IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. REYNALDO SANTOS DUNGO, Defendant and Appellant.	No. S176886 Court of Appeal No. C055923 San Joaquin County Superior Court No. SF100023A

ANSWER TO PETITION FOR REVIEW

After A Decision By The Court Of Appeal
Third Appellate District

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INTRODUCTION

In a unanimous opinion, the Court of Appeal correctly held that appellant's Sixth Amendment Right to Confrontation was violated by the prosecution's presentation of the contents of an autopsy report prepared by Dr. George Bolduc, who did not testify at trial, through the testimony of his supervisor, Dr. Robert Lawrence.

The district attorney of San Joaquin County seeks review on the ground that the appellate court's holding is inconsistent with this Court's precedent and with other recent appellate court decisions. (Petition for Review, at 5-7.) The district attorney further argues that allowing the decision to stand will result in murderers going free. (Petition for Review, at 8.)

To the extent that the appellate court's holding is inconsistent with this Court's precedent, that result was dictated by the holding and reasoning

of the United States Supreme Court's decision in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __, 129 S.Ct. 2527 ("*Melendez-Diaz*"). Even assuming the decision could affect the ability of the People to obtain criminal convictions in a small number of cases, this is not a valid reason for refusing to follow controlling United States Supreme Court precedent. Moreover, in light of the fact-specific nature of the Court of Appeal's decision, this case does not warrant further review.

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Did the appellate court correctly hold that appellant's rights under the Confrontation Clause of the Sixth Amendment were violated by testimony from a forensic pathologist who based his opinion concerning the decedent's cause of death on information contained in an autopsy report prepared by a pathologist who did not testify at trial, where the record indicated that there was reason to question the non-testifying pathologist's integrity and judgment?

STATEMENT OF THE CASE AND FACTS

Appellant admitted killing his girlfriend, Lucinda Correia Pina, by strangling her. He claimed he was provoked and lost control, and was thus guilty of at most voluntary manslaughter. The jury found him guilty of second degree murder (Pen. Code, § 187), based in part on the testimony of pathologist Dr. Robert Lawrence. He was sentenced to 15 years to life in prison. (*People v. Dungo* (2009) 176 Cal.App.4th 1388, 1391 ("*Dungo*").)

As summarized by the appellate court,

> At issue is the defendant's Sixth Amendment right to cross-examine the pathologist (Dr. George Bolduc) who prepared the report on the cause of the victim's death. A critical fact in the trial was the duration of the choking, which bore on the defendant's culpability, whether he was guilty of murder or

> voluntary manslaughter. Dr. Lawrence was not present at the autopsy on the victim's body and was permitted to testify, over defendant's Sixth Amendment objection, as to the cause of death, including the amount of time the victim was choked before she died. In doing so, he relied on the facts adduced in an autopsy report prepared by Dr. Bolduc, Dr. Lawrence's employee.
>
> The autopsy report itself was not admitted into evidence, though Dr. Lawrence disclosed portions of the report to the jury, and defendant was not able to cross-examine Dr. Bolduc either on the facts contained in the report or his competence to conduct an autopsy. Dr. Lawrence testified at a preliminary hearing [] that he was aware that Dr. Bolduc had been fired from Kern County and had been allowed to resign "under a cloud" from Orange County and that both Stanislaus and San Joaquin Counties refused to use him to testify in homicide cases. He explained that if Dr. Bolduc testifies "it becomes too awkward [for the district attorney] to make them easily try their cases. And for that reason, they want to use me instead of him." (*Dungo*, *supra*, 176 Cal.App.4th at 1391-1392 [footnote omitted].)

The trial court ruled that there was no Sixth Amendment issue because the autopsy report itself was not being introduced. (*Id.* at 1392.) On August 24, 2009, the Court of Appeal issued its published decision, concluding that 1) the contents of the autopsy report were "testimonial" within the meaning of *Melendez-Diaz*, 2) the admission of Dr. Lawrence's testimony based on and relaying to jurors the contents of Dr. Bolduc's report violated appellant's right to confrontation, and 3) the error could not be deemed harmless.

On October 2, 2009, the San Joaquin County District Attorney filed a petition for review. On October 6, 2009, the Attorney General's Office filed a request for depublication.

REASONS WHY REVIEW SHOULD BE DENIED

A. To The Extent *Dungo* Is Inconsistent With This Court's Decisions In *Beeler*, *Geier*, and *Gardeley*, The Result Was Dictated By *Melendez-Diaz*.

