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

Third District Court of Appeal No. C055923
San Joaquin County Superior Court No. SF100023A
Honorable Charlotte J. Orcutt, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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APPELLANT'S ANSWER BRIEF ON THE MERITS

STATEMENT OF ISSUES (CAL. RULES OF COURT, RULE 8.520(B)(2)(A))

"1. Was defendant 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 upon an autopsy report prepared by another pathologist?

"2. 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 ("*Melendez-Diaz*"), affect this Court's decision in *People v. Geier* (2007) 41 Cal.4th 555?"

INTRODUCTION

This case could be the poster child for why we have a Confrontation Clause, the fundamental constitutional guarantee that forces a criminal defendant's accusers to submit to cross-examination, "the greatest legal engine ever invented for the discovery of truth." (*California v. Green* (1970) 399 U.S. 149, 158 [90 S.Ct. 1930, 26 L.Ed.2d 489].)

A pathologist (Dr. Bolduc) performs an autopsy in a homicide case with a detective present, knowing his results will be given to the District Attorney for prosecution. The pathologist's *ex parte* report helps to refute the only defense in this case, a defense that the crime was voluntary manslaughter rather than murder. But for tactical reasons, the prosecution does not want to use that pathologist as a witness because he would be vulnerable to cross-examination: Kern County fired him, he falsified his resume, Orange County permitted him to resign "under a cloud," his competence had been repeatedly questioned, and Stanislaus and San Joaquin County prosecutors would not let him testify in homicide cases. Instead, the prosecution gets a supervisor (Dr. Lawrence) to give testimony based on the assumption that the *ex parte* report of the strategically absent pathologist was entirely accurate. The prosecution also gets the supervisor to opine that the pathologist's problems were "95 percent fluff." As Dr. Lawrence put it,

> The only reason they won't use [Dr. Bolduc] is because the law requires that the District Attorney provide this background information to each defense attorney for each case, and they feel it becomes too awkward to make them easily try their cases. And for that reason, they want to use me instead of him. (5RT 1501.)

The prosecution's theory as to why this is permissible? "Go ahead – cross-examine the supervisor." But as Justice Scalia wrote in his pathbreaking opinion in *Crawford v. Washington* (2004) 541 U.S. 36 [124

S.Ct. 1354, 158 L.Ed.2d 177]["*Crawford*"], that is the precise evil against which the Confrontation Clause safeguards. It is patently insufficient to say a defendant is "perfectly free to confront those who read [his chief accuser's statement] in court." (*Id.* at 51.)

The Third District got it right. Under *Crawford* and *Melendez-Diaz*, which applied *Crawford* in the context of forensic evidence created with an eye toward prosecution, this case presents a paradigmatic violation of the constitutional guarantee of confrontation and cross-examination. Dr. Bolduc's professional history illustrates the wisdom of the *Melendez-Diaz* court's observation that it is not evident that "'neutral scientific testing' is as neutral or as reliable" as the state suggests. (*Melendez-Diaz*, 129 S.Ct. at 2536.)

"Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar." (*Crawford*, 541 U.S. at 56, fn. 7.) Here, the prosecution's calculated suppression of a government agent whose *ex parte* report made him appellant's chief accuser, for fear that he might have a difficult time explaining his credibility problems to a jury, would certainly qualify. As the Third District cogently observed: "The prosecution's failure to call Dr. Bolduc as a witness prevented the defense from exploring the possibility that he lacked proper training or had poor judgment or from testing his honesty, proficiency, and methodology. Notably, that was the prosecution's intent." (Slip op. at 24.)

The Confrontation Clause imposed a burden on the prosecution to present appellant's accusers, a burden that could not properly be ignored, shifted to the defense, or explained away as "95 percent fluff." (*Melendez-Diaz,* 129 S.Ct. at 2540.) "Moreover, this case illustrates the inadequacies of substitute cross-examination. While Dr. Lawrence generally was aware

of Dr. Bolduc's work history, Dr. Lawrence was unable to respond to specific questions concerning Dr. Bolduc's alleged incompetence in prior cases." (Slip op. at 24.)

The Court of Appeal's opinion should be affirmed, so that the case can be tried in a manner which honors this "bedrock procedural guarantee" (*Crawford*, 541 U.S. at 42), rather than one in which the prosecution deliberately tries to sidestep it.

STATEMENT OF THE CASE

Appellant was charged by information with the April 2006 murder (§ 187) of Lucinda Correia-Pina ("Pina"). (1CT 158-159.) A lengthy jury trial began on February 28, 2007 and concluded on April 23, 2007, when jurors returned a verdict finding appellant guilty of second degree murder. (2CT 395, 397-398.) On June 5, 2007, the trial court sentenced appellant to 15 years to life in state prison. (11RT 3012.)

A. The Motion To Exclude Dr. Lawrence's Testimony.

Trial counsel moved in limine to exclude Dr. Lawrence's testimony concerning cause of death and autopsy-related issues on hearsay and Confrontation Clause grounds. (1CT 189-190.) The defense contended that the observations and conclusions of Dr. Bolduc, who actually performed the autopsy, were not trustworthy given various problems Dr. Bolduc had been facing since 1995, including the following:

- Dr. Bolduc concluded in one case that death was by strangulation when subsequent information demonstrated that the victim had died of asthma. (1CT 189-190.)
- Homicide officers in Arizona reported that Dr. Bolduc had wrongly concluded that a man had committed suicide,

although someone later confessed to shooting the man. (5RT 1258.)

- Dr. Bolduc had been fired from Kern County and was "allowed to resign" in Orange County. (5RT 1258.)
- The district attorneys of San Joaquin and Stanislaus Counties had performed an investigation, as a result of which Dr. Bolduc was no longer being used as a witness in homicide cases in those counties. (5RT 1258.)

Because of Dr. Bolduc's problems, prosecutors would have Dr. Lawrence testify in his stead and maintain that Dr. Bolduc is an excellent pathologist. (5RT 1258-1259.) Counsel's contentions were based in large part on an internal memorandum from a district attorney investigator to a deputy district attorney reporting on that office's investigation into Dr. Bolduc. (5RT 1317-1319.) The problems discovered during the district attorney investigation included Dr. Bolduc not having the facts to back up his opinions. (5RT 1259.)

