IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHESTER DEWAYNE TURNER, Defendant and Appellant.	No. S154459 (Los Angeles County Superior Court No. BA273283-01) Death Penalty Case

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

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I.

THE PROSECUTION PROVED COUNT 5 WITH STATEMENTS MADE IN AN AUTOPSY REPORT PREPARED BY A PATHOLOGIST WHO DID NOT TESTIFY IN VIOLATION OF *SANCHEZ*[1] AND *CRAWFORD*[2] AND REQUIRING REVERSAL

To convict Mr. Turner of fetal murder in Count 5, the prosecution had to prove the fetus was viable, that is, it could survive outside the womb. Medical literature indicates that viability is a function of gestational age and weight. If the fetus exceeds a

[1] *People v. Sanchez* (2016) 63 Cal.4th 665.

[2] *Crawford v. Washington* (2004) 541 U.S. 36.

certain gestational age and weight – 22 weeks and 500 grams – it is viable. The prosecution's only evidence that Regina Washington's fetus exceeded that age and weight was hearsay. Dr. Selser performed the autopsy on Washington and the fetus. Her autopsy report contained her purported findings concerning the gestational age and weight of the fetus (six and a half months and 825 grams). However, Dr. Selser did not testify and her autopsy report was never admitted into evidence. Instead, the prosecution attempted to prove viability by having a different medical examiner, Dr. Scheinin, offer her opinion that the fetus was viable based on the figures in Dr. Selser's autopsy report, which she also related to the jury. Mr. Turner did not object on hearsay or confrontation grounds, but such an objection would have been futile under then-existing law. (*People v. Perez* (2020) 9 Cal.5th 1, 9-13.)

While this appeal was pending, the law changed. (*People v. Sanchez* (2016) 63 Cal.4th 665 ("*Sanchez*").) An expert can no longer relate case-specific hearsay to the jury as the basis for an opinion absent a hearsay exception. (*Id.* at p. 682.) In his second supplemental opening brief, Mr. Turner argued that the admission of Dr. Selser's statements regarding the fetus' gestational age and weight through Dr. Scheinin was error under *Sanchez*. (2SAOB, at pp. 12-15.) Mr. Turner also argued that their admission violated the confrontation clause under *Crawford v. Washington* (2004) 541 U.S. 36 ("*Crawford*"), because the statements were testimonial, Dr. Selser was not unavailable, and Mr. Turner did not have a prior opportunity to cross-examine her. (2SAOB, at pp. 15-36.)

Respondent agrees that Dr. Scheinin related case-specific hearsay when she read the jury the gestational age and weight figures from Dr. Selser's autopsy report. (2SRB, at p. 17.) Nevertheless, respondent disputes the existence of both state evidentiary error under *Sanchez* and federal constitutional error under *Crawford.* Respondent observes that *Sanchez* held that case-specific hearsay is inadmissible *absent an exception*. Respondent points to two hearsay exceptions that could apply to autopsy reports: business records and official records. (2SRB, at pp. 17-21.)[3] But those exceptions were not asserted below and a sufficient foundation for them was never laid. The prosecution presented case-specific hearsay absent an exception; that is error under *Sanchez.*

Regarding the *Crawford* error, respondent disputes the testimonial nature of the hearsay, relying on *People v. Dungo* (2012) 55 Cal.4th 608, 619, 621 ("*Dungo*"), which held that statements of objective fact in autopsy reports are nontestimonial. Respondent disputes that decisions following *Dungo* have undermined its rationale. (2SRB, at pp. 21.) Respondent also asks this Court to read into *Crawford* and its progeny an even more constrictive standard

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[3] The hearsay exception in Evidence Code section 1280 is variously referred to as the "public records exception" (see, e.g., *People v. Morris* (2008) 166 Cal.App.4th 363, 367), the "public employee exception" (see, e.g., *Shea v. Department of Motor Vehicles* (1998) 62 Cal.App.4th 1057, 1059), and the "official records exception" (see, e.g., *People v. Martinez* (2000) 22 Cal.4th 106, 112). Although respondent refers to it as the public records exception, appellant instead uses the term "official records exception" throughout this brief to avoid confusion because not all public records meet the requirements of section 1280.

for testimonial hearsay than that set forth in *Dungo*. (2SRB, at pp. 21-39.) Respondent's analysis is unsound.

Respondent asserts that any error would be harmless beyond a reasonable doubt because Dr. Scheinin's opinion that the fetus was viable would have remained admissible and could have proved viability absent its hearsay basis. (2SRB, at pp. 39-42.) The premise of the argument is faulty. An expert's opinion is only as good as the facts on which it is based. Without a factual basis, Dr. Scheinin's opinion was hollow. The conviction on Count 5 must be reversed both because it was based on inadmissible hearsay under state law and violated Mr. Turner's constitutional confrontation rights, and because these errors impacted the jury's sentencing decision, his death sentences should also be reversed.

A. Dr. Scheinin Related Case-Specific Hearsay as the Basis for Her Opinion That the Fetus Was Viable; There Was No Foundation Laid to Admit That Hearsay Under the Business Records or Official Records Exceptions

Sanchez, supra, 63 Cal.4th at p. 686, made expert opinion basis testimony subject to the hearsay rules. Under *Sanchez*, as a matter of state evidentiary law, case-specific hearsay is now inadmissible**,** unless a hearsay exception applies or it is independently proven by competent evidence. Respondent concedes that Dr. Scheinin related case-specific hearsay to prove viability of the fetus. (2SRB, at p. 8.)[4]

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[4] At page 17 of its brief, respondent erroneously asserts that the statements at issue "would be hearsay under *Sanchez* if no

(*continued*)

Respondent asserts, however, that the admission of Dr. Selser's statements concerning the fetus's gestational age and weight in the autopsy report did not violate *Sanchez* because both the business records exception (Evid. Code, § 1271) and the official records exception (Evid. Code, § 1280) to the hearsay rule apply to autopsy reports. (2SRB, at p. 17.) Respondent points to a number of cases that have admitted autopsy reports under those exceptions.

But there are two problems with respondent's analysis. First, not all autopsy reports are admissible under the asserted hearsay exceptions; admissibility hinges on whether a proper foundation has been made, and the burden of establishing the foundational requirements falls on the proponent of the evidence. Here, because neither the business nor official record hearsay exceptions were asserted at trial, the trial court did not determine whether a proper foundation for either exception had been laid. Second, even if this Court may properly determine whether the record shows that a proper foundation could have been laid in the absence of a trial court ruling on the question, the record here does not establish that foundation.

1. This Court should not determine whether the hearsay would have been admissible pursuant to a hearsay exception on the undeveloped trial record

Evidence Code section 1271, the business record exception, provides that "[e]vidence of a writing made as a record of an act,

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hearsay exception applied." The statements remain hearsay, however, regardless of whether they might be admissible due to an evidentiary exception.

condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event" if all the following conditions are met: "(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." (Evid. Code, § 1271.)

Evidence Code section 1280, the official record exception, provides that a record "is not made inadmissible by the hearsay rule" if all the following applies: "(a) The writing was made by and within the scope of duty of a public employee. (b) The writing was made at or near the time of the act, condition, or event. (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1280.)

The rules require the proponent of hearsay to alert the trial court to the asserted hearsay exception and to meet the burden of laying the proper foundation. (*People v. Livaditis* (1992) 2 Cal.4th 759, 778; *People v. Morrison* (2004) 34 Cal.4th 698, 724.) Although autopsy reports in specific cases may be admitted under exceptions to the hearsay rule, the rules of evidence require the proponent to lay an adequate foundation first.

In asserting that Dr. Scheinin's testimony relating Dr. Selser's statements was admissible pursuant to hearsay exceptions that were neither raised nor adjudicated at trial, respondent relies on this Court's holding in *Sanchez* that case-specific out-of-court statements related by a testifying expert are inadmissible unless

they are covered by a hearsay exception or the same information is independently proven by competent evidence. (*Sanchez, supra*, 63 Cal.4th at p. 686.) While this Court's pronouncement in *Sanchez* set forth the requirements for the admission of hearsay testimony *at trial*, the court did not suggest that the appellate court should determine in the first instance whether the evidence *could* have been admitted under a hearsay exception in the absence of any findings by the trial court on the question. There are good reasons why this Court should not do so.