Respondent argues that the appellate court's decision is inconsistent with this Court's precedent, in particular the holdings of *People v. Beeler* (1995) 9 Cal.4th 953, *People v. Geier* (2007) 41 Cal.4th 555, and *People v. Gardeley* (1996) 14 Cal.4th 605. To the extent that is so, however, this result was mandated by *Melendez-Diaz*.

A defendant's Sixth Amendment right to be confronted with the witnesses against him is "a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner." (*Crawford v. Washington* (2004) 541 U.S. 36, 61; see also *Melendez-Diaz*, *supra*, 129 S.Ct. at 2536.)

As respondent observes (Petition for Review, at 5), in *Beeler*, this Court held that autopsy reports are admissible as business records. (*People v. Beeler*, *supra*, 9 Cal.4th at 978-981.) However, the *Beeler* holding that autopsy reports are admissible over a confrontation clause objection because they are business or public records was unquestionably overruled by *Melendez-Diaz*. The *Melendez-Diaz* Court made it clear that its result did not depend on whether the non-testifying analyst's materials might be considered business or official records under state law. (*Id.* at 2539-2540.) "Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against petition, and the analysts were subject to confrontation under the Sixth Amendment." (*Id.* at 2540.)

Respondent observes that this Court has held that experts may rely upon inadmissible hearsay. (Petition for Review, at 6, citing *People v. Gardeley*, *supra*, 14 Cal.4th 605, 618.) For the most part, this ruling is unaffected by *Crawford* and *Melendez-Diaz*. The rule of *Gardeley* is

affected only to the extent that it permits experts to relay *testimonial* hearsay to jurors in the guise of explaining the basis for the expert's opinion, at least, as in this case, when there was no appropriate limiting instruction and the testimonial hearsay had no tendency in reason to support the expert's opinion unless the jury believed it to be true. As the appellate court explained:

> The jury in this case was instructed that "[t]he meaning and importance of any [expert] opinion are for you to decide. In evaluating the believability of an expert witness ... [¶] ... consider ... the reasons the expert gave for any opinion and the facts or information on which the expert relied in reaching that opinion. *You must decide whether information on which the expert relied was true and accurate.*" (Italics added.) Thus, in evaluating Dr. Lawrence's opinions concerning the cause of Pina's death, the jury was required to evaluate the truth and accuracy of Dr. Bolduc's autopsy report. In other words, the weight of Dr. Lawrence's opinions was entirely dependent upon the accuracy and substantive content of Dr. Bolduc's report. (See Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington (2007) 15 J.L. & Pol'y 791, 822-823 (Mnookin) ["[T]o pretend that expert basis statements are introduced for a purpose other than the truth of their contents is not simply splitting hairs too finely or engaging in an extreme form of formalism. It is, rather, an effort to make an end run around a constitutional prohibition by sleight of hand."].) (*Dungo*, *supra*, 176 Cal.App.4th at 1403; see also *Wood v. State* (Oct. 7, 2009) 2009 Tex.App. LEXIS 7882, *30-*35 [permitting pathologist to testify to contents of another pathologist's autopsy report violated right to confrontation where the "facts and data in [the] autopsy report explained and supported [the testifying pathologist's] opinions only if they were true"].)

Respondent also observes that in *People v. Geier*, *supra*, 41 Cal.4th at 596-609, this Court held that experts may testify about reports that they did not prepare. (Petition for Review, at 6.) However, the ruling in *Geier* rested on this Court's conclusion that the laboratory report at issue was not testimonial hearsay (*People v. Geier*, *supra*, 41 Cal.4th at 605), a conclusion

that cannot be sustained in light of the decision in *Melendez-Diaz*. (See *People v. Lopez* (2009) 177 Cal.App.4th 202, 205-206; *Dungo*, *supra*, 176 Cal.App.4th at 1401, fn.11.)

Respondent points out that the United States Supreme Court denied review in *Geier*, and argues that this somehow adds to uncertainty about the state of the law. (Petition for Review, at 7.) The denial of certiorari, however, cannot be read as implicitly approving the reasoning of *Geier*. The "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." (*United States v. Carver* (1923) 260 U.S. 482, 490, 43 S.Ct. 181, 182.) Moreover, the U.S. Supreme Court will issue an order vacating the judgment and remanding for further consideration only when an intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, *and where it appears that such a redetermination may determine the ultimate outcome of the litigation.*" (*Lawrence v. Chater* (1996) 516 U.S. 163, 167, 116 S.Ct. 604 [emphasis added].) In *Geier*, this Court held that if error did occur, it was harmless beyond a reasonable doubt. (*People v. Geier*, *supra*, 41 Cal.4th at 608.) Thus, there was no basis to remand the case for further consideration.

