S176886

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.	Case No. ~~S176866~~

Third Appellate District Case No. C055923
San Joaquin County Superior Court Case No. SF100023A
The Honorable Charlotte J. Orcutt, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

JAMES P. WILLETT
District Attorney of San Joaquin County
EDWARD J. BUSUTTIL
Assistant District Attorney
RONALD J. FREITAS
Chief Deputy District Attorney
State Bar No. 135885
222 East Weber, Room 202
P.O. Box 990
Stockton, CA 95202
Telephone: (209) 468-2400
Fax: (209) 953-7884
Email: Ronald.Freitas@SJCDA.Org
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Statutes

ISSUES PRESENTED

1. Was appellant denied his right of confrontation under the Sixth Amendment when one forensic pathologist testified to the manner and cause of death in a murder case based on an autopsy report prepared by another pathologist?

2. Was the error prejudicial in light of the testimony of a board certified forensic pathologist about the manner and cause of death?

3. How does the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527, 174 L.Ed.2d 314] affect this Court's decision in *People v. Geier* (2007) 41 Cal.4th 555?

INTRODUCTION

This case arises from a judgment of conviction against Reynaldo Santos Dungo after he strangled and killed his girlfriend, Lucinda Correia Pina. Dungo hid her body in her car at a remote location. For three days, while others searched for the victim, Dungo lied to family, friends and law enforcement, telling authorities that he did not know her whereabouts, and that he did not kill her. After law enforcement found the car and her body, Dungo eventually admitted that he strangled her to death.

The autopsy of victim Pina was performed by Dr. George Bolduc, a board certified forensic pathologist. Dr. Bolduc opined in an autopsy report that the cause of death was asphyxia due to strangulation.

The autopsy report was not admitted into evidence at trial. Dr. Robert Lawrence, himself a board certified pathologist, and the employer and supervisor of Dr. Bolduc, testified as an expert witness. Based upon his training, his experience performing over eight thousand autopsies, his familiarity with Dr. Bolduc, and his review of the photographs, coroner's

investigation, and the autopsy report, Dr. Lawrence independently testified that in his expert opinion, victim Pina died from asphyxia due to strangulation.

The Court of Appeal, relying on *Melendez-Diaz*, *supra*, 129 S.Ct. 2527, concluded that it was error under the Sixth Amendment to introduce Dr. Lawrence's testimony because the prosecution had not produced Bolduc, who performed the autopsy, for cross-examination. The court further concluded that the error required reversal because it was not harmless beyond a reasonable doubt. But *Melendez-Diaz* invalidated, as a violation of the Sixth Amendment confrontation clause, a Massachusetts procedure in which affidavits setting forth forensic test results, without any foundational information or live testimony, were admitted against the defendant at a criminal trial. *Melendez-Diaz* did not address situations like this one, common in California, where a forensic pathologist who testifies as an expert witness is called to the stand and is available for cross-examination concerning the reliability of the autopsy.

In such a situation, as here, the confrontation clause is satisfied. First, unlike the affidavit in *Melendez-Diaz*, the autopsy report was never admitted into evidence, nor submitted to the jury, so that the prosecution never attempted to prove a portion of the case without a witness subject to cross-examination. Second, the autopsy report constituted non-testimonial evidence, and its contents were properly referenced for their truth as a business record pursuant to Evidence Code section 1271, and as an official medical record pursuant to Evidence Code section 1280. Finally, *Melendez-Diaz* does not invalidate Evidence Code section 801, subdivision (b), which provides that an expert witness may rely upon hearsay in forming his or her opinion. Nothing in *Melendez-Diaz* changes this long-established rule. For these reasons, *Melendez-Diaz* does not conflict with the conclusion reached by this Court in *Geier*, at least insofar as *Geier*

applies to autopsy reports and a live expert offering an opinion on the cause of death.

In any event, any error was harmless, because the crime of second degree murder was amply established without the forensic pathologist's testimony. Accordingly, this Court should reverse the judgment of the Court of Appeal and reinstate the conviction against Dungo.

STATEMENT OF THE CASE

The San Joaquin County District Attorney filed an information charging Reynaldo Santos Dungo with one felony offense. In Count 1, Dungo was charged with first degree murder in violation of Penal Code section 187. (1 CT 158-159.)

The jury found Dungo not guilty of first degree murder, and instead convicted him of the lesser offense of second degree murder. (2 CT 395-396, 398.) The trial court sentenced Dungo to state prison for a term of 15 years to life with the possibility of parole (Pen. Code, § 190, subd. (a)). (3 CT 590, 594, 601-602.)

Dungo appealed from the judgment. (3 CT 596-598, 604-606.) In a published opinion filed on August 24, 2009, the Third District Court of Appeal reversed the judgment. The Court of Appeal held that Dungo's Sixth Amendment confrontation rights were violated by the admission of testimony of a forensic pathologist who relied in part upon an autopsy report performed by another board certified pathologist. The Court of Appeal further found that the error was not harmless beyond a reasonable doubt.

STATEMENT OF FACTS

A. PROSECUTION CASE

1. EVIDENCE REGARDING THE UNDERLYING OFFENSE

Lucinda Correia Pina was 30 years old and in the process of finalizing a divorce when she met Dungo (6 RT 1644-1645; 7 RT 1808) at her children's school, where she volunteered as part of the Parent Teacher Organization. (6 RT 1593-1594.) As part of her separation from her husband, Pina had moved with her three children into a duplex at 7712 Santa Inez Court in Stockton, San Joaquin County (6 RT 1588-1589, 7 RT 1761), where she worked as a licensed day care provider. (6 RT 1586, 1592-1593.) Dungo and Pina began dating in December 2005. (6 RT 1595-1596; 7 RT 1759-1760; 2 CT 507-508.)

In April 2006, Pina confided to her friends that Dungo was "smothering her," and she told her mother, Pamela Smith, that she wanted to end her relationship with Dungo. (5 RT 1611; 7 RT 1766, 1826; 9 RT 2397-2398.) Pina's friends also noticed that Dungo acted very possessive toward her. (7 RT 1742-1744, 1887-1888.) Isaac Zuniga, a former boyfriend, had one of his calls to Pina's cell phone intercepted by Dungo, who threatened to kill Zuniga if he did not stop calling Pina.[1] (7 RT 1765; 8 RT 2027, 2064-2065.) After Zuniga told her about this, Pina said she was concerned about Dungo's controlling behavior. (7 RT 1799.)[2]

---

[1] Stockton Police Detective Craig Takeda's report of his interview with Zuniga indicates that Dungo threatened to "call" rather than "kill" Zuniga if he did not stop calling Pina. (8 RT 2075.)

[2] While Dungo believed Pina was being unfaithful and dishonest to him, he was unfaithful and dishonest to her. He lied about being divorced when he was only separated. (7 RT 1888-1889, 1911.) He lied when he told her his relationship with his own wife was over when it was not, and when he told her his daughter was on vacation with his wife in the

(continued...)

On the night of April 14, 2006, Dungo and Pina went out to dinner, and then played dominoes at the home of their friends, Felipe and Angelique Torres. (7 RT 1763-1764.) Pina asked Angelique for advice on whether she should confront Dungo because he had become "a little overbearing." (7 RT 1766.) Dungo and Pina left the Torres residence at about 1:00 a.m. on April 15, and drove to Pina's duplex. (7 RT 1770; 10 RT 2544; 2 CT 422.)

Between 7:30 to 8:30 a.m., Dungo went to the adjacent duplex of Pina's mother, Pamela Smith, and asked Smith if she knew of Pina's whereabouts.[3] (6 RT 1597-1598.) Dungo told Smith that Pina had driven away alone in the middle of the night to meet Zuniga in Tracy, and had not returned home. He told Smith that Pina went to "take care of this situation between her and Isaac," so that Isaac Zuniga would not bother her anymore. (6 RT 1598-1599.) Dungo said he spoke to Pina on her cell phone 10 minutes after she left. (6 RT 1601.) When Pina could not be located, Smith reported her daughter missing to the Tracy Police Department later that same day (6 RT 1606), and Dungo repeated this story over the next three days to several other people, including Tracy and Stockton detectives investigating Pina's disappearance. (6 RT 1698.1598-1599; 7 RT 1821-1822, 8 RT 2092-2093.)

Zuniga, however, was in Manteca with his girlfriend and his two children on the night of April 14 and morning of April 15, and never met

---

(...continued)
Philippines when she actually was living in Monterey, California with her mother. (10 RT 2587.)

[3] Dungo told detectives that he first spoke to Smith at about 5:00 a.m. or 5:30 a.m. (2 CT 448.)

with Pina during the period of time that she went missing. (8 RT 2027-2029.)[4]

For three days, members of the community and law enforcement searched for Pina, who was not heard from and could not be located. Dungo participated in the community searches, in addition to speaking to the detectives.

On the morning of April 18, 2006, police located Pina's vehicle. (8 RT 2068.) Inside, they discovered Pina's body lying along the rear floorboard, covered with a blanket and a black fleece jacket. (8 RT 2123-2125,2159.) Pina was wearing pajamas without any underwear or bra. (8 RT 2165.)