First, respondent overstates the law when it asserts that "an autopsy report is a public record, and statements from such a report have long been held admissible as such." (2SRB, at p. 18.) Indeed, respondent admits, as it must, that this Court has never held that *all* autopsy reports fall within the business or official records hearsay exceptions. (2SRB, at pp. 19-20; see e.g., *People v. Perez* (2018) 4 Cal.5th 421, 456 [assuming without deciding that autopsy records were admissible under an applicable hearsay exception]; *People v. Garton* (2018) 4 Cal.5th 485, 506 [finding facts relayed from an autopsy report hearsay under *Sanchez* but not discussing applicability of a hearsay exception].) And while this Court has found that an autopsy report was properly admitted at trial under the business record exception in one case (*People v. Beeler* (1995) 9 Cal.4th 953, 978-981), and under the official record exception in another (*People v. Clark* (1995) 3 Cal.4th 41,158-159), it only did so after it examined the particular requirements for admissibility under the exception and applied them to the specific facts developed at trial to determine if the requisite foundation for the report in each

case was made. The same is true of the court of appeal's analysis in *People v. Wardlaw* (1981) 118 Cal.App.3d 375.

The other appellate decisions cited by respondent did not address admissibility under the Evidence Code at all, but rather under sections of the Code of Civil Procedure that have been expressly superseded by Evidence Code section 1280. (See, e.g. *People v. Demes* (1963) 220 Cal.App.2d 423, 442 [autopsy report was admissible under "public records" provision of section 1920 of the Code of Civil Procedure]; *People v. Williams* (1959) 174 Cal.App.2d 364, 389-390 [same].) The Law Revision Commission comments following Evidence Code section 1280 note that section 1920 of the Code of Civil Procedure was superseded by section 1280, and that unlike under section 1920, the requirements of trustworthiness must be met before admission of official or business records under the Evidence Code. (Cal. Law Revision Com. com, Thomson Reuters Evid. Code (2020 Desktop ed.) foll. § 1280, p. 251.)

Given the absence of a rule that an autopsy report is always admissible as a business or official record, and the absence of a trial court finding that the report here was admissible under either exception, this Court should find the report was erroneously admitted hearsay. Nonetheless, should this Court reach the issue of whether the foundational requirements of the exceptions have been met in this case based on the evidence established at trial, it must conclude the requirements were not satisfied and that the evidence was impermissibly admitted.

2. The foundational requirements for admission of hearsay evidence pursuant to either Evidence Code section 1271 or section 1280 were not satisfied

Respondent argues that Dr. Scheinin's testimony provided an adequate foundation for the applicability of both exceptions. It points to Dr. Scheinin's testimony that medical examiners "typically" dictate their autopsy findings the same day or day after an autopsy and that these dictations are stored with limited access and later typed up "as needed." (2SRB, at p. 19, citing 12RT 1788-1791.) Dr. Scheinin's brief testimony, however, on the method and time of preparation did not provide an adequate foundation to establish the requirements of either exception.

To lay a proper foundation for the admission of a business record, the proponent must present testimony by either the custodian of records or "other qualified witness" to testify to its identity and "the mode of preparation." (Evid. Code, § 1271, subd. (c).) Additionally, both the business and official records exceptions require the proponent to establish that "the sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, §§ 1271, subd. (c), 1280, subd. (c).) Neither requirement was met in this case.

Although the hearsay exceptions at issue here were created to eliminate the need to call each witness, and to substitute the record of the transaction for live testimony, the foundational requirements must still be met. Even if these requirements are designed to streamline the process and are thus relatively easy to establish, the prosecution did not establish the admissibility of the hearsay Dr.

Scheinin related to the jury under either exception, and the record does not otherwise show that the requirements were met.

3. The foundational requirements for Evidence Code section 1271 were not met

a. Dr. Schienen was not qualified, as required by section 1271, to testify as to the report's "mode of preparation" nor to its trustworthiness because she was not employed by the Los Angeles County Coroner's Office at the time the report was prepared

i. Dr. Scheinin was neither the custodian of records nor qualified to testify under section 1271

Both Dr. Selser and Dr. Scheinin were employed by the Los Angeles County Coroner's Office. (12RT 1787; Exh. A, Appellant's Motion for Judicial Notice.) Dr. Selser conducted the autopsy in 1989 (Exh. A, Appellant's Motion for Judicial Notice); Dr. Scheinin didn't testify about it until April 11, 2007, some 18 years later. (12RT 1820 et seq.) When relating her qualifications as an expert in 2007, Dr. Scheinin testified that she had been employed by the coroner for "almost 16 years," including one year as a trainee (12RT 1788), indicating that she did not start working for the coroner's office until sometime in 1991, three years after the preparation of the report about which she was testifying.

Because Dr. Schenien was not the custodian of records, to lay a foundation for the admission statements in the autopsy report under the business record exception, the prosecution had to establish that she was "otherwise" qualified to testify to the document's identity and to "the mode of preparation." (Evid. Code, §

1271, subd. (c).) While respondent relies on Dr. Scheinin's testimony as to the "typical" practice in the Los Angeles County Coroner's Office regarding the dictation and typing of reports, there was no evidence presented to show that she had any knowledge, personal or otherwise, regarding the preparation of this particular report. And while in some instances a sufficient foundation can be established by someone who lacks such personal knowledge, the witness must nonetheless, at a minimum, be familiar with the procedures that were followed when the information was written. (*Conservatorship of S.A.* (2018) 25 Cal.App.5th 438, 448 ["But it is not necessary that the witness called to present foundational facts have personal knowledge of every transaction; he need only be familiar with the procedures followed"], citing *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301.)

Dr. Scheinin did not testify that she was personally familiar with the procedures followed by Dr. Selser or by anyone in the coroner's office in 1989, nor that she had any knowledge of the procedures otherwise. On that basis alone, her trial testimony did not establish that she was qualified under subdivision (d) of section 1271 to lay a foundation for the hearsay exception. But even if she were so qualified, her testimony did not provide an adequate foundation in other respects under either section 1271 or 1280.

ii. There is no evidence that the sources of information or the method and time of the report's preparation were such as to indicate its trustworthiness as required under Evidence Code section 1271

Pursuant to both hearsay exceptions, the proponent must establish that "[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, §§ 1271, subd. (d), 1280, subd. (c).) There was no evidence presented to meet this requirement under either section, but because the requirements are slightly different under section 1271 than they are under section 1280, appellant will discuss each section separately.

Dr. Scheinin, when describing usual procedures in the coroner's office, did not attribute those procedures to any specific time period within the 15 plus years she had worked for the coroner. Indeed, her testimony as to the process was in the present tense. (See, e.g., 12RT 1789 ["The cases are dictated . . . ."].) Nor can this Court reasonably infer that her brief description included practices in the coroner's office in 1989, because she had not even begun to work there yet. She did not indicate that she was familiar with the procedures followed either by Dr. Selser or by anyone in the coroner's office in 1989, and she provided no testimony regarding the time in which this report was prepared, nor the method of its preparation.

This lack of foundational testimony or other evidence stands in stark contrast to the evidence found sufficient to meet the exception in other cases. For example, in *People v. Beeler*, *supra*, 9 Cal.4th 953, this Court found the trial court had not abused its

discretion in admitting into evidence as a business record an autopsy report prepared by a non-testifying pathologist because testimony regarding the procedures used in the autopsy was provided by a pathologist who had worked in the same office as the person who wrote the report. The pathologist testified that "standard operating procedures were followed in the . . . autopsy and in the documentation of the autopsy." (*Beeler*, at p. 979.)

In *County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1451, the director of a laboratory that performed paternity tests was found to have laid a foundation to testify as to the results of tests he did not conduct himself based on his testimony that he had trained and supervised the technologists who performed the tests, and that he had reviewed their work. He described in detail the testing that was done, the strict quality controls on his company's testing and procedures, including regulations with which it had to comply in general, and specifically with regard to the tests he testified about. (*Grant W.*, at pp. 1445, 1451.) The court concluded that the director's testimony was sufficient for it to reasonably infer that the records in question were prepared in the usual manner and regular course of the business, and that it could presume that the regular course of business was followed. (*Ibid.*)

In *People v. Champion* (1995) 9 Cal.4th 879, this Court upheld the trial court's admission of fingerprint evidence as a business record where a fingerprint expert testified to the results of a report prepared by an employee of the Los Angeles Police Department fingerprint laboratory. Based on information contained in the employee's report, the expert testified as to the steps the employee

took to obtain latent fingerprints. He further testified that the report was on a form that is filled out in the regular course of business whenever a laboratory employee sprays an item with ninhydrin; that such reports are completed by the person doing the spraying; that he knew the employee was required to fill out such a form at or near the time she was doing the spraying, and also described briefly the manner in which a form such as the one prepared by the employee must be completed. (*Champion*, at pp. 915-916.)