The trial court concluded that there was no confrontation issue because the defense would have the opportunity to confront Dr. Lawrence regarding his opinions, and because the contents of the autopsy report were not being admitted for their truth, but only as the basis of Dr. Lawrence's opinion. (5RT 1261-1262.) The court stated that as the autopsy report itself was not being admitted, it did not need to get to the issue of whether the autopsy report was either trustworthy or testimonial. (5RT 1262.)

B. Dr. Lawrence's Evidence Code Section 402 Hearing Testimony.

Dr. Lawrence testified at a hearing outside the presence of the jury to determine the permissible scope of cross-examination. (See 5RT 1441-1442, 1516.) His opinion as to cause of death was based on his review of Dr. Bolduc's autopsy report and the autopsy photographs.[1] (5RT 1488-1490.) In his opinion, Dr. Bolduc's report was "complete, excellent, and allowed me to arrive at my own conclusion." (5RT 1492.) Dr. Lawrence was not present at the autopsy, but said that Dr. Bolduc's report "indicates all the things that are normally put in a report of this type to allow somebody like me, independently, to make a conclusion to the cause and circumstances of death." (5RT 1492-1493.)

Dr. Lawrence was aware of some of the "baggage" associated with Dr. Bolduc's career. (5RT 1494-1495.) Dr. Lawrence had hired Dr. Bolduc. (5RT 1495.) He had written a letter in November 2006 to the district attorney's office, expressing his opinion that Dr. Bolduc remained qualified to do his job. He believed that the criticism to which Bolduc had been subjected was "95 percent fluff." (5RT 1496.) He knew that Dr. Bolduc had been fired from Kern County and subsequently falsified his resume. (5RT 1498.) He knew Dr. Bolduc had resigned from Orange County "under a cloud." (5RT 1499.) He knew that the Stanislaus County and San Joaquin County District Attorneys refused to use Dr. Bolduc in homicide cases. (5RT 1500-1501.) He knew that Sonoma County also was reluctant to use him. (5RT 1503.) He explained, "The only reason [prosecutors] won't use him is because the law requires that the District Attorney provide this background information to each defense attorney for each case, and they feel it becomes too awkward to make them easily try

[1] Dr. Lawrence also had reviewed the coroner's investigative report, but stated that it did not provide any information not contained in the autopsy report. (5RT 1489.)

their cases. And for that reason, they want to use me instead of him." (5RT 1501.)

Dr. Lawrence felt that the allegations of Dr. Bolduc's incompetence were not supportable and had not been fully investigated. He did not investigate the allegations himself. He said that as to one case in which Dr. Bolduc's competence had been questioned, a different pathologist, not Bolduc, had performed the autopsy, but he evaded trial counsel's question as to whether this information came from Dr. Bolduc and did not reveal the basis of his conclusion. (5RT 1498-1499.) He had not heard about the Orange County case in which Dr. Bolduc had testified that the cause of death was strangulation, but it was later found that the victim died of complications due to asthma, but nevertheless opined that it "sounds like it's a difficult case. It's probably one of those situations that is extremely difficult medically. But I am just guessing." (5RT 1502-1503.) He felt it was unnecessary to look into the allegations against Bolduc further, stating, "I know the man. I know his work." (5RT 1510.) He could not explain why he would not undertake to look into the matter further. (5RT 1511.)

C. Additional Trial Court Proceedings.

The prosecution did not attempt to have the autopsy report admitted into evidence. (See 3RT 868-869.) Although the trial court had stated that the contents of the autopsy report were not being admitted for the truth, the jury was instructed:

> ... 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.* (1CT 272 [emphasis added]; 11RT 2901.)

D. The Appellate Court's Decision.

On appeal, Dungo challenged his conviction, on the ground, inter alia, that Dr. Lawrence's testimony violated his Sixth Amendment right to confrontation. On August 24, 2009, in a published decision, the Third District Court of Appeal agreed and reversed the judgment.

The appellate court began by observing that appellant admitted killing his girlfriend, Lucinda Pina, by strangling her. He contended that he was provoked and lost control, and was thus guilty of at most voluntary manslaughter. The jury had found him guilty of second degree murder (Pen. Code, § 187), based in part on the testimony of Dr. Lawrence. (Slip op. at 1-2.)

The Third District agreed that Dr. Lawrence's testimony ran afoul of the Confrontation Clause. The court observed that a "critical fact in the trial was the duration of the choking," which bore on the issue of whether the offense was murder or manslaughter. (Slip op. at 2.) As a result of the prosecution's use of a substitute pathologist, appellant "was not able to cross-examine Dr. Bolduc on either the facts contained in the report or his competence to conduct an autopsy." (*Ibid.*)

The appellate court found that the autopsy report was "testimonial," both because it constituted a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact,' namely the 'circumstances, manner and cause'" of the victim's death, and because it was "'made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial.'" (Slip op. at 17, citing *Melendez-Diaz*, 129 S.Ct. at 2531.)

The appellate court further concluded that the trial court erred in allowing Dr. Lawrence to testify based on the contents of Dr. Bolduc's report. It rejected the assertion that the contents of the report were admitted

for a non-hearsay purpose, observing that jurors were instructed that in evaluating an expert opinion, "You must decide whether information on which the expert relied was true and accurate."

> 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. (Slip op. at 22.)

The appellate court also rejected the argument that Dr. Lawrence's testimony relaying the contents of Dr. Bolduc's report was permissible to explain the basis of his opinion, because "[w]here testimonial hearsay is involved, the Confrontation Clause trumps the rules of evidence." (Slip op. at 22-23, fn. 14.) Dr. Lawrence's availability for cross-examination thus did not satisfy defendant's right to confrontation. "Where, as here, an expert bases his opinion on testimonial statements and discloses those statements to the jury, *Crawford* requires that the defendant have the opportunity to confront the individual who issued them." (Slip op. at 23.)

The Third District pointed to Dr. Lawrence's testimony that the prosecution would not call Dr. Bolduc as a witness in homicide cases because of his "baggage." It found that presenting a surrogate expert instead of Dr. Bolduc "prevented the defense from exploring the possibility that [Dr. Bolduc] lacked proper training or had poor judgment or from testing his honesty, proficiency and methodology. Notably, that was the prosecution's intent." (Slip op. at 24.)