Dungo was arrested the next morning and taken to the Stockton Police station. (6 RT 1703; 7 RT 1729; 8 RT 2247.) After waiving his *Miranda*[5] rights, Dungo spoke with Detectives Craig Takeda and Steven Capps of the Stockton Police Department for several hours.[6] At first, Dungo continued to stick to his story that Pina drove away in the middle of the night to meet with Zuniga to end their relationship. (2 CT 422-448.) After Detective Takeda informed Dungo that his story was contradicted by their investigation, Dungo admitted that his entire story was false. (2 CT 495-511.)

Dungo then provided this version of the events: Upon returning from the Torres residence, he and Pina got into an argument that turned physical. (2 CT 511.) Pina punched Dungo lightly on the chin and threw

---

[4] Zuniga last spoke with Pina at about noon on April 14, at which time he told her about the phone call that Dungo had intercepted a few weeks earlier. (8 RT 2026, 2029.)

[5] *Miranda v Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

[6] A videotape of most of the interview was played for the jury. (2 CT 407-542; 8 RT 2247-2249, 2259- 2270; 9 RT 2273-2274.)

children's toys at him. (*Ibid.*) After some of those toys hit Dungo, he began choking her. (2 CT 512.) Dungo ended up straddling Pina while she was lying on her back on the floor. He choked her as her arms slowly came to rest above her head and she lost consciousness. (2 CT 532-534.) Dungo continued, "It was like I couldn't control my strength at the moment. I didn't know what I was doing. I was a different person." (2 CT 512.) Dungo described Pina's death as an "accident." (2 CT 523.) When Dungo demonstrated how he strangled Pina, he placed four fingers of each hand on the sides of Takeda's neck and a thumb over Takeda's Adam's apple. (9 RT 2290.)

Dungo told the detectives that he then placed Pina's body inside her Ford Expedition, wrapped her body in a blanket, and drove around Stockton for a long time. (2 CT 513-514.) Dungo ultimately abandoned the vehicle in another part of town, and walked to a nearby shopping plaza where he discarded the car keys and Pina's cell phone in separate garbage cans. (2 CT 514-515, 529; 7 RT 1986-1988, 1995.) He then took a taxi cab back to Pina's duplex. (2 CT 514.)

The prosecution also presented evidence that Dungo had physically abused his estranged wife, Catherine Sabilla Dungo, on several occasions between 1998 and 2002. (7 RT 1919.) On one occasion, in October 1998, Ms. Dungo reported to the Seaside Police Department that Dungo grabbed her arms, squeezed them tightly, and then choked her by pinning her neck against a headboard with his forearm. (8 RT 2190-2193, 2198.) An officer observed that Ms. Dungo had bruises on her arms, as well as a mark on her throat. (8 RT 2200.) Dungo was arrested and was issued a restraining order to stay away from his wife.[7] (8 RT 2201.)

---

[7] At trial, Ms. Dungo acknowledged that she reported Dungo choked her with his forearm, but denied that actually happened. (7 RT 1922.)

Ms. Dungo also reported to the Salinas Police Department in January 1999 that Dungo pinned her arm inside a car door, and later slapped her and pinned her down at a hotel during an argument about his unfaithfulness. (8 RT 2222-2226.) While in the car, Ms. Dungo threw keys at Dungo, and burned his hand and cheek with a cigarette when he would not let go of her. (8 RT 2224, 2232-2233.) Again, Dungo was arrested, and a protective order was issued.[8] (7 RT 1933, 8 RT 2220.)

On a third occasion, Ms. Dungo reported to the Solano County Sheriff's Department in 2002 that Dungo had grabbed her hair and shoved her, and she got another protective order against him.[9] (7 RT 1932-1933.)

2. EVIDENCE REGARDING CAUSE OF DEATH

To establish Pina's cause of death, the prosecution produced the in-court expert testimony of Dr. Robert Lawrence. Dr. Lawrence testified that he is a board certified forensic pathologist for the San Joaquin County's Coroner's office, and the owner of his own private company, Forensic Consultants Medical Group, which provides pathologists to do coroner's work for San Joaquin and other counties, and private consultation and consultation for other attorneys and district attorneys. (7 RT 1837-1838.) Dr. Lawrence is board certified in anatomic, clinical and forensic pathology by the American Board of Pathology, has practiced in San Joaquin County for over 30 years and has performed over 8,000 autopsies, many involving violent death. Between 50 and 500 of them have involved death by strangulation. (7 RT 1838-1841.) He remains a licensed physician and

---

[8] At trial, Ms. Dungo portrayed the encounter as one of mutual combat. (7 RT 1927-1928.)

[9] At trial, Ms. Dungo once again recanted, testifying that Dungo never really assaulted her on that occasion. (7 RT 1932.)

surgeon in California and is a member in good standing of the National Association of Medical Examiners, American Society of Clinical Pathology, and American Medical Association, among others. (7 RT 1839.) He testified to having hospital privileges at several hospitals in the area and teaching residents at the County Hospital. (7 RT 1840.)

Dr. Lawrence opined that Pina died as a result of "asphyxia due to strangulation." He based his opinion on an autopsy report performed by Dr. Bolduc, a board certified forensic pathologist employed by Dr. Lawrence's company, and on photographs taken at various stages of the autopsy, including photographs taken of the inside and the outside of the body. (7 RT 1844-1846.) Lawrence further opined that Pina was strangled for at least two minutes, based on the lack of significant injuries to the bones and organs in her neck. (7 RT 1846- 1847, 1850-1851.) He told the jury initially that less manual strangulation is required if a person's larynx (voice box) or hyoid bone (wishbone-like structure above the larynx) is fractured, because even if one were to let go, the person will choke and die. (7 RT 1843.) In the case at bar, Ms. Pina's larynx and hyoid were not fractured. (7 RT 1846.) Thus, since there was no fracture of the larynx or the hyoid, one would need to hold pressure longer to accomplish a fatal strangulation. He clarified that the pressure would have to be applied for at least two minutes. (7 RT 1851.) He explained that the presence of pinpoint hemorrhages (known as petechiae) on the victim's eyes was consistent with neck compression. (7 RT 1847-1848.) He said that the bite marks on her tongue indicated there was struggling going on and she bit her tongue. (7 RT 1848.) Lawrence also testified that Pina probably would have lost consciousness after about three minutes of compression to her neck. (7 RT 1851.) He added that if Pina had been strangled only to unconsciousness and then released, she would have recovered. (7 RT 1871.) But if she

stopped breathing or had a heart attack, she would have needed cardiopulmonary resuscitation to survive. (7 RT 1872.)[10]

The autopsy report was not received into evidence. Nor did Dungo's counsel choose to cross-examine Dr. Lawrence regarding the qualifications of Dr. Bolduc.

i. ADMISSIBILITY HEARING

The trial court held an Evidence Code section 402 admissibility hearing, out of the presence of the jury, before allowing Dr. Lawrence's testimony. In compliance with *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] and Penal Code section 1054.1, the San Joaquin County District Attorney's Office provided Dungo's counsel with a report by San Joaquin County District Attorney Investigator Al Freitas into the background of Dr. George Bolduc in a timely manner before the trial. (5 RT 1497.) At the pre-trial hearing, defense counsel cross-examined Dr. Lawrence extensively about the report, including criticism it contained about Dr. Bolduc from law enforcement and deputy district attorneys. The defense attorney also cross-examined Dr. Lawrence about the "Brenda Torres" shaken baby case," about an Orange county death penalty case resulting in a hung jury which led to Dr. Bolduc's resignation from the Orange County coroner's office, about a third case from Sonoma County [*People v. Beeler* (1995) 9 Cal.4th 953], and about a case from Maricopa County, Arizona. (5 RT 1503-1504; 5 RT 1497.) He cross-examined Dr. Lawrence about Dr. Bolduc's employment history at Kinko's as a sales representative, as a census taker, as a deliverer of papers and

[10] Lawrence testified that Pina had 30 percent coronary artery disease, which was high but not enough to be life threatening at her age. (7 RT 1854.) He said that if Pina had a heart attack while being strangled, that could have accelerated her death. (7 RT 1854.)

Meals on Wheels, and as a service representative for the Safeway Deli counter. (5 RT 1504-1505.) The defense attorney also asked Dr. Lawrence if he was aware of a case where Dr. Bolduc began the autopsy before an officer wanted him to do so. (5 RT 1507.)

Dr. Lawrence testified that Dr. Bolduc had not been subjected to any criticism from anyone in their specialty. (5 RT 1496.) He further explained that he had investigated the above matters regarding Dr. Bolduc and had determined that no medical errors were made. (5 RT 1509.) Dr. Lawrence testified that he was completely confident in Dr. Bolduc's ability (5 RT 1510), and expressed a great deal of confidence in Dr. Bolduc's skills. (5 RT 1512.)

Dr. Lawrence testified at the hearing that he shared the same opinion as Dr. Bolduc: the cause of Ms. Pina's death was asphyxia due to neck compression. He had no dispute with Dr. Bolduc's report nor would he add anything to it. (5 RT 1491-1492.) Dr. Lawrence testified that the autopsy report was complete, excellent and allowed him to arrive at his own conclusion, which was the same conclusion as Dr. Bolduc's. (5 RT 1492.) He said the report contained all of the things normally put in a report of this type to allow another pathologist to independently come to a conclusion as to the cause and circumstances of death. (5 RT 1493.)