Dr. Scheinin's testimony provided no information comparable to the testimony presented in the cases cited above. Dr. Scheinin did not testify that Dr. Selser followed "standard operating procedures" in the autopsy of the fetus or in the preparation of the autopsy report. Indeed, Dr. Scheinin said nothing about the specific procedures Dr. Selser followed when she conducted the autopsy, and nothing about the specific procedures Dr. Selser followed when dictating or writing her report. To the extent which Dr. Scheinin did testify about practices in the coroner's office and autopsy procedures, she did not link them in anyway to Dr. Selser or the report on Washington's fetus. At no time did Dr. Scheinin say that Dr. Selser followed coroner's office procedures. Thus, the record does not contain any information from which this Court may infer that the method or time of preparation of Dr. Selser's report carries any indicia of trustworthiness. And because Dr. Scheinin did not testify that the procedures she did discuss were regularly followed in 1989, this Court may not presume that "the regular course of business" was followed here.

Dr. Scheinin's testimony failed to provide a sufficient foundation in another regard as well. Even if her testimony is presumed to establish the method and procedures regularly used in 1989, her testimony had a critical deficiency: she did not describe how the autopsy report was actually produced from the information initially dictated by the medical examiner. She stated that medical examiners dictate their findings after the autopsy. At some point later, the dictated information may be typed, but there apparently was no regular practice for the typing: "those are eventually typed and sometimes they're typed right away, sometimes they are not typed until somebody actually requests them . . . ." (12 RT 1290.) Dr. Scheinin also failed to explain how or by whom the contents of the dictated recording were transformed into a formal written autopsy report. It was the written report, and not the information initially dictated by Dr. Selser that Dr. Scheinin based her opinion on. Dr. Scheinin's testimony did not describe how the report itself was prepared, and thus could not meet the foundational requirements.

For all these reasons, the foundation for admission of Dr. Scheinin's testimony relating statements made in Dr. Selser's report under the business record exception was not established. Because the foundation for admission under the official records exception was not met either, the evidence was inadmissible hearsay.

4. The foundational requirements of section 1280 were not met

Respondent also urges this Court to find Dr. Scheinin's testimony relating the contents of Dr. Selser's report admissible under the official records exception to the hearsay rule set forth in

Evidence Code section 1280. The foundational requirements for this exception overlap with, but also differ from, those required under section 1271. But just as with the business record exception, the requirements were not met here.

a. The evidence did not establish that Dr. Selser's report was prepared within the scope of an official duty

The exception in Evidence Code section 1280, unlike that in section 1271, does not require the testimony of someone qualified to discuss the preparation of the report because of the additional requirement in section 1280 that the writing be prepared pursuant to an official duty. (*People v. Martinez* (2000), 22 Cal.4th 106, 129.)

The exception is based on the presumption that public officers properly perform their official duties. (*Jazayeri v. Mao, supra,* 174 Cal.App.4th at pp. 317–318.) "The fundamental circumstance is that an official duty exists to make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officer to its fulfillment . . . . It is the influence of the official duty, broadly considered, which is taken as the sufficient element of trustworthiness, justifying the acceptance of the hearsay statement." (*Ibid.*)

In *People v. Martinez, supra*, 22 Cal.4th 106, this Court discussed application of the official records exception in the context of a computer-generated CLETS report. As this Court explained, the first requirement of the exception requires proof that the record was prepared by a public employee within the scope of their official duties. Because there is a presumption that "official duty has been

regularly performed" under Evidence Code section 664, once the first prong is met, the court may assume that a record prepared pursuant to that duty is trustworthy.

Thus, Evidence Code section 1280 "'permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness.'" (*People v. Martinez*, *supra*, 22 Cal.4th at p. 129, quoting Cal. Law Revision Com. com., reprinted at 29B pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1280, p. 347.) This Court found the exception met in *Martinez* because a witness testified in detail about how information is entered into CLETS and how it is checked for accuracy. The witness also testified about the reporting obligations placed on California law enforcement agencies and his familiarity with the forms used by the agencies when fulfilling their reporting obligations. (*People v. Martinez, supra*, 22 Cal.4th at pp. 120–121.) This Court also found that, in addition to this testimony, the trial court could take judicial notice of a host of statutes that imposed obligations on California law enforcement agencies in relation to the compilation and reporting of criminal history information. (*Id.* at pp. 122-125.)

Although it appears that a foundation for the official record exception can be met either by testimony or by judicial notice of statutes creating a duty for an official to make an accurate report, the record in this case fails to establish either one. In *Martinez*, this Court examined a number of statutes that, read together,

established that the sources of the information in the CLETS printout were public employees who had a duty to observe, report, record, and disseminate the information, none of which reflected the opinions or conclusions of the reporting employees. Moreover, there were statutes mandating that, for the performance of their official duties, law enforcement agencies required "accurate and reasonably complete" information. This Court concluded that under these statutes public employees involved in the recording or reporting of information in the CLETS system have a duty to employ methods ensuring a reasonable level of accuracy and reliability. (*People v. Martinez, supra*, 22 Cal.4th at p. 130, citing *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1480.)

In contrast to the official duties placed on law enforcement with regard to reporting and entering criminal records information into the CLETS system, there are no statutory duties that require preparation of an actual or accurate autopsy report, even in homicide cases. Respondent has cited no statutes of which this Court could take judicial notice to establish such duties and it appears there are none. The statutes regarding the duties of the coroner do not discuss writing or disseminating the results of an autopsy in a report. (See Gov. Code, §§ 27491 [requiring coroner's inquiry and "determination" of cause of death in violent homicide cases], 27491.1 [requiring coroner to "immediately notify the law enforcement agency having jurisdiction over the criminal investigation . . . by the most direct communication available" when they suspect a death was caused by criminal means].) The statutes

are silent on preparation of an autopsy report.[5] Although there is an official duty to determine cause of death, and to immediately notify law enforcement where foul play is suspected, the coroner has no duty to prepare a formal report, and as Dr. Scheinin's testimony suggested, there may be situations where a report is never even generated. (12RT 1790 [testifying that after the information is dictated, the tape is kept "until" someone requests that it be typed into a report].)

In *Martinez,* this Court also found it significant that a CLETS printout contained no information reflecting the opinions or conclusions of the reporting employees. (*People v. Martinez, supra*, 22 Cal.4th at p. 130, citing *People v. Dunlap*, *supra*, 18 Cal.App.4th at p. 1480.) The same cannot be said of an autopsy report, which necessarily includes the coroner's opinions and conclusions – not only about cause of death but often about many other matters as well.

Because there are no statutes requiring that an accurate and complete autopsy report be prepared pursuant to the coroner's official duty, this Court must look only to Dr. Scheinin's testimony to determine if the exception applies. Her testimony was insufficient to lay the necessary foundation.

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[5] To the extent which appellant previously asserted that the Government Code requires that an autopsy report be transmitted to law enforcement upon suspicion of violent, criminal activity, it appears, upon closer review, that the statutory language does not support that assertion.

As described above, in *Martinez*, the testifying witness explained the reporting and accuracy obligations placed on California law enforcement agencies, his experience that they followed their obligations, and his familiarity with the forms used by the agencies when fulfilling those obligations. (*People v. Martinez, supra*, 22 Cal.4th at pp. 120–121.) Similarly, this Court has found that an autopsy report met the requirements of the official record exception where the expert who prepared the report had already testified about other autopsies, and a different doctor testified that he was personally familiar with the manner of preparation of autopsy reports in the medical examiner's office, that it was the original pathologist's duty at the time of the examination to make a report of the autopsy, that the report was made at or near the time of the autopsy examination, and that the report so prepared was an official record of the coroner/medical examiner's office. (*People v. Clark*, *supra*, 3 Cal.4th at p. 159.)

Dr. Scheinin, however, unlike the witnesses in *Martinez* or *Clark*, did not testify that Dr. Selser had a duty to make a report or that the report was an official record of the coroner's office. She did not discuss any obligations included in a coroner or medical examiner's official duties, let alone duties to accurately dictate information or prepare an autopsy report.