B. A Number Of Appellate Courts Have Held That Autopsy Reports Are Testimonial.

The petition for review asserts, "No appellate court in the nation has held an autopsy report to be "testimonial", other than in *Dungo*." (Petition for Review, at 8.) Petitioner also asserts, "No court has prevented an expert from testifying about an autopsy that they did not perform, other than in *Dungo*." (Petition for Review, at 7.) These assertions are incorrect.

For example, on August 28, 2009, the North Carolina Supreme Court found that the United States Supreme Court in *Melendez-Diaz* "squarely rejected" the argument that an autopsy report was not "testimonial," and held that evidence of forensic analyses performed by a non-testifying forensic pathologist and a non-testifying forensic dentist violated the defendant's right to confrontation. (*State v. Locklear* (Aug. 28, 2009) 363 N.C. 438, 452 [681 S.E.2d 293, 2009 N.C. LEXIS 872]).

In *Wood v. State*, *supra*, 2009 Tex.App. LEXIS 7882, a Texas appellate court held that while not all autopsy reports are categorically testimonial, where the autopsy was conducted in a suspected homicide and homicide detectives were present during the autopsy, the pathologist preparing the report would understand that the report containing her findings and opinions would be used prosecutorially. The autopsy report thus "was a testimonial statement and [the pathologist who authored the report] was a witness within the meaning of the Confrontation Clause." (*Id.* at *24.) In that case, as here, the testifying expert testified not only to his own expert opinion, but also disclosed to the jury the testimonial statements in the autopsy report upon which his opinions were based. Because the statements supported the testifying expert's opinion only if true, "the disclosure of the out-of-court testimonial statements underlying [the testifying expert's] opinion, even if only for the ostensible purpose of explaining and supporting those opinions, constituted the use of testimonial statements to prove the truth of the matters stated in violation of the Confrontation Clause." (*Id.* at *34.)

In *State v. Johnson* (Minn.App. 2008) 756 N.W.2d 883, 890, a pre-*Melendez-Diaz* case, a Minnesota appellate court concluded that an autopsy report prepared during the pendency of a homicide investigation was testimonial. Similarly, a Missouri appellate court held that an autopsy report prepared for the purpose of a criminal prosecution is a testimonial

statement. (*State v. Bell* (Mo. App. 2009) 274 S.W.3d 592, 595.) "As such, an autopsy report, or testimony regarding an autopsy report, cannot be admitted without testimony from the person who conducted the autopsy or prepared the report unless the defendant has had an opportunity for cross-examination." (*Ibid.*; see also *State v. Davidson* (Mo.App. 2007) 242 S.W.3d 409, 417 [admission of autopsy report and testimony about the report from another medical examiner in lieu of examiner who actually performed the autopsy and prepared the report violated defendant's confrontation clause rights].)

C. The Third District Correctly Held That Dr. Lawrence's Testimony Violated Appellant's Sixth Amendment Right To Confrontation.

The foregoing cases support the appellate court's conclusion that appellant's right to confrontation was violated by testimony relaying the contents of a non-testifying pathologist's report to the jury. In this case, Dr. Bolduc's report was clearly "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*, 541 U.S. at 52.) Applying the reasonable belief test for testimonial statements, the report of a forensic pathologist should likely always be considered to be prepared for litigation purposes. At the very least, when, as in this case, there is a suggestion or preliminary finding of a homicide prior to an autopsy, the autopsy takes on characteristics of a criminal investigation conducted by a forensic expert investigator working for the prosecution.

Moroever, in *Melendez-Diaz*, the Court referred specifically to autopsy reports when it noted, in footnote 5, that "forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated," and suggested in the text of the opinion that confrontation remains the one constitutional way "to challenge or verify the results." (*Melendez-Diaz, supra*, 129 S.Ct. at 2536

& fn. 5.) It is clear that the Court considers autopsies a form of forensic analysis that is subject to confrontation.

Under the circumstances present in this case, cross-examination of Dr. Lawrence was not an adequate substitute for questioning the author of the report. There is no evidence that Dr. Lawrence questioned the results of Dr. Bolduc's work. At issue, however, was whether Dr. Bolduc's reported observations were in fact accurate, and thus actually supported Dr. Lawrence's expert opinion.

