis for objecting to Dr. Cohen's proposed recitation of what "Dr. Garber did and what he found." (15 RT 3235, 3244; see *Sanchez*, 63 Cal.4th at p. 686, fn. 13 [disapproving six prior decisions, including "*People v. Gardeley* [(1996)] 14 Cal.4th 605, to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules"].) Not surprisingly, therefore, the trial court clearly intended to permit Dr. Cohen to testify in Dr. Garber's stead. (11 RT 2597, 2598 ["[I]f [Dr. Cohen] says that it is [the] wound to the throat rather than a heart attack, you [defense counsel] will certainly be permitted to cross-examine on doesn't Dr. Garber, who actually did the autopsy, doesn't [he] think it is heart attack and therefore isn't your opinion not good because Garber is the one who knows? . . . I would imagine that in coming to whatever opinion Dr. Cohen has, he relied on that report, and you will be able to cross-examine him"].) Any hearsay objection

to Dr. Cohen's testimony would have been pointless. (*People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 508.)

The landscape would have been markedly different had defense counsel had available a viable hearsay objection to Dr. Cohen's testimony. Imagine then what might have occurred: the prosecutor calls Dr. Cohen, but fails to offer the autopsy report into evidence or otherwise lay a foundation for the case-specific facts contained in it. Dr. Cohen attempts to testify to those facts. Trial counsel objects on hearsay grounds and the evidence is excluded. Absent Dr. Cohen's recitation of case-specific hearsay, there would have been no admissible evidence before the jury regarding the cause of death – virtually assuring no conviction for felony murder with special circumstances. To avoid that prospect, the prosecution would have been faced with having to call *Dr. Garber* to testify and/or to authenticate the autopsy report – thereby subjecting him to cross-examination about the suspicious handwritten entries in the autopsy notes and the troubling questions those entries raised about the manner in which the autopsy was conducted and the conclusions reached in the report. (See ASB, pp. 10-13.) To be sure, trial counsel wanted Dr. Garber to testify to what *he* did, what *he* found and what

he wrote. (11 RT 2597-2598.) That is a far cry from saying that trial counsel would not have objected to Dr. Cohen's substitute testimony had counsel been afforded the opportunity under state law to do so.

Without Dr. Cohen's testimony at its foundation, the prosecution's case would have come crashing down. After *Sanchez*, we know that the evidence to which Dr. Cohen testified, and upon which he relied in forming his opinion, was inadmissible hearsay. Since his critical testimony lacked a proper evidentiary basis, 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: December 20, 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 2,683 words.

Dated: December 20, 2017

Respectfully submitted,

/s/ Martin H. Dodd
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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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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 20, 2017, at San Francisco, California.

/s/ Gabrielle Van Vleck
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