Without such a duty, there is no presumption that the autopsy report was properly prepared within the scope of that duty. And without such a duty, there must be testimony by someone who

can establish the trustworthiness of the report. As shown above, Dr. Scheinin's testimony did not meet that requirement.[6]

5. Conclusion

Respondent has failed to show that the foundational requirements for the admission Dr. Scheinin's hearsay were met under either the business record or the official record exception to the hearsay rule. Dr. Scheinin was not a qualified witness who testified, or could testify, to the mode of the autopsy report's preparation 18 years earlier and three years before she had any knowledge of the practices of the Los Angeles County Coroner's Office. She presented no testimony that Dr. Selser followed standard operating procedures in either the autopsy or in the documentation of the autopsy. She did not and could not testify that the information she related to the jury from the autopsy report was trustworthy. For these reasons this Court cannot find that the business record exception applies.

For similar reasons, the hearsay was not admissible under the official record exception. There was no testimony that Dr. Selser

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[6] Respondent argues inconsistently that the report was admissible as an official record because it was prepared pursuant to an official duty affording it a presumption of regularity and accuracy, yet at the same time, that the report was not prepared with sufficient formality to qualify as testimonial. Both positions cannot be true: if the report was an official record under Evidence Code section 1280, then it was formal enough to be testimonial; if it was not formal, then it is not covered by the official records hearsay exception and not admissible on that basis. The testimonial nature of the report is discussed below.

prepared her report according to any official duty, and there is no statutory basis for this Court to conclude such a duty exists or presume that Dr. Selser complied with it. Dr. Scheinin's testimony relating the contents of Dr. Selser's report is hearsay that was neither supported by independent evidence nor otherwise covered by a hearsay exception, and thus should not have been admitted.

Regardless of whether this Court finds that Dr. Scheinin's testimony also violated Mr. Turner's constitutional rights, her testimony violated state evidentiary law. As argued below, and in the Second Supplemental Appellant's Opening brief, its introduction was prejudicial and requires reversal of his conviction on Count 5, as well as the sentences of death.

B. Dr. Selser's Autopsy Report and the Statements of Gestational Age and Weight Contained Therein were Sufficiently Formal and were Prepared Primarily for Evidentiary Purposes; *Dungo* Should Be Reconsidered

Under *Crawford*, *supra*, 541 U.S. at p. 59, the admission of testimonial hearsay violates the confrontation clause unless the declarant was unavailable and the defendant had a prior opportunity to cross-examine her. Respondent argues that Mr. Turner was not entitled to confront Dr. Selser concerning her statements in the autopsy report because her report was not testimonial. Whether a statement is testimonial depends on the formality with which it was made and its primary purpose. If the statements are sufficiently formal and their primary purpose was evidentiary, i.e., to establish or prove past events potentially relevant to later criminal prosecution, they are testimonial. (*Davis v. Washington* (2006) 547 U.S. 813, 833 ("*Davis*").) The statements

contained in an autopsy report where the cause of death obviously is a homicide are sufficiently formal to be testimonial and their primary purpose is evidentiary. An autopsy report in a homicide case is a formal document and it is difficult to imagine one that has greater evidentiary purpose or value.

Nevertheless, respondent disputes the testimonial character of autopsy reports in general and Dr. Selser's specifically. (2SRB, at pp. 21-39.) Respondent relies on *Dungo's* holding that physiological observations contained in autopsy report are not formal enough to be considered testimonial and insists that decisions following *Dungo* have done nothing to compromise its approach to forensic reports under the confrontation clause. (2SRB, at p. 21.) Respondent also appears to ask this Court to interpret *Crawford's* progeny as setting an even more constrictive standard for testimonial hearsay than that set forth in *Dungo*. (See, e.g., 2SRB at pp. 22-25 [proposing that a "sole purpose" test rather than the primary purpose test should apply to forensic reports].) This Court should reject respondent's proposals, reconsider *Dungo*, and conclude that autopsy reports and the statements contained within them are testimonial, at least in situations like this one, where homicide is obvious.

1. Autopsy reports and the statements of objective fact and opinion contained in them are "formal"

a. *Sanchez* undermines *Dungo's* rationale for treating expert conclusions and opinions differently than the facts on which they are based

Statements made to law enforcement during interrogation are formal. (*Crawford*, *supra*, 541 U.S. at p. 52.) Statements made in forensic reports are also formal. (*Melendez-Diaz v. Massachusetts*

(2009) 557 U.S. 305 ("*Melendez-Diaz*") [report discussing the results of testing for controlled substances]; *Bullcoming v. New Mexico* (2011) 564 U.S. 647 ("*Bullcoming*") [report discussing the results of testing for blood alcohol content].) In *Dungo*, *supra*, 55 Cal.4th at pp. 619-621, this Court assessed the testimonial character of statements contained in an autopsy report. It held that the opinions or conclusions in an autopsy report are formal but not the statements of observational fact underlying them. Respondent defends this distinction and takes the position that subsequent authority, *Sanchez*, has not undermined *Dungo*'s rationale. (2SRB, at pp. 21, 26-28.)

Sanchez, *supra*, 63 Cal.4th at pp. 682-683, 695, teaches that an expert's opinion is only as good as the facts it is based on: "the validity of [the expert's] opinion ultimately turn[s] on the truth of the hearsay statement. If the hearsay that the expert relies on and treats as true is not true, an important basis for the opinion is lacking." (*Sanchez*, *supra*, 63 Cal.4th at pp. 682-683, internal quotations and citations omitted.) The expert's opinion cannot be considered more formal than the facts underlying it because they are inextricably intertwined. In *Sanchez,* this Court rejected the distinction between expert opinion and its factual basis that had been drawn in *Dungo* because the United States Supreme Court had rejected that distinction in *Bullcoming*. (*Sanchez*, at p. 695, see SAOB, pp. 24-25.) *Sanchez* undermines any rationale for treating an expert's opinion differently than the facts on which it is based.

Nevertheless, respondent defends the distinction by pointing to *Dungo*'s citation to a footnote in *Melendez-Diaz* in which the

Court commented that "medical reports created for treatment purposes . . . would not be testimonial under our decision today." (*Melendez-Diaz*, *supra*, 557 U.S. at p. 312, fn. 2; 2SRB, at p. 28.) In *Dungo*, this Court relied on that footnote and reasoned that a medical examiner's statements of observational fact in an autopsy report are not testimonial because they are comparable to observations of fact made in medical treatment notes, which are not testimonial. (*Dungo*, *supra*, 55 Cal.4th at 619-620.)

But the footnote *Dungo* relied on is not about formality, nor is it about the difference between a treating physician's conclusions or opinions and his observations of fact. The footnote appears in a discussion refuting the dissents' concern that the Court was overturning a long line of cases. (*Melendez-Diaz, supra*, 557 U.S. at p. 312.) In that specific context, the Court noted that a majority of the cases cited by the dissent had already been discredited and, other than one lone case, the others were about medical treatment records and thus irrelevant because treatment records, in their entirety, would not be testimonial. (*Id.*, at fn. 2.)

The reason medical treatment notes are nontestimonial in their entirety is not because they lack formality but because they were prepared for "treatment purposes," and thus are "by their nature, made for a purpose other than use in a prosecution" and thus fail an entirely different prong of the analysis – the primary purpose prong. (See *Bullcoming*, *supra*, 564 U.S., at p. 672 (conc. opn. of J. Sotomayor) [citing inter alia *Melendez–Diaz*, *supra*, 557 U.S. at p. 312, fn. 2].) The footnote in *Melendez-Diaz* provides no support for *Dungo*'s distinction between facts and opinions for

purposes of assessing formality and even if it once did, *Bullcoming* expressly rejected any such distinction.

b. Gestational Age is Not an Observational Fact

Even if *Dungo*'s distinction is valid, respondent incorrectly characterizes the gestational age of the fetus as an observational fact. Respondent repeatedly refers to gestational age and weight as "basic measurements" that can be accomplished by assistants. (2SRB, at pp. 32-34.) That is not accurate. Respondent does not explain how gestational age is determined, and it is entirely unclear how Dr. Selser, or anyone, would have "measured" the age of a fetus absent the date of conception.

Dr. Scheinin testified that the fetus was "estimated" to be six and a half months and based on that, she opined the fetus was viable. (12RT 1821.) She explained that the literature talks about "gestational age" rather than just age; gestational age is how many weeks the fetus was inside the mother. (12RT 1822.) Based on literature that existed at the time of the autopsy here, Dr. Scheinin said the criteria for assessing viability then was similar to what it was at the time of her testimony. (12RT 1823.) Relying on a chart from the "Perinatal Autopsy Manual," published in 1983, she explained how confusing the literature about fetal life could be because of different terms used by different researchers in different times. The chart from the book, which was shown to the jury and entered into evidence (People's Exh. No. 141), included two criteria, weight and gestational age, for determining viability. But Dr. Scheinin did not testify how gestational age was determined by Dr.