Finally, the appellate court concluded that the state failed to meet its burden of establishing that the error was harmless beyond a reasonable doubt. The prosecution's argument that appellant was guilty of murder rather than manslaughter was based in large part on the theory that the strangling went on long enough so that "what may have begun as passion

shaded into intent. The only evidence offered by the prosecution in support of this theory was Dr. Lawrence's testimony that Pina was strangled for at least two minutes before she died, which he based on Dr. Bolduc's report." (Slip op. at 26.)

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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. On December 2, 2009, this court granted review, and ordered briefing and argument on the issues identified above.

STATEMENT OF FACTS

Pina was last seen alive in the early morning hours of April 15, 2006. (See 7RT 1767-1770.) Police found her body on April 18 in her Ford Expedition, parked in a residential area in Stockton not far from her home. (7RT 1983-1998; 8RT 2109-2112, 2185-2186.) The body was on the floor between the back and front seats, with a blanket tucked neatly around her. (8RT 2123-2124, 2162.) The case was immediately turned over to the police department's robbery/homicide unit. (8RT 2129-2130.) A homicide detective testified that "the coroner had also been requested and was on scene." (8RT 2161.) An autopsy was begun that day and completed on April 19. The homicide detective assigned to the case was present during the autopsy. (8RT 2167-2168.)

Police arrested appellant, who was dating Pina, on April 19th. (6RT 1703, 1706; 7RT 1728.) He confessed to strangling her. (2CT 504-505; 9RT 2296-2297.) The night of Pina's disappearance, he and Pina had argued, and for the first time the argument turned physical. Pina punched him on the chin. She pushed him. She threw things at him. (2CT 511.) The argument ended up in her daughter's bedroom, and after the arguing, her hitting him, and her throwing things at him, he had grabbed her by the throat and choked her to death. (2CT 511-512.)

He said he did not know what he was doing, and he did not mean to, "but it happened, and then I realized she wasn't breathing anymore." He saw that her neck was badly bruised. When it was happening it was as though he could not control his own strength. (2CT 512-513.) He told police how he had then put Pina in her truck, covered the body, driven around, and eventually parked the truck where it was found. (2CT 513-514.) After a phone call to his estranged wife, appellant demonstrated to detectives how he had strangled Pina. (2CT 531-536.) He said he did not

think that he had her by the throat very long, but indicated that he used a great deal of force in choking her. (2CT 538.)

At trial, appellant testified that after getting home from an evening spent with friends, he and Pina started arguing about her relationship with Isaac Zuniga, a former lover. (9RT 2536, 2546-2549, 2578-2580.) Both started swearing at each other, saying "you're full of shit," and trading accusations. (9RT 2449-2551.) After appellant said he knew something was going on with her and Zuniga, and she told him that nothing was going on, he asked why Zuniga kept calling. She responded by saying, "Fuck you, Rey." When she started out of the room, appellant grabbed her arm, saying "Fuck you, look Lucinda, this is bullshit." He asked her not to walk away but to discuss things. (9RT 2552-2554.)

In response, she punched him on the chin a couple of times. She said, "Fuck you, Rey. I'll talk to whoever I want. I'll see whoever I want. You can't tell me what to do." He was surprised when she hit him, as their arguments had never been physical before. She walked away and he followed her. She asked why he was following her, and said, "Fuck this, Rey." He responded, "Fuck what?" She then went into the garage, grabbed a box, and, still swearing, said she wanted him out. Appellant asked if she wanted him out because he was finding out the truth about her and Zuniga. She replied, "No, fuck you, Rey. I will see whoever I want. No man will control me. I will do whatever I want." She also said, "I'll fuck whoever I want. I'll have sex whoever I want. If I want to fuck you, if I want to fuck Isaac, if I want to fuck Anul, I will do whatever the hell I want." (9RT 2554-2555.) During the argument, she threw things at appellant, mostly toys. (9RT 2596-2597.)

She grabbed some of appellant's clothes out of the closet, and kept saying she wanted him out. Appellant, angry, said, "Why, because I busted you?" She replied, "Fuck you. I want you to go. I'm not going to explain

myself to you. I'm not going to have you tell me who I can talk to, who I want to see." The couple traded profanities, and at some point Pina started walking out again. Appellant was very angry. He grabbed her arm again. She hit him again, saying that his wife had probably taken his daughter away because "you're not even a good father. You're a lousy fucking father." Appellant swore at her and said he was a good father. Pina was very angry. She grabbed his sweater and dug her nails into his chest, while saying, "You're not a fucking good father, you're a worthless piece of shit." (9RT 2555-2556.)

When she hit him again in the face, appellant lost it. (9RT 2556-2557.) He grabbed her arm away from him. In response, she bit his arm. At this, he "snapped." He felt angry. He grabbed her by the neck, while saying something like, "Fuck you, Lucinda. I'm a good dad. I'm a good dad. I'm not a bad father. Fuck you." As he strangled her, he did not know what he was doing. Her arms started coming down and he just did not know what he was doing. (9RT 2556-2557, 2639.) He did not mean to kill her. (9RT 2633.) When his mind cleared, he let go right away, thinking, "What the fuck am I doing?" He did not know how long he had strangled her; it had not seemed long. (9RT 2558-559.)

Dr. Robert Lawrence worked as a pathologist for the San Joaquin County Coroner's office. He also owned Forensic Consultants Medical Group, which contracted with the San Joaquin County coroner's office and other counties to do "coroner's work." (7RT 1837-1838.) Dr. George Bolduc, who was employed by Dr. Lawrence, performed the autopsy on Pina and prepared the autopsy report. (7RT 1844-1845.) Dr. Lawrence was not present at the autopsy. (7RT 1855.)