The trial court ruled that Dr. Lawrence could testify based on an autopsy report prepared by another pathologist because experts are allowed to rely on hearsay in reaching their opinions. (5 RT 1261.) The court further ruled that the defense would be allowed to cross-examine Lawrence regarding the trustworthiness of the autopsy report. (5 RT 1264-1265.)

B. DEFENSE CASE

Dungo testified in his own behalf, and admitted that he strangled Pina to death. Dungo testified that tensions had been building for about

two months, based on his belief, despite her denials, that Pina still was romantically involved with Zuniga. (10 RT 2536, 2544, 2578, 2628.) They had five to ten arguments, and he was starting to feel he could not trust her. (10 RT 2566, 2569.)[11]

Dungo testified that on April 15, 2006 at about 1:00 a.m., he and Pina arrived at her duplex after playing dominoes at the Torres'. After each of them drank two vodka-cranberry juice drinks, they removed their clothes and began kissing until Pina asked Dungo if something was wrong. (10 RT 2544-2545.) Dungo said he was not feeling romantic because he was bothered about Pina's phone conversations with Zuniga. (10 RT 2546-2547.) Pina asked why they needed to talk about it now since this was their chance to be alone together without the kids. (10 RT 2547.)

According to Dungo, Pina kept walking away from him, denying his accusations, and he followed her from room to room, at one point grabbing her arm. (10 RT 2553.) Pina asked Dungo why he was following her (10 RT 2554), punched him on the chin and told him, "You can't tell me what to do." (10 RT 2554, 2631.) Pina then placed some of Dungo's clothes and other belongings in a box and ordered him to leave her home, saying that she would have sex with whomever she wanted. (10 RT 2254-2555.)

Dungo testified that he grabbed Pina's arm, and she hit him. (10 RT 2556.) Dungo said she then told him, "...You're a lousy fucking father", and called him a "worthless piece of shit." (10 RT 2556.) Dungo insisted he was a good father. When Pina hit Dungo in the face, Dungo testified, "I

---

[11] Dungo surreptitiously checked Pina's cell phone for calls, voice messages and text messages to or from Zuniga when Pina would leave her phone on the counter at home. (10 RT 2562-2565.) Dungo testified that he knew Pina's password and was able to retrieve any messages. (10 RT 2563-2565.) He also used this password to delete voicemail messages on her phone so that new messages could be left for her when she disappeared. (6 RT 1602-1603.)

just lost it." (10 RT 2557.) According to Dungo, he grabbed her arm, she bit his arm, and he grabbed Pina by the neck saying, "Fuck you, Lucinda. I'm a good dad.... I'm not a bad father. Fuck you." (10 RT 2557.) Dungo testified that he followed Pina into her daughter's bedroom with his hands on her neck. He did not realize that he had killed Pina until her arms stopped moving while he straddled her as she lay on the floor. (10 RT 2559.)

Dungo testified that he carried Pina to her car with her cell phone, keys, and a blanket, after checking that no one was outside. (10 RT 2600.) He also put the box that Pina had packed with his things into the vehicle, and then "dumped" it at a store by the duplex. (10 RT 2630-2631.) Dungo told of his drive around town, including a stop at McDonald's, which culminated in his parking the car on a residential street, locking it and walking away. (10 RT 2601-2603.) Dungo left Pina's body lying on the floor just below the back seat. He disposed of the keys and phone in different trash cans, each located by a different store. (10 RT 2611-2612.)

The defense also presented evidence to show that Pina provoked her estranged husband, Anul, to commit acts of violence against her. (10 RT 2358, 2361-2362, 2493-2500.)[12]

[12] Anul, however, testified that he could not recall trying to choke Pina, although he acknowledged that he pled guilty to domestic violence. (9 RT 2345-2346.)

ARGUMENT

I. DUNGO'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS NOT VIOLATED BY THE ADMISSION INTO EVIDENCE OF FINDINGS OF A FORENSIC PATHOLOGIST IN PART BASED ON A CONTEMPORANEOUSLY RECORDED AUTOPSY REPORT WHICH QUALIFIES AS A BUSINESS OR OFFICIAL RECORD

Although the Sixth Amendment confrontation clause guarantees a criminal defendant the right to confrontation and cross-examination, it does not preclude admission of all hearsay evidence. Rather, the confrontation right pertains only to testimonial statements. Autopsy reports do not fall within this category. Accordingly, testimony of a pathologist regarding an autopsy report did not violate Dungo's Sixth Amendment rights.

A. SCOPE OF SIXTH AMENDMENT CONFRONTATION RIGHT

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him[.]" (U.S. Const., Amend. VI.) Under prior Sixth Amendment jurisprudence, the admissibility of an out-of-court statement depended upon its reliability. (See *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597].) But in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 36, 158 L.Ed.2d 177], the United States Supreme Court abandoned the reliability analysis in favor of an inquiry into whether the witness's statement is "testimonial." Although the High Court declined to set out a comprehensive definition of "testimonial," it provided illustrations of statements that would fall into this category. Specifically, the Court stated, "testimonial" statements include ""ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial

examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"; "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'"; "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'"; and statements made in interrogations by law enforcement agents. (*Crawford*, *supra*, 541 U.S. at pp. 51-52.) At the very least, "'testimonial'" means "testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." (*Id.* at p. 68.)

In *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224], involving two companion cases in which victims had reported domestic violence to law enforcement but did not testify at trial, the United States Supreme Court further clarified the distinction between testimonial and non-testimonial hearsay. In the first case, *Davis*, the victim telephoned 911 and reported that the defendant was attacking her as the attack was occurring. In response to questioning by the 911 operator, she named the defendant as her assailant. In the second case, *Hammon v. Indiana*, police responded to a report of a domestic disturbance at the victim's house. When they arrived, the victim told them that everything was all right but that, earlier in the evening, the defendant had pushed her, threatened her, and broken several items in her house. The officers had her sign a battery affidavit detailing her account of that evening's events. (*Davis*, *supra*, 547 U.S. at pp. 817-821.)

The Court held that statements are not "testimonial" if the circumstances objectively indicate that the primary purpose of the interrogation is to enable the police to meet an ongoing emergency. By contrast, a statement is "testimonial" when the circumstances indicate that

there is no such emergency but that, instead, the primary purpose of the interrogation is to establish or prove past events that are potentially relevant to later criminal prosecution. (*Davis*, *supra*, 547 U.S. at pp. 821-824.) Applying these rules to the facts before it, the Court noted that the victim in *Davis* was describing events as they occurred, rather than giving a description of past events. (*Id.* at p. 827.) As the Court explained, "[n]o 'witness' goes into court to proclaim an emergency and seek help." (*Id.* at p. 828.) In *Hammon,* the officer was not seeking to determine "what was happening" but rather "what happened." (*Id.* at p. 830.) The victim's statements were taken some time after the events. "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." (*Ibid.*, footnote omitted.)

Next, in *Melendez-Diaz*, the United States Supreme Court considered whether testimonial evidence might include the results of some forensic testing. In that case, the defendants, arrested on suspicion of drug dealing, had tried to discard a plastic bag containing 19 smaller bags. The police submitted the bags to a state laboratory that was required, under Massachusetts law, to test samples upon police request. The analysis revealed that the substance was cocaine. (*Id.* at p. 2530.)

At trial, in lieu of live testimony, the state submitted three "certificates of analysis." The certificates set forth the weight of the seized bags and stated that the bags "have been examined with the following results: The substance was found to contain: Cocaine." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2531.) The certificates were sworn before a notary public and signed by analysts at the crime laboratory. The defendant, relying on *Crawford*, objected to introduction of the certificates. The trial court overruled the objection and admitted the statements as "prima facie

evidence of the composition, quality, and the net weight of the narcotic . . . analyzed." (*Ibid.*, omission in original.)

The United States Supreme Court reversed the defendant's conviction. The Court held that the certificates, despite their label, were in fact affidavits, i.e., "'declarations of fact written down and sworn to by the declarant before an officer authorized to administer oaths' [citation]." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.) The certificates, the Court continued, were the functional equivalent of live testimony, doing "'precisely what a witness does on direct examination.'" (*Ibid.*, citing *Davis*, *supra*, 547 U.S. at p. 830.) The sole purpose of the affidavits was to provide evidence against the defendant. Thus, the Court held, "Absent a showing that the analysts were unavailable to testify at trial and that [defendant] had a prior opportunity to cross-examine them, [defendant] was entitled to 'be confronted with' the analysts at trial." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, footnote omitted, quoting *Crawford*, 541 U.S. at p. 54.) The *Melendez-Diaz* Court characterized its opinion as a "rather straightforward application of our holding in *Crawford*." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2533.)