It appears unlikely that Dr. Bolduc, whose "baggage" included lying on his resume, would become *more* careful about accurately and competently reporting his findings knowing that he would never have to defend his work in a court of law. Dr. Lawrence did not observe Dr. Bolduc perform the autopsy. Obviously, he could not testify whether Dr. Bolduc deviated from standard procedures or how carefully or competently he performed the autopsy. His testimony was no substitute for a jury's first-hand observations of the pathologist who actually performed the autopsy. "Confrontation is one means of assuring accurate forensic analysis." (*Melendez-Diaz*, *supra*, 129 S.Ct. at 2536; see also *Dungo*, *supra*, 176 Cal.App.4th at 1404) That is particularly true in this case because, as the appellate court recognized, the very purpose of using Dr. Lawrence as a witness was to insulate jurors from Dr. Bolduc's known "baggage." (*Ibid.*)

Under the circumstances present in this case, the appellate court correctly held that appellant's right to confrontation was violated by the admission of Dr. Lawrence's testimony relaying the contents of Dr. Bolduc's report.

D. Respondent's "Parade Of Horribles" Does Not Justify Dispensing With Appellant's Constitutionally Guaranteed Right Of Confrontation.

Respondent argues that murderers will go free if the appellate court's decision is allowed to stand. (Petition for Review, at 8.) Even if that were the case, "[w]e may not ... vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." (*Davis v. Washington* (2006) 547 U.S. 813, 833, 126 S.Ct. 2266, 2279-2280.) While respondent's concern is legitimate, it cannot control the scope of the "bedrock procedural guarantee" (*Crawford, supra*, 541 U.S. at 42) provided by the Confrontation Clause.

In any case, it seems highly unlikely that the holding will lead to the dire results respondent predicts. In many cases, there is ample evidence aside from the autopsy report to establish that death was the result of a criminal act. Testifying pathologists may in some cases be able to render an opinion based on non-testimonial materials, such as photographs and possibly videotapes of autopsy procedures. Moreover, this case does not present the issue of whether substitutes to actual confrontation might be constitutionally sufficient when the pathologist who performed the autopsy is truly unavailable; this case involved a pathologist the People *chose* not to use because of his "baggage".

In addition, respondent's analysis overlooks the costs of suspending the right of confrontation: wrongful convictions, resulting civil suits, loss of public trust, and, in some cases, failure to apprehend the real perpetrator of the crime. (See *In Re Investigation Of West Virginia State Police Crime Lab., Serology Div.* (W.Va. 1993) 438 S.E.2d 501, 508 [systemic forensic failures "stain our judicial system and mock the ideal of justice under law"].)

E. The Unique Facts Of This Case Make It An Inappropriate Vehicle For Review.

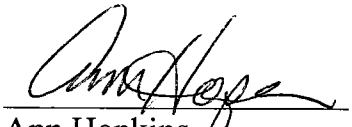
While appellant vigorously disagrees with the Attorney General's criticism of the Third District's well-reasoned decision, appellant agrees that "peculiar factual circumstances" make this case an inappropriate vehicle for review. (Request for Depub., at 6.) Review should be denied and the Third District's decision should be allowed to stand for what should be an unremarkable proposition: Prosecutors should not be permitted to "sanitize" a problematic forensic witness and evade the requirements of the Confrontation Clause by simply presenting the findings of the available though absent witness through a different, more presentable expert. (See Request for Depub., at 6 ["when the defense has a good-faith basis to question the competence and veracity of the examining pathologist, cross-examination of another pathologist unfamiliar with those allegations arguably [sic] is a less effective method of impeachment and might raise additional questions about the validity of the testifying expert's opinion"].)

CONCLUSION

For the foregoing reasons, this court should deny review.

Dated: October 22, 2009

Respectfully submitted,



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CERTIFICATE PURSUANT TO CRC RULE 8.504(D)(1)

I, Ann Hopkins, counsel for respondent Reynaldo Santos Dungo, certify pursuant to the California Rules of Court that the word count for this document is 3,068 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(d)(3). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

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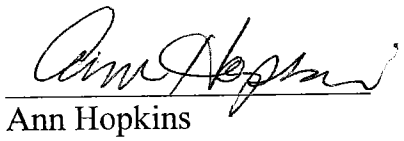

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PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is P.O. Box 23711, Oakland, California 94623. On the date shown below, I served the within ANSWER TO PETITION FOR REVIEW to the following parties hereinafter named by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as follows:

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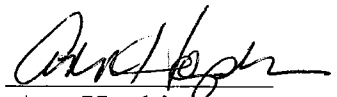

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