Dr. Lawrence testified, based on his review of Dr. Bolduc's report and the autopsy photographs, that the cause of Pina's death was manual strangulation. (7RT 1845-1846.) It would have taken her at least several

minutes, and more than two minutes, to die. This opinion was based on the lack of a fractured voice box or hyoid bone, hemorrhages in the neck organs consistent with fingertips during strangulation, and signs of lack of oxygen, including petechiae in the eyes. (7RT 1846-1848.) In particular, the absence of fractures in the cartilage and the "absence of extreme bruising" made it unlikely that she was just briefly squeezed before she died. (7RT 1850.) There were bite marks on either side of the tongue, which meant that there was some struggling during which she had bitten her tongue. (7RT 1848.) Pina had a history of asthma, "but there was no indication at autopsy that she was having an asthma attack." (7RT 1853.)

Dr. Lawrence's testimony often did not specify whether the findings he was relaying were based on Bolduc's report or the autopsy photographs. (See 7RT 1837-1838, 1844-1851.) There was no evidence that the autopsy photographs documented the absence of fractured cartilage, the bite marks on the tongue, or the basis for Dr. Lawrence's conclusion that Pina was not having an asthma attack. He testified that he took all of Dr. Bolduc's report into account in forming his opinion. (7RT 1869.)

Dr. Lawrence did testify that there were several small, discrete hemorrhages in the muscles under the skin and some deeper hemorrhages about the neck organ structures deep inside the neck, and that Dr. Bolduc had described hemorrhages in all layers of the neck muscles. (7RT 1847.) Dr. Lawrence could not be sure based on the photographs how many layers of the neck muscles had hemorrhages; he had to rely on Dr. Bolduc's description. (7RT 1848-1849.) Dr. Lawrence testified that the photographs did not show injuries to the external neck that one would expect with a violent struggle. (7RT 1850.) He observed that the autopsy photographs showed evidence of early decomposition. (7RT 1851.) Decomposition could cause "minor bruises" to be obscured, though they would be there "when you look underneath the skin." (7RT 1853.)

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY HELD THAT APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED BY DR. LAWRENCE'S TESTIMONY, WHICH WAS BASED UPON AND RELAYED THE CONTENTS OF ANOTHER PATHOLOGIST'S AUTOPSY REPORT.

A. INTRODUCTION.

It was undisputed that the victim died at appellant's hands as a result of manual strangulation. The defense was that the offense was voluntary manslaughter, rather than murder, because appellant had acted in the heat of passion.

The state offered evidence crucial for conviction of the greater offense, a killing with malice -- i.e. that the victim was strangled for several minutes and at least two minutes, long enough, argued the prosecution, to negate any conclusion that appellant acted in the heat of passion – through the testimony of Dr. Lawrence, who had neither conducted nor witnessed the victim's autopsy. In his testimony, Dr. Lawrence relied upon and conveyed to jurors the findings and conclusions of Dr. Bolduc, the pathologist who did conduct the autopsy. Dr. Lawrence, who had hired Dr. Bolduc and was his supervisor, based his own opinion on Dr. Bolduc's reported observations at autopsy.

Dr. Bolduc did not testify at trial and appellant thus had no opportunity to cross examine him. According to Dr. Lawrence, the prosecution called him instead of Dr. Bolduc precisely to avoid subjecting Dr. Bolduc to cross-examination. (5RT 1501.)

The Court of Appeal, Third Appellate District, correctly held that under these circumstances Dr. Lawrence's testimony, by relaying and relying upon the testimonial statements of Dr. Bolduc, violated appellant's Sixth Amendment right "to be confronted with the witnesses against him."

B. *PEOPLE V. GEIER* WAS OVERRULED BY THE UNITED STATES SUPREME COURT'S DECISION IN *MELENDEZ-DIAZ V. MASSACHUSETTS.*

1. Summary Of Relevant Developments In Confrontation Clause Jurisprudence Prior To *Melendez-Diaz.*

The Sixth Amendment, made applicable to the states by the Fourteenth Amendment (*Pointer v. Texas* (1965) 380 U.S. 400, 401 [85 S.Ct. 1065, 13 L.Ed.2d 923]), provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The right of confrontation has been construed to include not only the right to face-to-face confrontation, but also to the right to meaningful and effective cross-examination. (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316 [94 S.Ct. 1105, 39 L.Ed.2d 347].)

Even prior to *Crawford, supra*, 541 U.S. 36, United States Supreme Court decisions suggested that the Confrontation Clause requires the prosecution to present the findings of its forensic examiners through live testimony at trial. (See *California v. Trombetta* (1984) 467 U.S. 479, 490 [104 S.Ct. 2528, 81 L.Ed.2d 413] ["defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the fact-finder whether the test was properly administered"]; *Diaz v. United States* (1912) 223 U.S. 442, 450 [32 S.Ct. 250, 56 L.Ed.2d 500] [autopsy report and other pretrial statements, characterized as "testimony," "could not have been admitted without the consent of the accused . . . because the accused was entitled to meet the witnesses face to face"].)

For a few decades preceding *Crawford*, however, an out-of-court statement could be admitted over a Confrontation Clause objection if the witness was unavailable to testify and the statement carried with it adequate "indicia of reliability." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct.

2531, 65 L.Ed.2d 597].) In order to meet this test, the evidence had to either "fall within a firmly rooted hearsay exception" or "have particular guarantees of trustworthiness." (*Ibid.*)

Under this framework, in the pre-*Crawford* case of *People v. Beeler* (1995) 9 Cal.4th 953, this court held that admission of an autopsy report prepared by a pathologist (in fact, Dr. Bolduc) who did not testify at trial did not violate the defendant's right of confrontation because the report was admitted under the business records exception to the hearsay rule, a firmly rooted exception to the hearsay rule "'that carries sufficient indicia of reliability to satisfy requirements of the confrontation clause.'" (*Id.* at 979, quoting *People v. Clark* (1992) 3 Cal.4th 41, 158.)

Following *Crawford*, however, the fact that evidence falls within a firmly rooted hearsay exception or has guarantees of trustworthiness is not germane to the Confrontation Clause analysis. *Crawford* expressly overruled *Ohio v. Roberts* and divorced the law of hearsay from its Confrontation Clause jurisprudence. The *Crawford* decision represents a return of the court's Confrontation Clause jurisprudence to a meaning more consistent with the original intent of the Framers. (*Crawford*, *supra*, 541 U.S. at 42-56, 61-62, 67-69.)