Selser in particular, by any standard practices of pathologists at the time of the autopsy here, nor at the time of her testimony.

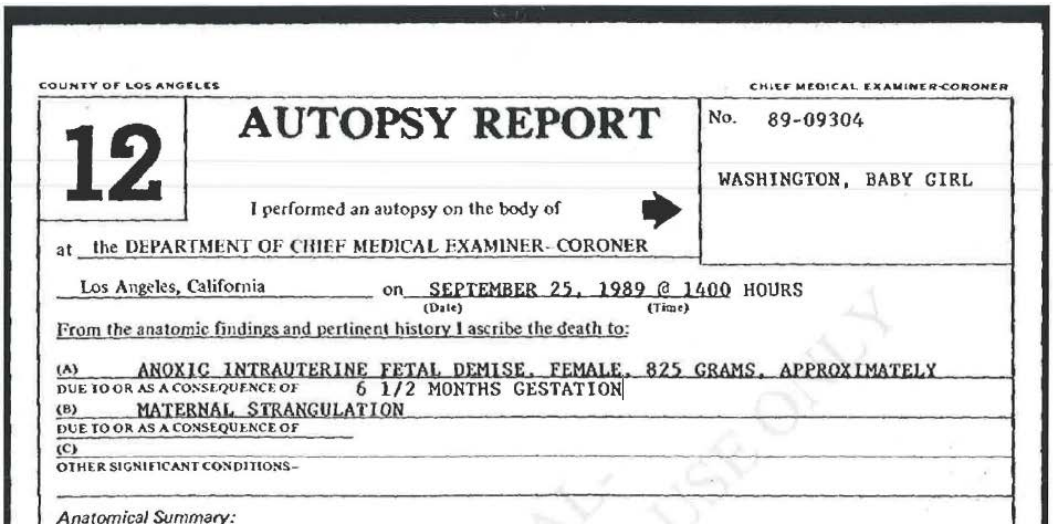
According to the source Dr. Scheinin relied on, however, "Gestational Age can be measured in days, weeks, lunar months, calendar months or trimesters, and calculated from the estimated day of conception or from the first day of the last menstrual period." (Valdés-Dapena & Huff, Perinatal Autopsy Manual (1983) p. 4.) No other method of determining gestational age itself was suggested or recommended in cases such as this, where neither the date of conception nor of the mother's last period was available.

Respondent's contention that the gestational age was an observational fact is thus incorrect. Without the testimony of Dr. Selser or a pathologist with knowledge of the coroner's practices in 1989, it not clear how the estimate was reached in this case. What is clear is that it was based on something more than a mere fact observable to anyone trained to take the proper measurements. As Justice Corrigan observed in her opinion in *People v. Edwards* (2013) 57 Cal.4th 658, 769 (conc. & dis. opn. of Corrigan, J.), "[t]he line between an inadmissible statement amounting to a *conclusion*, and an admissible statement about an *observation*, is not as bright as *Dungo* suggests." For these reasons, *Dungo's* approach is not sound and the statement of gestational age in this case should be treated as formal. Even under *Dungo*, however, its admission violates *Crawford*.

c. Dr. Selser Recorded the Gestational Age and Weight Figures with the Same Level of Formality as Her Conclusions and Opinions

Even if gestational age and weight are both considered to be observational facts and this Court continues to generally treat such facts in autopsy reports as nonformal, it should find that the statements of gestational age and weight in this specific case are formal.

Dr. Selser expressed her findings concerning the fetus's gestational age and weight with the same formality that she expressed her opinion concerning the cause of death. In the first section of her autopsy report, before detailing her external and internal observations, Dr. Selser wrote her conclusion: "From the anatomic findings and pertinent history I ascribe the death to: (A) Anoxic intrauterine fetal demise. Female. 825 grams. Approximately 6 1/2 months gestation due to or as a consequence of (B) Maternal strangulation."



COUNTY OF LOS ANGELES — CHIEF MEDICAL EXAMINER-CORONER

12

AUTOPSY REPORT

No. 89-09304

WASHINGTON, BABY GIRL

I performed an autopsy on the body of

at the DEPARTMENT OF CHIEF MEDICAL EXAMINER- CORONER

Los Angeles, California on SEPTEMBER 25, 1989 @ 1400 HOURS
(Date) (Time)

From the anatomic findings and pertinent history I ascribe the death to:

(A) ANOXIC INTRAUTERINE FETAL DEMISE, FEMALE, 825 GRAMS, APPROXIMATELY
DUE TO OR AS A CONSEQUENCE OF 6 1/2 MONTHS GESTATION
(B) MATERNAL STRANGULATION
DUE TO OR AS A CONSEQUENCE OF
(C)
OTHER SIGNIFICANT CONDITIONS–

Anatomical Summary:

(Exh. A, Appellant's Motion for Judicial Notice.)

The statements concerning the gestational age and weight, although observations in some sense, were incorporated into Dr. Selser's formal opinion. Assuming, without conceding, that there may have been a basis to treat the medical examiner's objective observations in *Dungo* as less formal than her opinions, there is no reason to do so here with respect to Dr. Selser's statements of gestational age and weight. Respondent does not address this component of Mr. Turner's argument. (2SAOB, at p. 29.)

d. There Is No Requirement that a Statement Include an Attestation of Truth or Correctness to Be Considered Formal

In her *Dungo* concurrence, Justice Werdegar reasoned that autopsy reports were insufficiently formal because they did not contain an attestation of truth or accuracy. (*Dungo*, *supra*, 55 Cal.4th at p. 623 [conc. opn. of J. Werdegar].) Respondent asserts that *Melendez-Diaz*, *supra*, 557 U.S. 305 and *Bullcoming*, *supra*, 564 U.S. 647, support a requirement that a document contain such an attestation. Because Dr. Selser's autopsy report does not, respondent asserts that the report and all its contents are informal and therefore nontestimonial. (2SRB, at p. 26.) Respondent is mistaken.

Melendez-Diaz involved a forensic report that had been sworn to before a notary public. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 308.) *Bullcoming* involved a forensic report that contained an attestation that the statements made in the report were correct. (*Bullcoming*, *supra*, 564 U.S. at p. 653.) But neither *Melendez-Diaz* nor

Bullcoming stand for the proposition respondent asserts—that an attestation or certification is a requirement for formality.

In *Bullcoming*, the state argued that a forensic report was not formal because it was not sworn before a notary public, as the forensic report in *Melendez-Diaz* had been. (*Bullcoming*, *supra*, 564 U.S. at p. 664.) The Court did not accept the argument, observing that the absence of an oath was not dispositive. (*Ibid.*) It noted that *Crawford* "rejected as untenable any construction of the Confrontation Clause that would render inadmissible only sworn ex parte affidavits, while leaving admission of formal, but unsworn statements 'perfectly OK'" as it would "make the right to confrontation easily erasable." (*Ibid*.) When assessing the formality of the forensic report before it, the *Bullcoming* court did not give significance to either the absence of an oath or the presence of the attestation. (*Id.* at pp. 664-665.) The Court instead focused on the facts that law enforcement was involved with the collection of the evidence that was analyzed, that the report was signed by the analyst who prepared it, and that it was titled a "report." (*Id.* at p. 665.) The Court also noted that the report contained a legend listing rules regarding its admissibility. (*Ibid.*)

Applying these factors, Dr. Selser's autopsy report is sufficiently formal. Law enforcement was involved in the collection of Washington's body and her fetus, and the transfer of that evidence to the medical examiner for autopsy. (8RT 1171, 1183, 13RT 1888.) Dr. Selser signed and dated her report, and it was titled a "report." (Exh. A, Appellant's Motion for Judicial Notice.) While it did not have a list of the rules regarding its admissibility, the report

still meets the test for formality. (See, e.g., *People v. Ogaz* (July 14, 2020, No. G055726) __ Cal.App.5th __ [2020 WL 4581253, *6] [discussing how a laboratory report was sufficiently formal despite the absence of an attestation or list of rules regarding its admissibility because it had been signed by the analyst who prepared it reflecting that "she was willing to stand behind the information contained therein"].) The test cannot turn, as respondent says it should, on whether it contains an attestation, or any other specific indicia of formality. Making that the test "grants constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protections." (*Williams v. Illinois* (2012) 567 U.S. 50, 139 (dis. opn. of Kagan, J.).)