The five-to-four decision in *Melendez-Diaz* further affirms that its holding does not apply in the present case. Justice Thomas explained that he concurred in the majority opinion only because the certificates of analysis were "quite plainly affidavits" and thus fell "'within the core class of testimonial statements' governed by the Confrontation Clause [citation]." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543.) Justice Thomas stated that the Clause is limited to "extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions [citation]." (*Ibid.*, internal quotations omitted.) "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the

holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'[citation]." (*Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d 260], omission in original.) "When there is no majority opinion, the narrower holding controls [citation]." (*Panetti v. Quartermain* (2007) 551 U.S. 930, 949 [127 S.Ct. 2842, 168 L.Ed.2d 662].) Therefore, the concurrence of Justice Thomas provides the holding of the case in *Melendez-Diaz*, or at least provides a firm basis for distinguishing *Melendez-Diaz* from cases that do not involve formal affidavits.

The certificate in *Melendez-Diaz* was admitted without accompanying in-court testimony from a live witness. Because in the present case the autopsy report was not received into evidence, and instead there was in-court testimony from a live witness, the narrow holding of *Melendez-Diaz* is not applicable to Dr. Lawrence's testimony.

B. AUTOPSY REPORTS ARE NOT TESTIMONIAL EVIDENCE

The well established rule is that autopsy reports are medical records, a type of business or official records within the meaning of Evidence Code sections 1271 and 1280, that are admissible absent confrontation. (See *People v. Beeler, supra,* 9 Cal.4th at pp. 978-981 [autopsy report qualified as business record within the meaning of Evidence Code section 1271, such that witness coroner who did not prepare it could testify concerning its contents]; *People v. Clark* (1992) 3 Cal.4th 41, 159 [autopsy report qualified as official record within the meaning of Evidence Code section 1280, such that witness coroner who did not prepare it could testify concerning its contents].) Having qualified as a proper custodian of records, Dr. Lawrence could relate the contents of the report during the testimony to the jury. Additionally, autopsy reports are not testimonial

evidence within the meaning of *Crawford*, and *Melendez-Diaz* did not change this conclusion.[13]

Autopsy reports are very different from the sworn drug analysis certificates labeled "testimonial" in *Melendez-Diaz*. An autopsy report does not fall within any of the descriptions of testimonial evidence provided by *Crawford*. It is not prior testimony at a judicial proceeding. It is not generated in response to police questioning. Consequently, because the autopsy report is a nontestimonial official record and business record, testimony regarding the autopsy report in this case did not violate Dungo's Sixth Amendment rights.

1. THE MEDICAL RECORD DISTINCTION IN *MELENDEZ-DIAZ*

The confrontation clause does not apply at all to nontestimonial statements. (See *Davis v. Washington*, *supra*, 547 U.S. at p. 824 [holding that the limitation with respect to testimonial hearsay is "so clearly reflected in the text" of the confrontation clause that it "must . . . mark out not merely its 'core,' but its perimeter"].) *Melendez-Diaz* highlighted this boundary when it emphasized that the drug certificates at issue were "testimonial" in part because Massachusetts law expressly contemplated their preparation for use as evidence at trial. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.) The underlying reason a document is prepared is a key criterion in determining its testimonial (or nontestimonial) status. (See also

---

[13] *See* Zabrycki, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement* (2008) 96 Cal L.Rev. 1093, 1115 (hereinafter Zabrycki) [noting that every court post-*Crawford* has held that autopsy reports are not testimonial].

id. at pp. 2539-2540 ["Business and public records are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial"].) This is a point on which the United States Supreme Court and this Court agree. (*People v. Geier*, supra, 41 Cal.4th at p. 607 [in determining whether a statement is testimonial, "the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made"].)

The *Melendez-Diaz* Court emphasized the purpose-of-preparation principle when it observed that "medical reports created for treatment purposes . . . would not be testimonial under our decision today." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2533, fn. 2.) The Court cited two state court opinions explaining that medical records are not testimonial in nature. (*Ibid.*) Both cases held that blood tests—one indicating alcohol, one indicating drugs—conducted at hospitals where impaired drivers were treated for their injuries were admissible at the subsequent trials as business records. (*Baber v. State* (Fla. 2000) 775 So.2d 258, 260-262; *State v. Garlick* (Md. 1988) 545 A.2d 27, 34-35.) The *Baber* court's reasoning was premised upon the reliability of medical records, and it quoted with approval the following language from the *Garlick* decision:

> The blood sample was not taken for the purpose of litigation. The testing was performed in the hospital and not by a police laboratory. . . . [¶] . . . Many hospital tests and procedures are performed routinely and their results are relied upon to make life and death decisions. The examining doctor relied on these objective scientific findings for Garlick's treatment and never doubted their trustworthiness. Neither do we. This high degree of reliability, as we explained early on, permits introduction of the test results contained in the hospital records presented in this case without any need for showing unavailability of the technician and without producing the technician. Under these

circumstances the constitutional right of confrontation is not offended.

(*Baber v. State*, *supra*, 775 So.2d at pp. 261-262, quoting *State v. Garlick*, *supra*, 545 A.2d at pp. 34-35.)

The Supreme Court in *Melendez-Diaz* cited the same passage from *Garlick* in footnote 2 as an illustration of why "medical reports" are not testimonial. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2533, fn. 2.)

2. THE NATURE AND PURPOSE OF AN AUTOPSY REPORT

Autopsy reports are no less medical records than the hospital records discussed in *Baber* and *Garlick*, and are prepared pursuant to statutory mandates without regard to any potential criminal prosecution. Pathologists are medical doctors. Pathology is a medical specialty, defined as "[t]he medical science, and specialty practice, concerned with all aspects of disease, but with special reference to the essential nature, causes, and development of abnormal conditions, as well as the structural and functional changes that result from the disease processes." (Stedman's Medical Dict. (24th ed. 1982) p. 1041.) To claim that autopsy reports, although written by physicians and documenting physiological conditions, are nonetheless not "medical records" would be a legal fiction.

To the contrary, California law recognizes that autopsy reports are "medical reports." Government Code section 27463, subdivision (e), requires coroners to document the cause of death in an official register "with reference or direction to the detailed *medical reports* upon which decision as to cause of death has been based." (Emphasis added; see also 18 C.J.S. (2008) Coroners, § 26, p. 286 ["A coroner is a medical expert rendering expert opinion on medical questions" who makes "factual

determinations concerning the manner, mode, and cause of death, as expressed in a coroner's report . . . "].)

Like medical records in other contexts, autopsy reports are prepared according to standardized medical protocols that do not change based on the potential future use of those reports. State law mandates that coroners "inquire into and determine the circumstances, manner, and cause" of many categories of death, both related to criminal activity (e.g., "gunshot, stabbing") and unrelated to criminal activity (e.g., "exposure, starvation, acute alcoholism, drug addiction, . . . sudden infant death syndrome; . . . contagious disease"). (Govt. Code, § 27491; see also Govt. Code, § 27491.41, subd. (c) [mandating an autopsy in "any case where an infant has died suddenly and unexpectedly"]; Health & Saf. Code, § 102850 [listing six circumstances of death in which the coroner must be notified, only one of which expressly involves a criminal act].[14]) Significantly, these statutory mandates do not command, suggest, or even imply that the purpose, methods, or nature of the coroner's inquiry change depending upon whether the "circumstances, manner, and cause" of death were related to criminal activity. (See, e.g., Gov. Code, § 27491.41, subd. (d) [infant death autopsies must be conducted using a "standardized protocol"]; *People v. Leach* (Ill.App.Ct. 2009) 908 N.E.2d 120, 130 [where county code requires

---

[14] The full list set forth in Health and Safety Code section 102850 is as follows:

"(a) Without medical attendance.

"(b) During the continued absence of the attending physician and surgeon.

"(c) Where the attending physician and surgeon or the physician assistant is unable to state the cause of death.

"(d) Where suicide is suspected.

"(e) Following an injury or an accident.

"(f) Under circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another."

the medical examiner to determine the "manner and cause" of deaths falling within 15 categories—including criminal violence, suicide, accident, disease constituting a public health threat, and death during medical procedures—the medical examiner does not perform a law-enforcement function].)

In fact, the pathologist's medical examination of a body is the condition precedent to any determination that criminal activity was involved, thus the reporting of that examination must always be from the perspective of a medical doctor, not that of a law enforcement investigator. (See *People v. Leach*, *supra*, 908 N.E.2d at p. 130.) This paradigm lies in stark contrast with the drug certificates at issue in *Melendez-Diaz*, which were prepared for the "sole purpose" of prosecuting the defendant. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

Accordingly, an autopsy is not performed for the purpose of contributing to subsequent criminal proceedings, any more so than an emergency room physician treats a gunshot victim for the purposes of contributing to subsequent criminal proceedings. The emergency room doctor's file does not change from a nontestimonial "medical record" to a testimonial "investigative record" based on the apparent cause of a patient's injuries. It would make little sense for an autopsy report to be nontestimonial in nature when it documents the postmortem condition of an accident or suicide victim (no prospect of criminal proceedings) but testimonial when it documents the postmortem condition of a homicide victim (prospect of criminal proceedings), when the methods, protocols, and statutory obligations of the pathologist are identical in both scenarios.