In overruling *Ohio v. Roberts* and concluding that the reliability of hearsay is now irrelevant to the confrontation issue, *Crawford* effectively overruled *Beeler*. In *Crawford*, the court held that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Crawford*, *supra*, 541 U.S. at 61; see also *White v. Illinois* (1992) 502 U.S 346, 363 [112 S.Ct. 736, 116 L.Ed.2d 848] [Thomas, J., concurring] ["the Clause makes no distinction based on the reliability of the evidence presented"].) Instead of focusing on reliability, the court held that the Clause categorically precludes the prosecution's introduction into

evidence of "testimonial statements" unless the witness is shown to be unavailable and the defendant had a prior opportunity to cross-examine the witness. (*Crawford, supra*, 541 U.S. at 68.)

The threshold issue to be resolved is thus whether Dr. Bolduc's autopsy report was "testimonial" under *Crawford.* While *Crawford* did not offer a precise definition of "testimonial statements" (*Crawford, supra*, 541 U.S. at 68), it did indicate that testimonial statements are made by witnesses who "bear testimony" and that "testimony" is defined as a "solemn declaration or affirmation for the purpose of establishing or proving some fact." (*Id.* at 51.) The court observed that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Ibid.*)

The court cited three useful formulations for determining which statements are "testimonial": (1) "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," (2) "extrajudicial statements ... contained in affidavits, depositions, prior testimony, or confessions," and (3) "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." (*Id.* at 51-52.)

The court further elaborated on "testimonial" statements in *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224] ("*Davis*"). The court held that statements by a victim of domestic violence to a 911 operator immediately after an assault were not testimonial, while statements made by a victim during a police interview shortly after an incident were testimonial and thus inadmissible absent confrontation. The

court summarized its holding concerning the Clause's applications to statements to police:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (*Id.* at 822.)

In *People v. Geier* (2007) 41 Cal.4th 555, 607, this court ruled that testimony relaying information contained in a report of contemporaneous scientific observation recording "raw data" was admissible under *Crawford* and *Davis*, based on its conclusion that the report and notes at issue in that case were nontestimonial. In *Geier*, a laboratory supervisor was allowed to testify regarding a DNA report she had not authored. The supervisor also proffered a scientific opinion based on the test results, and testified that the report consisted of contemporaneously recorded observations. [2] (*Id.* at 593-595.)

In finding the laboratory report to be non-testimonial, this court found "critical" the fact that the *Davis* court, in ruling that a 911 call was non-testimonial, had contrasted this "contemporaneous description of an unfolding event" with questioning by police about potentially criminal past events. As the laboratory technician who authored the report in *Geier* had contemporaneously recorded her observations and analysis, the court

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[2] Respondent suggests that Dr. Bolduc's report contains his "contemporaneously recorded" observations. (Respondent's Opening Brief on the Merits ["ROBM"], at 14.) Unlike *Geier*, however, there was no evidence here that Dr. Bolduc's findings were "contemporaneously recorded." Indeed, when Dr. Lawrence was asked if he had reviewed Dr. Bolduc's "autopsy notes," he responded, "I didn't look at any notes. I don't even know if there are any notes." (7RT 1845.)

concluded that the technician in authoring the report was not "testifying." (*Id.* at 605-606.) Moreover, the court reasoned that the technician was simply doing her job in preparing her notes and report, rather than trying to incriminate the defendant. "Records of laboratory protocols followed and the resulting raw data acquired are not accusatory." (*Id.* at 607.) Finally, the court observed that the accusatory opinions in the case "were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, ..." (*Ibid.*)

2. *Melendez-Diaz* Rejected The *Geier* Court's Reasons For Concluding That Forensic Reports Are Not Testimonial.

In *Melendez-Diaz*, the United States Supreme Court revisited the Confrontation Clause in the context of scientific laboratory reports. The court held that affidavits reporting the results of a forensic analysis showing that a substance was cocaine were "testimonial," and that it followed that the affiants were "witnesses" whom the defendant had a Sixth Amendment right to confront.

In reaching this conclusion, the *Melendez-Diaz* court completely undermined *Geier's* rationale.[3] (See *People v. Vargas* (2009) 178 Cal.App.4th 647, 659, rev. denied [reasoning of majority in *Melendez-Diaz* is inconsistent with primary rationale in *Geier*].) First, as to *Geier's* "contemporaneous description" rationale, *Melendez-Diaz* rejected the argument that a forensic analyst's report was not testimonial because it reported "near-contemporaneous observations." It observed that in *Davis* the statements to officers responding to a report of a domestic disturbance were testimonial notwithstanding that they were "near contemporaneous" to the events reported, sufficiently close in time to the alleged assault that the

[3] The Attorney General's office conceded as much in its supplemental brief addressing the import of *Melendez-Diaz*. (Slip op. at 18-19, fn. 11.)

trial court had admitted the victim's statement as a "present sense impression." (*Melendez-Diaz*, 129 S.Ct. at 2535.) Moreover, the proposed exception for witnesses who make "contemporaneous" observations would eliminate a defendant's right to confront a police officer's on-the-scene description of what the officer observed when he or she responded to a crime scene. (*Ibid.*)

Second, as to *Geier's* conclusion that a forensic report was not testimonial because the witness preparing it was not accusatory, the *Melendez-Diaz* court found "no authority" for the proposition that those who did not see the crime "nor any human action related to it" should not be subject to confrontation. (*Ibid.*) The majority expressly rejected the argument that forensic analysts, such as a coroner, should not be subject to confrontation because they are not "accusatory witnesses," stating that the argument "finds no support in the text of the Sixth Amendment or in our case law." (*Id.* at 2533.)

The court further rejected the notion that forensic witnesses should be immune from cross examination because the testimony they provide is the result of "neutral, scientific testing." In doing so, it reiterated its conclusion in *Crawford* that it did not matter how reliable the evidence might be. (*Id.* at 2536, quoting *Crawford*, *supra*, 541 U.S. at 61-62.) The court also pointed out that it was not evident that forensic testing "is as neutral or reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation." (*Melendez-Diaz*, 129 S.Ct. at 2536.) Rather, "[a] forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." (*Ibid.*) Moreover, "an analyst's lack of proper training or deficiency in judgment may be disclosed in cross examination." (*Id.* at 2537.)