The *Dungo* dissenters found that the autopsy report of Dr. Bolduc, who did not testify at trial, "comport[ed] closely" with the description of testimonial evidence in *Bullcoming,* and found that Dr. Bolduc's report, although not certified, was signed and dated, and was "manifestly an official report, prepared by . . . an agent of the Sheriff-Coroner and in compliance with the Government Code." (*Dungo*, *supra*, 55 Cal.4th at p. 639-641.) The dissent's analysis is correct and it applies fully to the report at issue here. (See *Bullcoming*, *supra*, 564 U.S. at p. 664-665.) This Court should reconsider *Dungo* and join the jurisdictions that have concluded that autopsy reports and the statements of fact and opinion contained in them are formal for purposes of *Crawford*.[7]

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[7] As noted above in footnote 6, respondent argues both that the report was formal enough to satisfy the official record hearsay

(*continued*)

2. The Primary Purpose of Dr. Selser's Autopsy Report was Evidentiary

It would be clear to a reasonable medical examiner in Dr. Selser's position that the primary purpose of her autopsy report was evidentiary. Washington's death was obviously the result of homicide. Washington was brought into the medical examiner's office with the ligature still in place around her neck. The cause of Washington's fetus's death was "fetal demise" due to "maternal strangulation." (12RT 1820.) Law enforcement was present for the autopsy (Exh. A, Appellant's Motion for Judicial Notice) and there is a notation indicating that police reports were requested.

Respondent admits that autopsy reports are primarily used for evidentiary purposes in homicide cases, but maintains that primary "use" is distinguishable from primary "purpose." (2SRB, at pp. 32-33.) The position is indefensible; respondent cites no authority for this supposed distinction and there is none.

Respondent also argues that the court should abandon the primary purpose test when forensic reports are involved and instead adopt a sole purpose test. That position, as well as a number of respondent's other arguments, conflicts with the one taken by the United States Supreme Court.

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exception in Evidence Code section 1280, and that it was not formal enough to be testimonial. If this Court finds the official record exception applies, then the report was sufficiently formal enough, when considered together with its primary evidentiary purpose, to be testimonial.

a. Even if the primary purpose of other autopsy reports is not evidentiary, the primary purpose of Dr. Selser's report was evidentiary, which is the only issue here

Respondent admits that in homicide cases autopsy reports are primarily used for evidentiary purposes but claims "the simple fact that it may primarily be *used* in a particular way does not transform its primary *purpose*." (2SRB, at pp. 32-33.) Respondent notes that homicides make up a small number of autopsies in a particular year. (2SRB, at pp. 30-31.) Although the primary purpose of autopsy reports in homicide cases might be evidentiary, respondent points to statistics indicating that the primary purpose of the majority of autopsies is not. (2SRB, at pp. 30-31 ["Their primary focus is to assist families and the community as a whole, usually in cases that have nothing to do with crime or prosecution"].) For that reason, respondent claims Dr. Selser's autopsy report fails the primary purpose test. *Dungo* took a similar, yet erroneous approach to the primary purpose prong. (*Dungo*, *supra*, 55 Cal.4th at p. 621.) That rationale is in tension with decisions of the United States Supreme Court, and was rejected in *Sanchez*. (*Sanchez*, *supra*, 63 Cal.4th at p. 696.)

The United States Supreme Court looks at the circumstances of a particular statement when ascertaining whether its purpose was primarily evidentiary. (See, e.g., *Melendez-Diaz*, *supra*, 557 U.S. at p. 311 [framing the inquiry as whether the forensic report was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"]; *Crawford*, *supra*, at p. 52 [same]; *Ohio v. Clark*

(2015) 576 U.S. 237, 243-244 [discussing how the court "must consider all of the relevant circumstances" to the making of a particular statement in order to assess its primary purpose].) The existence of important but hypothetical purposes motivating preparation of an autopsy should not be more important than the actual reason that a particular autopsy is conducted. As Justice Corrigan observed in her dissent in *Dungo* "[w]hile some autopsies may be conducted for purposes unrelated to criminal prosecution, other autopsies conducted under different circumstances may well result in the production of testimonial statements." (*Dungo*, *supra*, 55 Cal.4th at p. 644 (dis. opn. of Corrigan, J.).)

In *Sanchez*, the Attorney General made an argument similar to the one it makes here. It argued that a STEP notice was nontestimonial because, hypothetically, it may serve various purposes in addition to the memorialization of facts for use in later criminal prosecutions. (*Sanchez*, *supra*, 63 Cal.4th at p. 696.) The Court rejected the argument, examined the particular circumstances under which the notice in that case was prepared, and concluded it was for possible use in a prosecution. (*Ibid.*)

The particular circumstances under which the autopsy report was prepared in this case reflect that its primary purpose was evidentiary. That this case involved an obvious homicide requiring a formal notification to a prosecutorial entity (Gov. Code, § 27491.1) demonstrates that the purpose of the autopsy report that followed that notification was primarily, if not entirely, evidentiary. While there may be many purposes for an autopsy, it appears from Dr. Scheinin's testimony that a formal autopsy report was not

automatically produced following every autopsy in her office, but only produced upon "request." (12 RT 1790.) Respondent fails to point to any evidence that the report in this case was typed up for any purpose (or "use") other than an evidentiary one, and as Dr. Scheinin testified, it was well known in the coroner's office that one examiner's report might be used and relied on by another examiner for testimony in court. (12RT 1790-1791, 13RT 1884-1885.)

b. Although an autopsy involves procedures also used for medical purposes, the primary purpose of an autopsy report is not medical

Respondent makes a number of arguments revolving around the medical or surgical nature of autopsies. (2SRB, at p. 31-34.) The thrust of respondent's analysis is that medical examiners are collecting medical evidence using medical techniques during an autopsy and therefore the autopsy report's primary purpose is "medical, not legal." (2SRB, at p. 32.) But merely because a medical examiner uses methods to collect medical evidence that are also used by doctors providing treatment to live patients does not mean the purpose of the autopsy report is medical. As respondent admits, in homicide cases, autopsy reports are primarily used for evidentiary purposes and the pathologist would know that. (2SRB, at pp. 32-33.) The autopsy itself may utilize medical procedures that results in an autopsy report filled with medical information, but, when homicide is obvious, the primary purpose of that report still is evidentiary.

Law enforcement's interest was manifest in this case. They found Washington's body with a ligature still around her neck, her

pants unfastened, and her shirt pulled up. (People's Exh. No. 43; 7RT 1077-1083.) After collecting evidence at the scene, law enforcement released custody of the body to the Coroner's Office for autopsy. (8RT 1171, 1183, 13RT 1888.) Law enforcement attended the autopsy and the report subsequently generated was critical to the prosecution. Respondent claims that the obligation of a medical examiner in preparing an autopsy is the same in every case and that it is "unrealistic" to expect a medical examiner would shift their primary purpose and perspective whenever an autopsy is conducted in a potential homicide case. (2SRB, at p. 33.) Mr. Turner's argument is not that the pathologist would go about an autopsy in a homicide case any different than she would in a nonhomicide. Mr. Turner's argument is that a reasonable pathologist in Dr. Selser's position would have known that the primary purpose of *her report* would be evidentiary. That is the test that ought to apply. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 311 [framing the inquiry as whether the forensic report was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"].)

Respondent presents a hypothetical situation in which Washington and her fetus survive, and are treated at a hospital. (2SRB, at p. 34.) Even though it is clear that the medical treatment notes would be relevant to a criminal prosecution, respondent takes the position that their primary purpose would remain medical. (2SRB, at p. 34.) While that may be true, medical notes are only nontestimonial to the extent they were *created for treatment purposes*. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 312, fn. 2 ["[M]edical

reports created for treatment purposes . . . would not be testimonial under our decision today"].) If the physician created notes to memorialize information that was unnecessary for treatment, but highly relevant to an anticipated criminal prosecution, such as a statement that a wound appeared to have been intentionally inflicted or was made by an illegal firearm or device, it could not seriously be contended that its primary purpose would remain treatment.

This case does not involve a report prepared for the purpose of medical treatment. The fetus was already dead. Dr. Selser was investigating the circumstances, manner, and cause of the death and to that end performed an autopsy on the fetus in the presence of law enforcement, who had an obvious interest obtaining and using her autopsy report for prosecution. The primary purpose of Dr. Selser's report was to supply medical information for prosecution, not treatment and medical examiners are well aware of that when producing an autopsy report. (2SRB, at pp. 32-33.)

c. The perceived reliability of medical observations in an autopsy report and the existence of hearsay exceptions that may apply to them are irrelevant to the confrontation analysis

Respondent analogizes the statements of gestational age and weight in Dr. Selser's autopsy report to the types of basic measurements and observations recorded in medical treatment notes. (2SRB, at pp. 33-35.) Respondent emphasizes that such measurements may be made by a nonphysician during the autopsy. (2SRB, at p. 32.) Relatedly, respondent argues that one would not

expect the medical examiner's results to change depending on whether the case was a homicide or nonhomicide.