The conclusion that a pathologist examines a body from a medical and not a law enforcement perspective is supported by additional statutory mandates that define a coroner's role independently of any law enforcement consequences the work may entail. In fact, a comprehensive summary of

California law related to the functions and duties of coroners states that "[t]he coroner must inquire into the cause of some deaths in order to prepare death certificates." (15 Cal.Jur.3d (2004) Coroners, § 15, p. 18.) Health and Safety Code section 102860 requires coroners to document on death certificates "the disease or condition directly leading to death, antecedent causes, other significant conditions contributing to death and other medical and health section data as may be required on the certificate, and the hour and day on which death occurred." (See also Health & Saf. Code, §§ 102875 [describing contents of death certificate without reference to potential law enforcement consequences of autopsy], 102795 [coroner's obligation to certify medical and health section data on death certificates], 102800 [same].) Further, "[t]he coroner shall specifically indicate the existence of any cancer . . . of which he or she has actual knowledge." (Health & Saf. Code, § 102860.) These are statutory obligations required of medical doctors performing primary duties irrespective of their law enforcement implications, not duties required of law enforcement investigators.[15]

Many courts have recognized that the mode of creation of autopsy reports distinguishes them from testimonial writings prepared in anticipation of criminal proceedings. The First Circuit Court of Appeals summarized the prevalent reasoning as follows:

> An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous

---

[15] See Zabrycki at p. 1125: "In 2004, the Los Angeles Medical Examiner's office conducted 4,180 complete autopsies of 9,465 cases taken by the office [citation]. Of the 9,465 total cases, 1,121 died from [lawful and unlawful] homicide, 709 from suicide, 3,090 from accidents, and 4,256 from natural causes."

> reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*.

(*United States v. De La Cruz* (1st Cir. 2008) 514 F.3d 121, 133; see also *United States v. Feliz* (2d Cir. 2006) 467 F.3d 227, 236-237 [autopsy reports are kept in the course of regularly conducted business activity and are nontestimonial under *Crawford*]; *Manocchio v. Moran* (1st Cir. 1990) 919 F.2d 770, 778 [autopsy reports are business records akin to medical records, prepared routinely and contemporaneously according to "statutorily regularized procedures and established medical standards" and "in a laboratory environment by trained individuals with specialized qualifications"]; *State v. Craig* (Ohio 2006) 853 N.E.2d 621, 639 [autopsy reports admissible as nontestimonial business records under *Crawford*]; *Denoso v. State* (Tex.Ct.App. 2005) 156 S.W.3d 166, 182 [same]; *State v. Cutro* (S.C. 2005) 618 S.E.2d 890, 896 [same]; *Campos v. State* (Tex.Ct.App. 2008) 256 S.W.3d 757, 762-763 [same]; *State v. Russell* (La.Ct.App. 2007) 966 So.2d 154, 165 [relying on Louisiana statute making reports admissible to prove death and cause of death, and singling out "routine, descriptive, non-analytical, and thus, nontestimonial" information in the autopsy report].)

Although a medical examiner may reasonably expect that an autopsy report will be used in a criminal prosecution when the deceased appears to be the victim of foul play, that circumstance alone does not make the report testimonial. (See *United States v. Feliz*, *supra*, 467 F.3d at p. 235 ["Certainly, practical norms may lead a medical examiner reasonably to expect autopsy reports may be available for use at trial, but this practical expectation alone cannot be dispositive on the issue of whether those reports are testimonial"]; *United States v. Ellis* (7th Cir. 2006) 460 F.3d 920, 926 ["the mere fact a person creating a business record (or other

similar record) knows the record might be used for criminal prosecution does not by itself make the record testimonial"].) This Court has stated that, in determining whether a statement is testimonial,

> the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality which, *viewed objectively*, are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial.

(*People v. Cage* (2007) 40 Cal.4th 965, 984, fn. 14, italics in original.) As discussed, the primary purpose of conducting an autopsy is to fulfill the statutory duty of generating cause of death information for death certificates, and most fundamentally involves the neutral and objective recordation of medical facts based on a medical examination without respect to criminal justice consequences.

In sum, nothing in the record in this case indicates that the autopsy report was anything other than a nontestimonial medical record.[16]

---

[16] *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1277, is inapposite. *Dixon* held that coroner's reports constitute law enforcement investigatory files for purposes of exemption from the disclosures otherwise required by the California Public Records Act ("CPRA"). (*Id.* at pp. 1276-1277.) Considerations of investigative sensitivity and the potential to impact an ongoing investigation, however, while underlying the "investigatory files" exemption to the CPRA (Govt. Code, § 6254, subd. (f)), are irrelevant in determining whether an autopsy report is a standardized medical record prepared according to statutory mandates and without respect to the consequences of the findings. In addition, if *Dixon*'s holding were to be rigorously applied, then an autopsy report regarding an accident victim or another death unrelated to criminal activity would also qualify as a "law enforcement investigatory file." This would be a nonsensical result, indicating that *Dixon*'s reasoning had more to do with the "bullet-ridden body" facts presented than with creating a coherent categorical rule.

Accordingly, introduction of the autopsy results did not violate the confrontation clause.

II. EVEN IF THE AUTOPSY REPORT WAS INADMISSIBLE, THE TRIAL COURT PROPERLY PERMITTED TESTIMONY BY A BOARD CERTIFIED FORENSIC PATHOLOGIST BASED IN PART ON THE AUTOPSY REPORT

Regardless of the admissibility of the writings themselves, Dr. Lawrence was allowed to rely on them in forming his opinion pursuant to Evidence Code section 801, subdivision (b). The presence of Dr. Lawrence on the stand for cross-examination satisfied Dungo's confrontation rights.

A. THE PATHOLOGIST, TESTIFYING AS AN EXPERT, PROPERLY COULD RELY ON TESTIMONIAL OR NON-TESTIMONIAL HEARSAY IN FORMING HIS OPINION

Dungo's jury, of course, also received evidence of the cause of death in connection with the expert opinion testimony of Dr. Robert Lawrence. *Melendez-Diaz* did not overrule statutes like Evidence Code section 801, subdivision (b), which provides for this type of evidence. (*United States v. Turner* (7th Cir. 2010) __ F.3d __ [2010 WL 92489 at *5 ["*Melendez-Diaz* did not do away with Federal Rule of Evidence 703"].) An expert may base his opinion on any material, "whether or not admissible," reasonably relied upon by experts in the field in forming their opinions; and, if questioned, the expert may relate the basis on which he formed his opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Montiel* (1993) 5

Cal.4th 877, 918-919; Evid. Code, § 801.[17]) Such expert-opinion testimony is permissible because the expert is present and available for cross-examination. (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 154; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*People v. Sisneros*, *supra*, 174 Cal.App.4th at pp. 153-154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; accord., e.g. *State v. Bethea* (2005) 173 N.C. App. 43, 54-58 [617 S.E.2d 687].)

This Court and others have upheld the opinion testimony of a supervising pathologist based upon another pathologist's observations and conclusions. (*People v. Beeler*, *supra*, 9 Cal.4th at pp. 980-981 [autopsy report qualified as business record within the meaning of Evidence Code section 1271, such that witness coroner who did not prepare it could testify concerning its contents]; *People v. Clark, supra, 3* Cal.4th at p. 159 [autopsy report qualified as official record within the meaning of Evidence Code section 1280, such that witness coroner who did not prepare it could testify concerning its contents]; *People v. Wardlow* (1981) 118 Cal.App.3d 375 [same]; *Commonwealth v. Nardi* (Mass. 2008) 893 N.E.2d 1221, 1230-1231 [confrontation clause not violated when testifying experienced pathologist based cause of death opinion on documentation and photographs in another pathologist's autopsy report].) This Court in *Beeler* emphasized that the reliability of an autopsy report flows from the direct observations of the medical examiner set forth in that report, as

---

[17] Section 801, in pertinent part, provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (b) Based on matter . . . perceived by or personally known to the witness or made known to him at or before the hearing, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

distinguished from more subjective conclusions based upon "'the consideration of many different factors.'" (*People v. Beeler, supra,* 9 Cal.4th at p. 981 [quoting *People v. Terrell* (1955) 138 Cal.App.2d 35, 58].)

California courts have long held that experts may testify based on hearsay which may itself by testimonial in nature. (E.g., *People v. Thomas, supra,* 130 Cal.App.4th at pp. 1208-1210.) And, even after *Melendez-Diaz,* courts have continued to reach the same conclusion. (E.g., *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 634-637; *Haywood v. State* (Ga. App. 2009) __ S.Ed.2d __ [2009 WL 4827842 at * 5]; *State v. Lui* (Wash. App. 2009) __ P.3d __ [2009 WL 4160609 at * 3-9]; *People v. Johnson* (Ill. App. 2009) 915 N.E.2d 845, 851-854.) As the court explained in *United States v. Johnson*:

> Here . . . [the] experts [who relied on information provided by others] took the stand. Therefore, [defendant] and his co-defendants, unlike the defendant in *Melendez-Diaz*, had the opportunity to test the experts' "honesty, proficiency, and methodology" through cross-examination.

(*United States v. Johnson, supra,* 587 F.3d at p. 636, quoting *Melendez-Diaz, supra,* 129 S.Ct. at p. 2538.)[18]

---

[18] Like section 801 of the Evidence Code, the Federal Rules of Evidence allow experts to rely upon otherwise inadmissible evidence in forming their opinions. Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their

(continued...)