The *Melendez-Diaz* court thus definitively rejected the idea that a forensic report made to document facts for possible use in a criminal prosecution could be deemed "non-testimonial" because the witness's observations were recorded "near contemporaneously" and/or because the witness could be considered "neutral" or "non-accusatory."[4] The conclusion in *Geier* that such reports were not testimonial has been overruled. Moreover, as discussed below, the fact that the contents and opinions contained in a forensics report are conveyed to jurors through a surrogate expert who *is* subject to cross-examination does not cure the Confrontation Clause violation.

Respondent notes that the United States Supreme Court denied certiorari in *Geier*. (ROBM at 41, fn. 24.) However, the denial of certiorari 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, 67 L.Ed. 361].) 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, 133 L.Ed.2d 545].) In *Geier*, this Court held that if error did occur, it was harmless

[4] In reaching this result, the *Melendez-Diaz* court implicitly overruled the cases, referenced by this court in *Geier*, concluding that forensic laboratory reports are nontestimonial, e.g., *Commonwealth v. Verde* (Mass. 2005) 827 N.E.2d 701; *State v. Forte* (N.C. 2006) 629 S.E.2d 137; *State v. Lackey* (Kan. 2005) 120 P.2d 332; *People v. Durio* (N.Y. Sup. Ct. 2005) 793 N.Y.S.2d 863, 869; *State v. Craig* (Ohio 2006) 853 N.E.2d 621; *People v. Johnson* (2004) 121 Cal.App.4th 1409; *United States v. Feliz* (2d Cir. 2006) 467 F.3d 227; *United States v. Ellis* (7th Cir. 2006) 460 F.3d 920.

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.[5]

C. UNDER *CRAWFORD* AND *MELENDEZ-DIAZ*, THE AUTOPSY REPORT AND ITS CONTENTS WERE TESTIMONIAL HEARSAY.

1. An Autopsy Report Would Not Have Been Admissible At The Founding Absent Confrontation Of Its Author As A Business, Official, Or Medical Record.

The Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." (*Crawford*, *supra*, 541 U.S. at 54; see also *Giles v. California* (2008) __ U.S. __ [128 S.Ct. 2678, 2682, 171 L.Ed.2d 488].) Autopsy reports would have been considered testimonial at the time of the founding.

In *Melendez-Diaz*, in acknowledging the dissent's point that "there are other ways – and in some cases better ways – to challenge or verify the results of a forensic test" (*Melendez-Diaz*, 129 S.Ct. at 2536) than through confrontation, the majority pointedly referred to autopsy reports as an *exception* to the dissent's contention, observing that "forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated." The court concluded that confrontation remains the one constitutional way "to challenge or verify the results" of such forensic tests. (*Melendez-Diaz*, *supra*, 129 S.Ct. at 2536 & fn. 5.) From this, it is plain that the court considers autopsies a form of forensic analysis subject to confrontation.

Respondent has cited to and appellant has found no case suggesting that an autopsy report prepared as part of an ongoing homicide investigation would be admissible absent confrontation of its author when

[5] The high court did grant review, vacate, and remand two cases that had held that the prosecution could introduce one forensic analyst's statement

the Sixth Amendment was adopted, whether under a business record exception, or for the "non-hearsay" purpose of establishing the basis of expert testimony.

Respondent persists, in reliance on *Beeler*, *supra*, in arguing that autopsy reports are non-testimonial because they are admissible under state evidentiary law as business or official records. (ROBM at 18, 28-29.) However, the *Melendez-Diaz* court rejected the contention that anything admissible under a jurisdiction's business records exception was therefore non-testimonial:

> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. [Citation.] But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. (*Melendez-Diaz*, *supra*, 129 S.Ct. at 2538 [citation and footnote omitted].)

In *Palmer v. Hoffman* (1943) 318 U.S. 109 [63 S.Ct. 477, 87 L.Ed. 645], cited in *Melendez-Diaz* on this point, the court wrote that the business records exception was meant to apply to "entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls" *and* that relate to the "management or operation of the business[.]" (*Id.* at 113.) Such records are considered inherently trustworthy, as opposed to records that are created as a "system of recording events or occurrences" that have "little or nothing to do with the management or operation of the business" such as "employees' versions of their accidents." (*Ibid.*) Expanding the rule to incorporate "any regular course of conduct which may have some relationship to business .... opens wide the door to avoidance of cross-examination" because companies

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through the in-court testimony of another. (See *Barba v. California* (2009) 129 S.Ct. 2857; *Crager v. Ohio* (2009) 129 S.Ct. 2856.)

could make recording certain activities not covered under the business records exception a routine event. (*Id.* at 114.)

Although it is the "business" of the coroner (or companies working for the coroner) to conduct autopsies, the purpose for conducting autopsies in suspected homicide cases is for prosecutorial use, rather than as a function of the company's administrative activities. Such reports are precisely the type of out-of-court statement that must be excluded under *Palmer,* because admitting them "opens wide the door to avoidance of cross-examination[.]" (318 U.S. at 114; see also Grimm, Deise, & Grimm, *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions Are Testimonial* (2010) 40 U. Balt. L.F. 155, 181 [concluding that autopsy reports in homicide cases are testimonial under *Melendez-Diaz*].)

In a similar vein, respondent argues that autopsy reports fall under the general rubric of medical records, and are therefore nontestimonial. (ROBM at 19-21.) There is a crucial difference, however, between a medical record created as part of a patient's treatment and a record prepared as part of a police investigation into the circumstances of a suspected homicide. Dr. Bolduc was not treating Pina when he conducted the autopsy; he was conducting a statutorily mandated investigation into the cause and manner of her death as an agent of the San Joaquin County Sheriff-Coroner. (See *People v. Geier*, *supra*, 41 Cal.4th at 605 ["we use the term 'agent' not only to designate law enforcement officers but those in an agency relationship with law enforcement"]; see also *People v. Vargas*, *supra*, 178 Cal.App.4th at 660-661 [finding statements of sexual assault victim during examination performed pursuant to statutorily mandated protocol to be testimonial].)