The high court addressed a somewhat similar argument in *Melendez-Diaz*, *supra*, 557 U.S. at pp. 317-318. There, the state argued that there should be a "difference, for Confrontation Clause purposes, between testimony recounting historical events, which is prone to distortion or manipulation, and the testimony at issue . . . which is the resul[t] of neutral, scientific testing." According to the state, confrontation of forensic analysts would be "of little value because one would not reasonably expect a laboratory professional . . . to feel quite differently about the results of his scientific test by having to look at the defendant." (*Melendez-Diaz*, at p. 317.) The Court rejected it:

> "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S., at 61–62, 124 S.Ct. 1354.

(*Id.* at pp. 317–318.)

Respondent also claims that the autopsy report's status as a public or business record "further suggests that autopsy reports are properly considered nontestimonial." (2SRB, at p. 35.) However, the high court has rejected that argument, too. Business and public records created for an evidentiary purpose, like Dr. Selser's autopsy report, are not admissible absent confrontation, even if they are admissible as a matter of state evidentiary law. (*Bullcoming*, *supra*, 564 U.S. at p. 659, fn. 6; *Melendez-Diaz*, *supra*, 557 U.S. at pp. 321-322.)

d. *Melendez-Diaz* and *Bullcoming* did not replace the primary purpose test with a sole purpose test

According to respondent, the primary purpose test "does not comfortably fit within the context of forensic reports." (2SRB, at p. 22.) Respondent claims that the court has applied a primary purpose test to statements made during interrogation, but has applied a sole purpose test to statements made in forensic reports. (2SRB, at pp. 22-25.) There is no basis for respondent's claim and the Court has never applied a sole purpose test.

Respondent points to *Melendez-Diaz* and *Bullcoming* (2SRB, at pp. 22-25), both of which involved forensic reports that the Court concluded had been prepared solely for evidentiary purposes. But neither case purported to replace the primary purpose test with a sole purpose test. In *Melendez-Diaz*, the Court applied the primary purpose test set forth in an interrogation case (*Crawford*) to a forensic report and concluded that the test was easily met because the forensic report's sole purpose was evidentiary. (*Melendez-Diaz*, *supra*, 557 U.S. at p. 311.) *Melendez-Diaz* stands for the unremarkable proposition that the primary purpose test is necessarily met when a forensic report's sole purpose is evidentiary. *Bullcoming* applied that same principle. (*Bullcoming*, *supra*, 564 U.S. at pp. 663-664.) Respondent's argument that the Supreme Court has *sub silentio* replaced the primary purpose test with a sole purpose test is wrong.

e. Statements in Dr. Selser's autopsy report were testimonial, even though the report was not prepared in a combined sheriff-coroner's office at a time when there was an identifiable suspect

Respondent claims that the circumstances surrounding the autopsy report in this case are "even less connected to law enforcement and a criminal investigation than the circumstances in *Dungo*." (2SRB, at p. 37.) Respondent points out that a combined sheriff-coroner was involved in the preparation of the autopsy report in *Dungo*, that the medical examiner who prepared the report had credibility problems, and that, at the time the report was prepared, law enforcement had already identified a suspect. (2SRB, at pp. 37-38.) While there are differences between this case and *Dungo*, they were not critical to the court's analysis in that case nor are they critical to an analysis under *Melendez-Diaz* or *Bullcoming*.

Dungo's conclusion that statements in an autopsy report were insufficiently formal turned on the perceived distinction between opinions/conclusions and observational facts. This Court's conclusion that the primary purpose of all autopsy reports was nonevidentiary flowed from its failure to make a statement-specific or case-specific assessment of primary purpose. Contrary to respondent's suggestion, none of the facts present in *Dungo* but absent from this case were critical to the court's analysis.

That the office responsible for performing the autopsy and preparing the report in this case was not a combined sheriff-coroner's office does not negate the formality of the autopsy report or its primarily evidentiary purpose. While the existence of a combined office may support an inference that autopsy reports generated by

such an office are more likely to have an evidentiary purpose, the absence of a combined office does not support the opposite inference. The forensic labs in *Bullcoming* and *Melendez-Diaz* were not combined with law enforcement. (*Bullcoming*, *supra*, 564 U.S. at p. 652 [noting that it was an analyst at the New Mexico Department of Health, Scientific Laboratory who prepared the report]; *Melendez-Diaz*, *supra*, 557 U.S. at p. 308 [noting that analysts at the State Laboratory Institute of the Massachusetts Department of Public Health who prepared the report].) Nevertheless, the absence of a combined lab was not a fact that entered the court's confrontation calculus. The same reasoning applies to the existence or absence of credibility issues with the medical examiner. Issues concerning a specific expert's credibility may support robust confrontation, but the absence of specific credibility issues is not critical to the analysis.

Respondent's suggestion that there is a meaningful distinction between statements made when there is already a suspect and those made when there is no suspect finds support in Justice Alito's plurality opinion in *Williams*, *supra*, 567 U.S. at pp. 84-86. However, a five-justice majority composed of the four justice dissent and Justice Thomas, did not embrace grafting that requirement onto the primary purpose test. (*Williams*, at pp. 114-115 (conc. opn. of Thomas, J.) [concluding that Justice Alito's requirement that there be an identifiable suspect "lacks any grounding in constitutional text, in history, or in logic"]; *id.* at p. 135 (dis. opn. of Kagan, J.) ["[w]here that test comes from is anyone's guess . . . it has no basis in our precedents"].)

Thus, while *Dungo* may be distinguishable in some respects, the differences do not alter the testimonial character of Dr. Selser's autopsy report, nor the statements of gestational age and weight contained in it.

f. The ability to cross-examine a surrogate expert does not satisfy the confrontation clause

"As a practical matter," respondent claims Dr. Selser wouldn't have recalled the gestational age and weight if she had been called to testify nearly 20 years after performing the autopsy and thus there would be "no meaningful difference" between Dr. Selser testifying and Dr. Scheinin relating Dr. Selser's findings as her surrogate. (2SRB, at p. 38.) Respondent adds "Dr. Scheinin provided her own independent opinion about viability, which was fully amenable to confrontation, and the confrontation clause demands no more." (2SRB, at pp. 38-39.) While Dr. Scheinin did provide an independent opinion about viability, she also related that her opinion was based solely on Dr. Selser's testimonial statements concerning the fetus's gestational age and weight. (12RT 1822-1826.) The confrontation clause gives Mr. Turner the right to confront Dr. Selser about those statements; his ability to confront Dr. Scheinin about them is constitutionally insufficient. As the high court observed in *Bullcoming*, *supra*, 564 U.S. at p. 662, "the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."

C. The Admission of Case-Specific Testimonial Hearsay to Establish This Fetus' Gestational Age and Weight Requires Reversal of Mr. Turner's Fetal Homicide Conviction and the Death Penalty under Any Prejudice Test

Dr. Selser's testimonial statements concerning the gestational age and weight were critical to proving viability. Dr. Scheinin told the jury that her opinion on viability was based solely on Dr. Selser's statements that the fetus's weight was 825 grams and that it had a gestational age of six and a half months, and her review of medical literature setting viability at a gestational weight exceeding 500 grams and an age exceeding 22 weeks.

Respondent asserts that Dr. Scheinin's opinion on viability remains admissible under *Crawford* and *Sanchez* even if its hearsay basis is not. Respondent reasons that Dr. Scheinin's opinion was all that was relevant to the jury and characterizes the hearsay itself as "otherwise meaningless," rendering its admission harmless beyond a reasonable doubt. (2SRB, at pp. 39-40.) There are two main problems with respondent's analysis.

First, the factual basis for an expert's opinion is not "meaningless"; it is critical. "[T]he law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618, disapproved on another ground in *Sanchez*, *supra*, 63 Cal.4th 665.) *Sanchez* elaborated on this interaction between an expert's opinion and its factual basis from the jury's perspective:

> The jury is not required to accept an expert's opinion. The final resolution of the facts at issue resides with the jury alone. The jury may conclude a fact necessary to support the opinion has not been adequately proven, even though there may be some evidence in the record tending to establish it. If an essential fact is not found proven, the jury may reject the opinion as lacking foundation.

(*Sanchez*, at p. 675.) Respondent's suggestion that the only factual basis offered for Dr. Scheinin's opinion was "meaningless" is at odds this Court's evaluation of expert testimony.