A situation analogous to the present case was before the Washington court of appeals in *State v. Lui*, *supra*, 2009 WL 4160609. In *Lui*, the appellate court held that testimony by a pathologist's supervisor, and by the director of the DNA lab who reviewed the work of technicians who performed the tests, was not rendered inadmissible by *Melendez-Diaz*. (*Id.* at * 6.) The court noted that, in *Melendez-Diaz*, certificates were used in lieu of live testimony whereas, in the case before it, the jury heard testimony from two experts. (*Ibid.*) Further, the court observed, the disputed evidence in *Melendez-Diaz* was a "bare bones" affidavit that said nothing about the testing methods or the tests conducted. In *Lui*, by contrast, the experts testified extensively about their experience and training, as well as the tests performed in the defendant's case. Thus, "the very live testimony absent in *Melendez-Diaz* was present." (*Ibid.*) Additionally, the court stated, nothing in *Melendez-Diaz* changed the general rule that an expert may rely on otherwise inadmissible facts, including testimonial statements, as a basis for the expert's opinion. (*Id.* at * 7.) Finally, the defendant had the "full opportunity to test the basis and reliability of the experts' opinions and conclusions 'in the crucible of cross-examination.'" (*Id.* at * 9, quoting *Crawford*, *supra*, 541 U.S. at p. 60; accord, e.g., *People v. Johnson*, *supra*, 915 N.E.2d at p. 854 [the experts "each testified in person as to their opinions based on the DNA testing and were subject to cross-examination"]; see also Argument II C, *infra*.)

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject which his testimony relates. (Evid. Code, § 720,

---

(...continued)

> probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

subd. (a).) Once found to be qualified, expert witnesses have two major distinctions from a percipient witnesses. First, expert witnesses do not have a requirement of personal knowledge of the matter upon which their testimony is based. (Evid. Code, § 702, subd. (a).) Second, experts may testify in the form of an opinion, and state the basis for their opinion on direct examination. (Evid. Code, § 802.)

Dr. Lawrence testified regarding his qualifications as an expert witness, including the fact that he owned the company which the San Joaquin County Coroner's Office contracted with to perform autopsies. (7 RT 1837.)[19] With over 30 years of experience in forensic pathology, board certification and 8,000 autopsies, the trial court properly allowed Dr. Lawrence to testify as an expert witness regarding the strangulation death of the victim, Lucinda Correira Pina. (See *People v. Farnam* (2002) 28 Cal.4th 107, 162 [find that error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness clearly lacks qualification as an expert.]) Thus, Dr. Lawrence was properly permitted to state his opinion, that the caus se of death wstrangulation, and the basis for his opinion, namely the findings of Dr. Bolduc during the autopsy which were memorialized in the autopsy report.

In the present case, the autopsy report was not received into evidence, and did not "bear testimony" against Dungo. Nor did it improperly function as the equivalent of live testimony as did the affidavits at issue in *Melendez-Diaz*. Instead, the "statement" used at appellant's trial was forensic pathologist and owner of Forensic Analytical Medical Group, Dr. Robert Lawrence's, expert opinions concerning the cause of Lucinda Correia Pina's death. With respect to the cause of death, Dr. Lawrence

[19] Dr. Lawrence's *curriculum vitae* was marked as People's Exhibit 83. (7 RT 1838.)

rendered his own opinions, independent of, but consistent with, those of Dr. Bolduc, based upon the coroner's investigation, the photographs, and the autopsy report.

The basis for the opinion further promotes the reliability, and independence, of the opinion. Dr. Lawrence testified that the autopsy report in the present case "indicates all the things that are normally put in a report of this type to allow someone like me to independently, to make a conclusion as to the cause and circumstances of death. (5 RT 1493.) He did not have any disputes with the autopsy report, nor did he require any additions, and testified that the report was "complete, excellent, and allowed me to arrive at my own conclusion." (5 RT 1492.)

Dr. Lawrence testified he was personally familiar with Dr. Bolduc, who performed the autopsy. (7 RT 1844-1845.) Dr. Bolduc was one of his employees and a board certified forensic pathologist. (7 RT 1845.) Dr. Lawrence opined that Dr. Bolduc was as qualified as Dr. Lawrence to do his job. (7 RT 1946.) Dr. Lawrence thought that Dr. Bolduc's autopsy technique was "[e]xcellent." (5 RT 1512.) Based upon his review of the autopsy reports, the autopsy photographs, and his conversations with Bolduc, Dr. Lawrence opined that Bolduc was "fully skilled and capable and right-on in terms of his assessment of these issues." (5 RT 1512.)

Dr. Lawrence had "seen no evidence that Dr. Bolduc has ever did anything incompetent." (5 RT 1507.) He was unaware of any difficulties that Dr. Bolduc had testifying, and was aware of "baggage associated with his career, not related to his practice here." (5 RT 1494-1495.) The only thing Dr. Bolduc ever did wrong, in Dr. Lawrence's opinion, was stating on his resume that he was an independent consultant after being fired in Kern County; all other allegations were not supportable or had not been fully investigated. (5 RT 1498.)

This testimony was Dr. Lawrence's independent opinion as an expert. It was a far cry from the "bare bones" written affidavits, found inadmissible in *Melendez-Diaz,* which merely set forth the ultimate conclusion, under oath, that the tested substance contained cocaine. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2531.)

B. THE REQUIREMENTS OF THE CONFRONTATION CLAUSE WERE SATISFIED BY ALLOWING DUNGO TO CROSS-EXAMINE THE SUPERVISING FORENSIC PATHOLOGIST

While a defendant has a Sixth Amendment right to cross-examination, that right is satisfied as long as the opportunity for cross-examination is an adequate one. The defendant has no right to cross-examination that is perfect or ideal. As the United States Supreme Court has explained, as long as the "defense is given a full and fair opportunity to probe and expose. . . infirmities [in testimony] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness's testimony" (*Delaware v. Fensterer* (1985) 474 U.S. 15, 22 [106 S.Ct. 292, 88 L.Ed.2d 15]), "the Confrontation Clause is generally satisfied." (*Ibid.*) Although "the main and essential purpose of confrontation is to secure for the [defendant] the opportunity for cross-examination" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 89 L.Ed.2d 674], a defendant has no right to "cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." (*Delaware v. Fensterer*, *supra*, 474 U.S. at p. 20 [106 S.Ct. 292, 88 L.Ed.2d 15].)

Nothing in *Melendez-Diaz* conflicts with this analysis. *Melendez-Diaz* did not hold that a defendant's confrontation rights are satisfied only if every person who provides a link in the chain of information relied upon by a testifying expert is available for cross-examination. Nor does it require

that the prosecution call every person who can offer information about scientific evidence. Rather, the Supreme Court stated that the defendant must be able to challenge the "honesty, proficiency and methodology" of the analyst(s) in question in order to "weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2537, 2538.) There is no logical reason why the confrontation clause is not satisfied in this regard if the witness on the witness stand possesses sufficient qualifications and knowledge about the autopsy process and the results of the examination, about the sufficiency of the training received by the original individual who performed the autopsy, about what methods were used, whether they were accepted in the pertinent scientific community, and the skill and judgment exercised by the original pathologist. (*Id.* at pp. 2537-2538.)

This reading of *Melendez-Diaz* is consistent with *Crawford*'s observation that the purpose of the confrontation clause is "to ensure reliability of evidence" by exposing it to the "crucible of cross-examination." (*Crawford*, *supra*, 541 U.S. at p. 61.) The confrontation clause is satisfied if a defendant can adequately test the reliability of a scientific conclusion or result by engaging in cross-examination. The identity of the expert cross-examined is and should be beyond the purview of the Constitution. (See *United States v. Turner*, *supra*, 2010 WL 92489 at * 4 ["the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself"].)

With more than 30 years of experience, and over 8000 autopsies performed, Dr. Lawrence was more than adequately qualified to be cross-examined as to his opinions, and the basis for those opinions. As the owner of the company responsible to perform autopsies for the Coroner, and Dr. Bolduc's employer and supervisor, Dr. Lawrence was fully informed about the investigation, and possessed unique knowledge of Dr. Bolduc. Dr.

Lawrence testified that he had investigated Dr. Bolduc "better than the investigators who have because they hadn't even talked to the man and I have. And I can talk to him on a collegial basis, one-on-one, and discuss these cases to my satisfaction that there are no medical errors that have been made." (5 RT 1509.)