When the Sixth Amendment was adopted and until relatively recently (that is., until the decision in *Ohio v. Roberts*, *supra*, 448 U.S. 46, permitted statements deemed sufficiently "trustworthy" to evade

confrontation), the contents of an autopsy report would be inadmissible absent the testimony of the pathologist who conducted the autopsy. (See *Crawford, supra*, 541 U.S. at 47, fn. 2, citing *State v. Houser* (1858) 26 Mo. 431, 436; see also *Palmer v. Hoffman, supra*, 318 U.S. at 111-114; *Commonwealth v. Slavski* (Mass. 1923) 140 N.E. 465, 468-469 [autopsy reports prepared by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are inadmissible hearsay]; *Commonwealth v. McCloud* (Pa. 1974) 322 A.2d 653, 656-657 ["evidentiary use, as a business records exception to the hearsay rule, of an autopsy report in proving legal causation is impermissible unless the accused is afforded the opportunity to confront and cross-examine the medical examiner who performed the autopsy"]; *State v. Miller* (Or. Ct. App. 2006) 144 P.3d 1052, 1058-1060 [tracing history of business records exception and concluding that state crime laboratory reports fall outside historical exception].) The rationale of the cases allowing the introduction of autopsy reports as business, official, or medical records was soundly repudiated by the court in *Melendez-Diaz.*

2. Coroners Are Agents Of Law Enforcement.

In *Crawford*, the court particularly noted that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar." (541 U.S. at 56, fn. 7.) Coroners and deputy coroners whose primary duty is to conduct inquests and investigations into violent deaths are peace officers under state law. (Pen. Code, § 830.35, subd. (c).) In San Joaquin County, where appellant was tried, the coroner is also the sheriff.

Government Code section 27491 requires the coroner "to inquire into and determine the circumstances, manner, and cause of all violent,

sudden, or unusual deaths; ...." (See also *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1277.) Government Code section 27491.4, subdivision (a), provides in pertinent part:

> ... The detailed medical findings resulting from an inspection of the body or autopsy by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with medicolegal practice and this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of the death. ...

When there are reasonable grounds to suspect that a death "has been occasioned by the act of another by criminal means, the coroner ... shall immediately notify the law enforcement agency having jurisdiction over the criminal investigation." (Gov. Code, § 27491.1.)

In short, a forensic pathologist conducting an autopsy for the coroner in a case of suspected homicide is part of law enforcement. (*Dixon, supra*, 170 Cal.App.4th at 1277.) Indeed, in *Mar Shee v. Maryland Assurance Corp.* (1922) 190 Cal. 1, 4, this court observed that the primary purpose of coroner's inquest "is to provide a means for the prompt securing of information for the use of those who are charged with the detection and prosecution of crime" At least when, as in this case, there is a suggestion or preliminary finding of a homicide prior to autopsy, the autopsy takes on characteristics of a criminal investigation conducted by a forensic expert investigator working for the prosecution.

3. Although Justice Thomas Holds A Somewhat Narrower View Than Other Members Of The Court As To What Constitutes A "Testimonial Statement," The Conclusion That Appellant's Right To Confrontation Was Violated By Dr. Lawrence's Testimony Conveying The Contents Of Dr. Bolduc's Report Is Compelled By United States Supreme Court Precedent.

Without pointing to *any* evidence that autopsy reports would have been admissible at the founding absent confrontation of the report's author, respondent asserts that *Geier* is still good law because autopsy reports are not "formalized testimonial materials." (ROBM at 41.) The hook for this argument is that Justice Thomas, in his concurring opinion in *Melendez-Diaz*, indicated that he holds a narrower view of what constitutes "testimonial" matter than did the other justices who joined in the decision. (ROBM at 17.)

However, the formality associated with the preparation of autopsy reports, even in the absence of an oath, plainly satisfies even Justice Thomas's interpretation of what constitutes testimonial hearsay. In *Crawford*, the majority, joined by Justice Thomas, observed that certain statements taken in the *absence* of an oath in Raleigh's trial were part of what constituted "a paradigmatic confrontation violation." (*Crawford*, 541 U.S. at 52.) Moreover, there is no suggestion in Justice Thomas's opinions that he considers an oath a necessary precondition to trigger the confrontation guarantee.

Rather, in his concurring and dissenting opinion in *Davis*, while he disagreed with the majority's conclusion that statements in response to informal police questioning in a noncustodial setting constituted testimonial hearsay, Justice Thomas observed that the history of the Confrontation Clause indicates that it was designed to target, *in particular*, the use of ex parte examinations whereby government agents were required to interview the suspect and the accusers and transmit the transcribed results to the judges hearing the case. (*Davis*, *supra*, 547 U.S. at 835-836.) The autopsy

report here – formally memorializing the results of an autopsy *initiated* when police called in the sheriff-coroner, prepared in accordance with a statutory mandate, resulting in formal and official findings, and, where foul play is reasonably suspected, *required* to be turned over to prosecutors – is precisely the sort of ex parte examination the Clause was intended to target. While Thomas may well require "some degree of solemnity" to qualify a statement as "testimonial" (*id.* at 836), his analysis makes it plain that an autopsy report prepared in a homicide case would qualify.

In his concurring opinion in *White v. Illinois*, *supra*, 502 U.S. 346, where he first expressed his view that the court should return to original intent in its Confrontation Clause jurisprudence, Justice Thomas observed that the Clause was aimed against what had been the common English practice of "obtain[ing] 'information by consulting informed persons not called into court.'" (*Id.* at 361.) That is exactly what happened in this case when the prosecution presented Dr. Bolduc's findings and conclusions through Dr. Lawrence.

While the formal affidavits in *Melendez-Diaz* may represent the "paradigmatic case" implicating the "core of the right to confrontation," the court has made it clear that they did not demarcate "its limits." (*Melendez-Diaz*, 129 S.Ct. at 2534.) Moreover, the court found that the certificates at issue were testimonial on an additional ground, because they constituted "'a solemn declaration or affirmation made for the purpose of proving some fact,'" (*ibid.*, quoting *Crawford*, *supra*, 541 U.S. at 51), a formulation Justice Thomas has endorsed. (See, e.g., *Davis*, *supra*, 547 U.S. at 836 [Thomas, J., conc. & dis.].)