Respondent cites *People v. Perez*, *supra*, 4 Cal.5th at p. 457, in support of its position, but *Perez* does not assist it. *Perez* does not stand for the global proposition that respondent claims it does – that the erroneous admission of basis testimony is always harmless beyond a reasonable doubt if the jury would have still heard the opinion testimony. (2SRB, at p. 40.)

Perez dealt with a unique situation. The victim had been both choked and stabbed and the defendant's culpability for murder depended to some degree on whether the victim had died before the defendant stabbed her. (*People v. Perez*, *supra*, 4 Cal.5th at p. 457.) The testifying pathologist (Peterson) related portions of an autopsy report that had been prepared by another pathologist (Hogan) and offered his opinion that the victim was still alive when she was stabbed. Peterson's opinion conflicted with the opinion given by Hogan at the codefendant's trial. On appeal, Perez raised *Sanchez* and *Crawford* claims. This Court assumed error but found it harmless beyond a reasonable doubt. The Court observed that Peterson had related portions of Hogan's autopsy report that constituted case-specific hearsay, but noted that independent

evidence had been admitted during the trial, including photos and police testimony, to establish the same facts. (*Ibid*.) The Court also observed that Peterson would have been allowed to offer his opinion under *Sanchez* even if the trial court had prevented him from relating the hearsay from Hogan's report. (*Ibid*.)

The situation at issue here is not analogous to *Perez*. There was no independent evidence (photos or testimony) offered in this case to establish the gestational age and weight of the fetus apart from Dr. Selser's testimonial statements. Respondent points to the fact that Washington's daughter could tell Washington was pregnant because she had a bump and that she knew it was going to be a girl. (2SRB, at p. 41, citing 7RT 1055.) Respondent claims that such evidence supports an inference of viability.

Respondent cites what appears to be a medical article discussing when gender was generally revealed to parents in the 1980's and 1990's. (2SRB, at p. 41.) But the article is actually a webpage from a company (Mother Nurture 3D/4D Ultrasound Studio) that sells early gender reveal ultrasounds and blood tests to parents. The webpage advertises a test to determine gender as early as 9 weeks and notes that in the 1980's and 1990's "before elective ultrasound became a 'thing,' couples didn't usually find out the sex until their anatomy scan around 20 weeks in the pregnancy." (2SRB, at p. 41.) The webpage does not include a citation for that observation and respondent has not offered any authority for the proposition that statements made on such a webpage are reliable or admissible on appeal.

In any event, there is no evidence as to how or when Washington's daughter learned about the gender. It is complete speculation to infer that she knew it because her mother had an anatomy scan around her 20th week of pregnancy and that at least two weeks had elapsed from that date to her death (viability begins at 22 weeks). There was no evidence such a scan occurred or if it did, when, and no evidence that Washington's daughter based her conclusion about gender on anything more than myths surrounding supposed signs of a baby's gender or her mother's own hunches. As respondent appears to concede, Washington's daughter's testimony "likely would not be sufficient to find viability." (2SRB, at p. 41.)

The second problem with respondent's prejudice analysis is its emphasis on the fact that Mr. Turner did not dispute or contest viability at trial. (2SRB, at pp. 41-42.) Respondent cites *People v. Garton*, *supra*, 4 Cal.5th at p. 507 and *People v. Leon* (2015) 61 Cal.4th 569, 604, for the proposition that the erroneous admission of testimonial hearsay from an autopsy report is harmless unless the defendant contests or disputes the truth of the hearsay or what it was offered to prove. (2SRB, at pp. 40-42.) That is inaccurate.

At trial, the defense in *Garton* stipulated to the cause of death and argued to the jury that the issue was not whether the victim was shot, but who had shot her. (*People v. Garton*, *supra*, 4 Cal.5th at p. 507.) On appeal, the defendant argued that the admission of statements concerning the cause of death from a nontestifying pathologist's autopsy report violated *Sanchez* and *Crawford*. The Court assumed error, but concluded it was harmless beyond a

reasonable doubt because "the state of [the victim's] body and the manner in which she died were not disputed at trial." (*Ibid.*)

As in *People v. Garton*, *supra*, 4 Cal.5th at p. 507, the defense in *People v. Leon* (2015) 61 Cal.4th 569, 604, challenged identity, not cause of death. (*Leon*, at p. 604.) On appeal, the defendant argued that the admission of statements in an autopsy report prepared by a nontestifying pathologist concerning the cause of death violated *Sanchez* and *Crawford*. This Court assumed error and found it harmless beyond a reasonable doubt. Witnesses testified that they saw or heard someone shoot the victim. (*Id.* at pp. 578-579.) Thus, "[t]he central trial dispute concerned defendant's identity as the shooter, not that [the victim] was shot to death." (*Ibid.*)

Mr. Turner did not stipulate to viability. While he did not present evidence to challenge it, he was not required to. He pled not guilty to the fetal murder count which is considered a denial of every element of an offense. "[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." (*Estelle v. McGuire* (1991) 502 U.S. 62, 69.) In *Melendez-Diaz*, Massachusetts advanced an argument similar to respondent's, which the Court rejected. (*Melendez-Diaz*, *supra*, 557 U.S. at pp. 324–25.) "Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused." (*Ibid.*) As the Court found, the Confrontation Clause imposes a burden on the prosecution to prove its case, not on the defendant to challenge it. "Its value to the

defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses." (*Ibid.*) Mr. Turner had no obligation to put on a case and his failure to do so does not render the error in this case harmless.

The jury heard Dr. Scheinin's opinion that the fetus was viable, that viability occurs at 22 weeks and 500 grams and that Dr. Selser stated in her autopsy report that Washington's fetus was six and a half months old (26 weeks) and weighed 825 grams. Thus, the only evidence of this fetus's precise age and weight was testimonial hearsay. Its admission was prejudicial under any test and requires the reversal of Count 5.

As discussed above, the admission of Dr. Selser's statements concerning the gestational age and weight was erroneous as a matter of both state evidentiary law (*Sanchez*) and federal constitutional law (*Crawford*). However, the state and federal errors are not interdependent. There can be error under *Sanchez* but not *Crawford* and vice versa. If this Court concludes there is error under *Crawford*, or both *Sanchez* and *Crawford*, reversal is required unless the prosecution can prove beyond a reasonable doubt that the error did not affect the outcome. (*Chapman v. California* (1967) 386 U.S. 18, 24.) If there is error under *Sanchez* but not *Crawford*, reversal is required if there is a reasonable chance the outcome would have been different absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Because there was no other evidence admitted to prove that Washington's fetus exceeded the 22 week/500 gram threshold, the admission of Dr. Selser's testimonial hearsay was

critical to the fetal murder conviction and requires reversal under both *Watson* and *Chapman*.

The error also requires reversal of the death judgments. It is reasonably possible that the jury considered the viability of the fetus as uniquely aggravating. The prosecutor considered this evidence significant enough to the penalty decision to bring it to the court's attention when it reviewed the sentence (14CT 3638-3639 [referring to the murder of Washington and her fetus as involving "shocking indifference" and "cruel depravity" and as an "unspeakable" crime in its opposition to the automatic motion to modify the death judgment]), and thus it is likely the jury also considered it.

CONCLUSION

For the foregoing reasons, the admission of case-specific hearsay violated Mr. Turner's state rights, and because that hearsay was testimonial, it also violated his state and federal constitutional rights, was prejudicial, and requires reversal of Count 5 and the judgments of death.

Dated: August 13, 2020

Respectfully submitted,

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/s/
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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2))

I, William C. Whaley, am the Deputy State Public Defender assigned to represent appellant CHESTER DEWAYNE TURNER in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 12,493 words in length excluding the tables and this certificate.

Dated: August 13, 2020

/s/
WILLIAM C. WHALEY
Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: ***People v. Turner (Chester Dewayne)***
Case Number: **Supreme Court Case No. S154459**
Los Angeles County Superior Court No. BA273283-01

I, **Joy E. Rapp**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

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The envelopes were addressed and mailed on **August 13, 2020**, as follows:

Chester Dewayne Turner, J-69942 CSP-SQ 1 AC 8 San Quentin, CA 94974	Honorable William R. Pounders, Judge Criminal Appeals Unit 210 West Temple Street, Room M-3 Los Angeles, CA 90012

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **August 13, 2020**, at Sacramento, CA.

/s/
JOY E. RAPP

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S154459**
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Whaley, William (293720)
Last Name, First Name (PNum)

Office of the State Public Defender
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