Furthermore, Dungo had ample opportunity to cross-examine Dr. Lawrence about the test results, the general procedures for performing the autopsy, the documentation of those results, the preservation of samples, and any other autopsy issue he deemed appropriate. Indeed, defense counsel cross-examined Dr. Lawrence at length about all of these issues at an evidentiary hearing out of the presence of the jury, and during the jury trial. (5 RT 1492-1515, 7 RT 1855-1871.)[20] Dr. Lawrence was just as capable of addressing issues as the original pathologist would have been, especially because (1) the autopsy report made routine and descriptive observations of the physical body with little incentive to fabricate the results, and (2) any medical examiner would not likely have an independent recollection of performing a specific autopsy, and would have had to rely upon the report to the same extent Dr. Lawrence did. (*Geier*, *supra*, 4 Cal.4th at p. 602.) Dr. Lawrence was the owner of Forensic Consultants Medical Group and thus particularly capable of rendering opinions on matters of procedure, protocol, and documented facts. Nothing in *Melendez-Diaz* precluded Dr. Lawrence from relying upon another

[20] During his cross-examination of Dr. Lawrence at the jury trial, defense counsel made only passing reference to Dr. Bolduc, and asked no questions about Bolduc's qualifications, unlike his cross-examination at the earlier evidentiary hearing. The trial court had ruled that the defense would be allowed to cross-examine Dr. Lawrence regarding the trustworthiness of the autopsy report. (5 RT 1264-1265.) His failure to take advantage of this opportunity should not provide a basis for him to claim his confrontation rights were violated.

pathologist's autopsy report in forming his opinion. And, "[b]ecause [Dr. Lawrence] was a highly qualified expert [and owner of the company] who was familiar with the particular lab procedures and performed the peer review in this particular case, then gave an independent expert opinion, h[is] presence was sufficient to satisfy [Dungo's] right to confrontation." (*State v. Williams* (2002) 253 Wis. 99, 116 [644 N.W.2d 919].)[21]

Pendergrass v. State (Ind. 2009) 913 N.E.2d 703[22], is illustrative. In *Pendergrass*, a supervisor at the Indiana State Police Laboratory testified that another analyst had performed a DNA analysis and reached certain results. The supervisor had supervised the analyst and checked her work for accuracy. (*Id.* at p. 705.) The prosecution also called an expert witness who interpreted the results for the jury. (*Ibid.*) The defendant claimed that the Sixth Amendment guaranteed him the right to confront the analyst who performed the testing. (*Id.* at p. 708.) The Indiana Supreme Court disagreed. The court noted that in essence, the defendant was complaining that the prosecution "did not call the right—or enough—witnesses." (*Id.* at p. 708.) The court stated that, while *Melendez-Diaz* did not address this question, its language was useful in analyzing the claim. Specifically, the *Melendez-Diaz* dissent expressed concern that the opinion required "in-court testimony from each human link in the chain of custody." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2546 (Kennedy, J., dissenting).) The *Melendez-Diaz* plurality rejected this assertion, making it clear that it would be up to prosecutors to decide which witnesses to call, as long as their testimony

---

[21] See Zabrycki at p. 1116 ["A deviation from the medical examiner's standard procedure can be exposed by confronting another examiner from the office. Similarly, any experienced medical examiner can explain the susceptibility of physical descriptions to characterization, and how a different characterization could affect the conclusion"].

[22] Petition for certiorari filed, 78 USLW 2337 (Jan. 19, 2010) (09-866).

was presented live. (*Pendergrass v. State*, *supra*, 913 N.Ed.2d at p. 708, citing *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1.) The court further noted that the supervisor provided the information found lacking in *Melendez-Diaz*, i.e., which tests were performed, whether those tests were routine, and whether the analysts possessed the skill and experience necessary to perform them. (*Pendergrass v. State*, *supra*, 913 N.E.2d at p. 708, citing *Melendez-Diaz*, 129 S.Ct. at p. 708.)

Where, as here, a supervisor who is familiar with the pathologist who performed the autopsy testifies at trial, the purpose behind the confrontation clause has been fulfilled. To the extent the witness did not personally participate in the autopsy and bases his information on work performed by others, such areas can be probed through cross-examination. (*Delaware v. Fensterer*, *supra*, 474 U.S. at p. 22.) The presence of the witness on the stand satisfies the Sixth Amendment by preventing a trial by affidavit found objectionable in *Melendez-Diaz*. Once the defendant's Sixth Amendment right to confrontation has been satisfied, the question of which witnesses to call is a matter of state law. (See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1; see also *People v. Black* (2007) 41 Cal.4th 799, 813 [so long as defendant is eligible for upper term sentence consistent with Sixth Amendment principles, selection of actual sentence is state law question left to discretion of trial court].)

C. DECISIONS SUGGESTING A DIFFERENT CONCLUSION ARE NOT PERSUASIVE

Appellate opinions suggesting a different conclusion are not persuasive, as they fail to address the key distinctions between the affidavits in *Melendez-Diaz* and circumstances involving expert testimony presented from the witness stand. For instance, in *State v. Locklear* (2009) 363 N.C. 438 [681 S.Ed.2d 293], the North Carolina Supreme Court found

harmless error in the admission of testimony by a forensic pathologist about the results reached by another forensic pathologist and a forensic dentist. The court stated that, under *Melendez-Diaz*, "forensic analyses" are "testimonial statements," analysts are witnesses, and the state did not show the non-testifying witnesses were unavailable or that the defendant had a prior opportunity to cross-examine them. (*State v. Locklear*, *supra*, 363 N.C. at p. 452.) In *People v. Payne* (2009) 285 Mich. App. 181 [774 N.W.2d 714], documents described in the opinion only as "laboratory reports containing the results of DNA testing" (*People v. Payne*, *supra*, 774 N.W.2d at p. 724) prepared by a non-testifying analyst were admitted into evidence as business records. A witness testified that the reports concerned the basics of DNA testing and the methods used to prepare the reports. However, the witness had not personally conducted the testing, had not examined any of the evidence in the case, and had not reached any of his own scientific conclusions. (*Id.* at p. 726.) A Michigan appellate court held that under *Melendez-Diaz*, admission of the reports violated the defendant's Sixth Amendment rights because he was not afforded his opportunity to be confronted with "the analyst" at trial. (*Ibid.*)

These decisions fail to recognize that *Melendez-Diaz* did not deal with scientific evidence per se, but rather with affidavits attesting to the results of those analyses. Further, the courts in *Locklear* and *Payne* assumed, without explanation, that the confrontation clause would be satisfied only by the production of the individual who actually performed the forensic test. *Melendez-Diaz*, however, espouses no such requirement. These cases also ignore the fact that there was live testimony presented at trial, by a witness available for cross-examination.

Moreover, neither of these cases discuss an expert's ability to rely on outside information in forming an opinion. In fact, following the holding of these cases does nothing to "ensure reliability of evidence", and instead

makes an expert's opinion less reliable. Experts would be allowed to base their opinion upon the notes generated during the analysis, but not the certified reports, signed under penalty of perjury, which obviously have much greater reliability. For instance, in the present case, there could be no objection if Dr. Lawrence based his opinions upon the medical records from an emergency room. But not the autopsy medical records designed to determine the cause of death, and prepared by a board certified forensic pathologist? Trial courts will be required to hold extensive hearings so they can limit expert opinions to those based upon non-testimonial evidence. Expert opinion in criminal proceedings will become courtroom legal fiction, having been mutated from the scientific community. This Court has recognized that to preclude a murder prosecution because the medical examiner is deceased or otherwise unavailable is a "harsh and unnecessary result in light of the fact that autopsy reports generally make routine and descriptive observations of the physical body in a environment where the medical examiner would have little incentive to fabricate the results." (*Geier*, *supra*, 41 Cal. 4th at pp. 601-602 [citing *State v. Lackey* (2005) 280 Kan. 190 [120 P.3d 332, 351-352]; *see* Zabrycki at p. 1115 [warning that a contrary rule would "effectively functio[n] as a statute of limitations for murder".)

III. *MELENDEZ-DIAZ* DOES NOT OVERRULE THIS COURT'S DECISION IN *PEOPLE V. GEIER*

Melendez-Diaz does not overrule this Court's decision in *Geier*. In *Geier*, *supra*, 41 Cal.4th 555, a DNA laboratory director testified to work done by her subordinate. At trial, the defendant objected to her testimony, arguing that the results were inadmissible absent testimony from the analyst who conducted the testing. The trial court overruled the objection. (*Geier*, *supra*, 41 Cal.4th at p. 596.) On his direct appeal from a judgment

imposing the death penalty, the defendant renewed his claim, arguing that under *Crawford*, admission of the supervisor's testimony violated his Sixth Amendment right to confrontation. (*Id.* at p. 587.) Specifically, he contended that the DNA report forming the basis of the supervisor's testimony was "testimonial" because objectively, it would be understood that the report would be used at a later trial. (*Id.* at p. 598.)

This Court rejected the claim. This Court held, based on its own interpretation of *Crawford* and *Davis*, that scientific evidence, like the report at issue before it, was non-testimonial. In so doing, this Court concluded that a statement is not testimonial unless: "(1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." (*Geier*, *supra*, 41 Cal.4th at p. 605.) This Court found that in the case before it, the second factor was dispositive. This Court stated, "[the analyst's] observations. . . constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events." (*Id.* at p. 605.) Specifically, the analyst recorded her observations regarding the samples, her preparation of the samples for analysis, and the results of the analysis, as she was performing those tasks. (*Id.* at pp. 605-606.) Furthermore, scientific testing is neutral, i.e., the tests were done as part of the analyst's job, and not to incriminate the defendant. (*Id.* at p. 607.) Finally, the accusatory statements were made not through the analyst's notes but rather, through the supervisor, who testified at the defendant's trial. (*Geier*, *supra*, 41 Cal.4th at p. 607.)[23]

---

[23] This Court also noted that, as a matter of state law, the supervisor, as an expert witness, was allowed to rely upon the analyst's report in forming her opinions. (*Geier*, *supra*, 41 Cal.4th at p. 608, fn. 13.) This Court did not address the issue insofar as it relates to the confrontation clause.

Melendez-Diaz did not undercut this Court's reasoning in *Geier*. California does not follow the procedure outlawed in *Melendez-Diaz*, i.e., introducing witness affidavits instead of live testimony. Furthermore, autopsy reports are not "formalized testimonial materials." Thus, *Melendez-Diaz* has no impact on *Geier* or on California's practices. Although improper introduction of forensic evidence will violate a defendant's Sixth Amendment rights, proper introduction of such evidence will not. As explained throughout this brief, *Melendez-Diaz* was concerned with a particular type of evidentiary practice, i.e., introduction of a bare-bones, after-the-fact declaration as prima facie evidence against the accused, without supporting testimony. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2531, 2537.) *Geier* involved raw data, contemporaneous recordation of observable events, an expert relying on work by others, and live testimony by a witness subject to cross-examination. None of these circumstances was present in *Melendez-Diaz*; thus the High Court had no occasion to consider them.[24]

Furthermore, the Court in *Melendez-Diaz* once again passed up the opportunity to provide a comprehensive definition of "testimonial" or a framework for determining whether a statement is testimonial in a particular case. In the absence of further guidance from the High Court, the *Geier* three-part test remains a valid formula for evaluating the "testimonial" nature of an out-of-court statement. As can be readily seen, all three *Geier* criteria were met in this case. First, there was no statement made to a law enforcement agency. Instead, an autopsy report was created at the direction of the coroner. Second, the scientific data did not describe a past fact relating to criminal activity. The autopsy report was a

[24] Four days after deciding *Melendez-Diaz*, the High Court denied certiorari in *Geier*. (*Geier v. California* (2009) 129 S.Ct. 2856.)

contemporaneous observation of the pathologist. Third, the purpose of the autopsy was not for use at a later trial. Autopsy reports are medical records prepared pursuant to statutory mandates without regard to any potential criminal prosecution.

Finally, and in any event, even when a statement is found to be testimonial, neither *Geier* nor *Melendez-Diaz* abrogated the longstanding rule that an expert may rely on hearsay in forming his or her opinion. (See *United States v. Floyd* (11th Cir. 2002) 281 F.3d 1346, 1349-1350.)

IV. ANY ERROR IN ADMITTING THE PATHOLOGIST'S EXPERT TESTIMONY WAS HARMLESS BEYOND A REASONABLE DOUBT

The Court of Appeal held that the alleged error in admitting the autopsy evidence was not harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 1065, 17 L.Ed.2d 705] and therefore required reversal of the judgment. When properly evaluated under the criteria laid down by the United States Supreme Court in *Delaware v. Van Arsdall, supra*, 475 U.S. 673, any error was harmless.

In *Delaware v. Van Arsdall, supra*, 475 U.S. 673, the United States Supreme Court set forth the factors to be used in determining whether erroneous restriction on or denial of cross-examination would be deemed harmless. The High Court held that a reviewing court should "tak[e] into consideration the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Id.* at p. 684.)

Here, the prosecution had an overwhelming case against Dungo. Victim Pina was in an unhappy relationship with Dungo, who was jealous and overbearing. Dungo had a previous history of domestic violence. On the eve of her death, victim Pina asked her close friend if she should confront Dungo. Pina was never seen alive again.

Dungo attempted to conceal his strangulation of Pina, hid her body and possessions in remote locations, and lied over and over for three days about Pina's whereabouts to family, friends, and law enforcement investigators. He falsely assisted in searching for her when he knew her actual whereabouts. When law enforcement eventually located Pina, Dungo continued to lie to the investigators. Finally, he admitted that he strangled and killed Pina, and hid her body. Dungo repeated these admissions in his testimony to the jury.

Moreover, the crime of which Dungo was convicted, second degree murder, did not require the prosecution to prove that Pina died of strangulation. Murder simply requires proof that: (1) a human being was killed, and (2) the killing was done with malice aforethought. (Pen. Code, §§187, subd. (a), 189.) These elements were amply proven without the autopsy finding by the totality of the evidence, including Dungo's own admissions and testimony.

In addition, the length of time Dungo strangled Pina, which was the main subject of Lawrence's testimony, was not relevant to whether Dungo was guilty of murder or the lesser included offense of manslaughter. A killing is reduced to manslaughter is when malice is mitigated upon a sudden quarrel or heat of passion (Pen. Code, § 192, subd. (a)), or the defendant acts in the actual but unreasonable belief in the need for self-defense. (*People v. Flannel* (1979) 25 Cal.3d 668, 672.) In the present case, overwhelming evidence supported the jury's rejection of Dungo's uncorroborated and incredible testimony that the killing was manslaughter.

For instance, Dungo admitted lying to the victim's mother, friends, husband, children and investigators with the Tracy and Stockton police departments. (10 RT 2626-2627.) He admitted that he told Detective Takeda that Pina did not deserve what he did to her. (10 RT 2631.) He admitted that he never mentioned before trial that Pina called him a bad parent. (10 RT 2634-2635.) He also admitted that he did not tell the detectives that Pina hit him during the incident because, "I didn't want to make Lucinda look bad." (*Ibid.*) He admitted that he did not believe he was in danger of dying when Pina punched his chin. (10 RT 2639.) He admitted that he did not call 911, run out of the home or yell for help, nor did he go to Pina's mother, who lived in the adjacent duplex, after strangling Pina. (10 RT 2582-2583.)

Beyond a reasonable doubt, the jury found Dungo's uncorroborated testimony unpersuasive based upon his numerous admissions of untruthfulness, and omissions in his earlier statements. Because his testimony was the primary evidence justifying a manslaughter verdict, and because this was rejected by the jury, even independent of the pathologist's testimony, the murder conviction must be affirmed.

Finally, the observations of Dr. Lawrence which were related to the jury from the report, specifically that the larynx and hyoid bone were not broken, would be harmless in light of Dungo's admissions that he strangled Pina to death. (7 RT 1846.) Very little could have been uncovered through cross-examination of Dr. Bolduc that was not otherwise explored through the probing cross-examination of Dr. Lawrence.

Accordingly, any error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

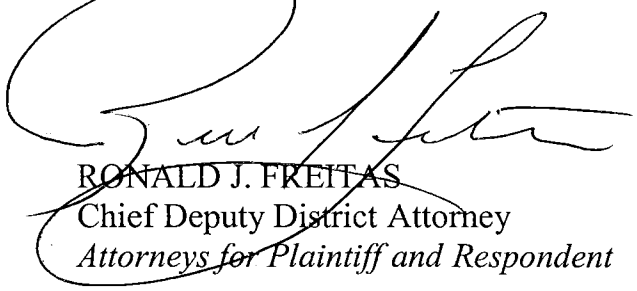
CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: March 3, 2010

Respectfully submitted,

JAMES P. WILLETT
District Attorney of San Joaquin County
EDWARD J. BUSUTTIL
Assistant District Attorney



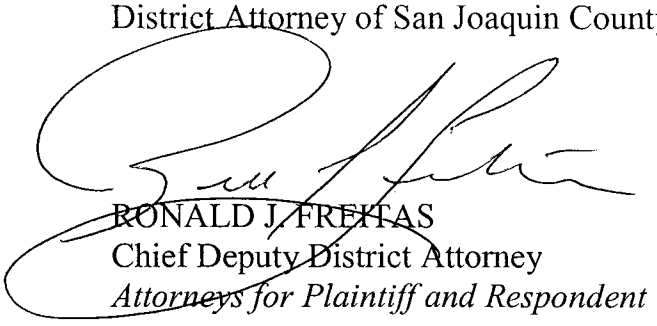
RONALD J. FREITAS
Chief Deputy District Attorney
Attorneys for Plaintiff and Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 12178 words.

Dated: March 3, 2010

JAMES P. WILLETT
District Attorney of San Joaquin County



RONALD J. FREITAS
Chief Deputy District Attorney
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Dungo* No.: S176886

I declare:

I am employed in the Office of the District Attorney, San Joaquin County, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the District Attorney, San Joaquin County, for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the District Attorney, San Joaquin County, is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 3, 2010, I served the attached RESPONDENT'S OPENING BRIEF ON THE MERITS by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the District Attorney, San Joaquin County, at 222 East Weber, Room 202, Stockton, CA 95202, addressed as follows:

Anne Hopkins
Attorney at Law
P.O. Box 23711
Oakland, California 94623
(Attorney for Appellant)
served 2 copies

Edmund G. Brown, Jr.
Attorney General of California
1300 I Street
Sacramento, CA 94244-2500

Clerk of the Superior Court
San Joaquin County
222 East Weber Avenue, Room 303
Stockton, CA 95202

Clerk, Court of Appeal,
Third Appellate District
900 N Street, Room 400
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 3, 2010, at Stockton, California.

Nellie James
Declarant