Even if there were a plausible argument following *Melendez-Diaz* that an autopsy report prepared in a case of suspected homicide is not testimonial hearsay, there is no doubt that Justice Thomas would find that appellant's right to confrontation was violated by the prosecution's

presentation of a substitute pathologist for the very purpose of shielding the problematic Dr. Bolduc from the scrutiny of cross-examination. Justice Thomas wrote,

> [b]ecause the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process. [] That is, even if the interrogation itself is not formal, the production of evidence by the prosecution would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation, []. In such a case, the Confrontation Clause could fairly be applied to exclude the hearsay statement offered by the prosecution, preventing evasion without simultaneously excluding evidence offered by the prosecution in good faith. (*Davis*, *supra*, 547 U.S. at 839 [Thomas, J., conc. and dis.]; see also *Giles v. California*, *supra*, 128 S.Ct. at 2693 [Thomas, J., conc.].)

It is clear from this passage that Justice Thomas would consider the prosecution's conduct in this case, where the reason the government called Dr. Lawrence was because Dr. Bolduc's career baggage made his appearance as a witness "awkward" for the prosecution to "easily try their cases" (Slip op. at 2-3), to represent the very evil the Framers sought to protect against in enacting the Confrontation Clause.

As the Third District held, the autopsy report in this case, as with the certificates at issue in *Melendez-Diaz*, constitutes a "solemn declaration or affirmation made for the purpose of establishing or proving some fact," namely the "circumstances, manner and cause" of death in cases of suspected homicide. (Slip op. at 17.) The autopsy was performed for the primary purpose of establishing a fact – cause and manner of death – for potential use in later criminal proceedings.

Respondent's argument that autopsy reports are insufficiently formal to constitute testimonial hearsay should be rejected. Under *Melendez-Diaz*, the conclusion that the contents of Dr. Bolduc's autopsy report were "testimonial" is inescapable. Dr. Bolduc conducted the autopsy and prepared the autopsy report after a homicide investigation had already been initiated. (See 8RT 2129.) At least one homicide detective was present at the autopsy. (8RT 2168.) The prosecution used the contents of the report, through Dr. Lawrence's testimony, to establish that the victim died at the hands of another, and to provide the factual underpinning for Dr. Lawrence's opinion that it would have taken at least two minutes to strangle the victim. An autopsy report like this one, prepared for the prosecution to prove an element of crime charged, bears all the characteristics of an ex parte examination and is thus "testimonial" under *Crawford*.

As Dr. Bolduc's report was a testimonial statement, Dr. Bolduc was a "witness" for purposes of the Sixth Amendment. (*Melendez-Diaz*, *supra*, 129 S.Ct. at 2532.) Dr. Bolduc, through the contents of his report, consisting of both "facts" and "opinions", "certainly provided testimony *against* [appellant]" by establishing facts necessary for his conviction" (*Melendez-Diaz*, 129 S.Ct. at 2533) – namely, the physical findings necessary to support Dr. Lawrence's opinion as to the cause and manner of death. (See summary of Dr. Lawrence's testimony, *ante*, at 13-14.) Absent a showing that he was unavailable to testify at trial and that appellant had a prior opportunity to cross-examine him, appellant was entitled to be confronted with Dr. Bolduc at trial. (*Ibid.*)

4. Respondent's Remaining Arguments That The Autopsy Report Was Not "Testimonial" Are Unpersuasive.

The People argue that autopsy reports are "prepared pursuant to statutory mandates without regard to any potential criminal prosecution." (ROBM at 21.) This is not so. Respondent ignores facts inconvenient to its position, for example, that coroners are peace officers (Pen. Code, § 830.35, subd. (c)) required by law to turn over their findings and reports to law enforcement as soon as they reasonably suspect that a death is a homicide (Gov. Code, § 27491.1).

The People's argument that somehow an autopsy is not investigatory because "the pathologist's medical examination is a condition precedent to any determination that criminal activity was involved" (ROBM at 23) is similarly unavailing. Aside from being highly debatable in most cases, including this one where a woman disappeared without explanation under suspicious circumstances and was found a few days later dead and covered up on the rear floorboard of her parked car, and where the police not only called the coroner but were actually present at the autopsy, the argument is like suggesting that a homicide detective conducting a pre-arrest interrogation of a suspect is not involved in law enforcement because the suspect has not yet confessed.

The People point out that autopsies are sometimes conducted in cases where homicide is not suspected, and argues from this that it "would make little sense" for autopsy reports to be nontestimonial when conducted in such circumstances, but testimonial in cases of suspected homicide, "when the methods, protocols, and statutory obligations of the pathologist are identical in both scenarios." (ROBM at 23.)

However, a coroner's pathologist is under no "statutory obligation" to call in law enforcement unless he or she suspects foul play. (Gov. Code, § 27491.1.) Under *Melendez-Diaz*, an autopsy performed in anticipation of

criminal litigation, as in a case of suspected homicide, will be testimonial, while a similar procedure performed without any involvement of law enforcement may not be. (See *Melendez-Diaz,* 129 S.Ct. at 2532; *Martinez v. State* (Mar. 24, 2010) 2010 Tex.App. LEXIS 2124, *15 [that medical examiner may be required to perform autopsies where there is no suspicion of foul play, "does not justify this Court in abdicating its duty to determine whether the primary purpose of the autopsy report was to establish or prove past events potentially relevant to later criminal prosecution"].)

Moreover, the distinction makes perfect sense when one considers the purpose and history of the Confrontation Clause, which is the prevention of a particular kind of prosecutorial abuse: criminal convictions obtained by ex parte "testimony" by witnesses not called into court. A pathologist working for the sheriff, with a homicide detective at his side as he performs an autopsy in a case of suspected homicide, may have pressures and incentives to color his findings to please the police and his employer that are simply lacking where the pathologist is conducting an autopsy under circumstances where there is no suspicion of foul play. (See *Melendez-Diaz*, 129 S.Ct. at 2536.)

5. A Number Of Courts Have Concluded That Autopsy Reports Prepared In Cases Of Suspected Homicide Are Testimonial.

Following *Melendez-Diaz*, a number of appellate courts have found autopsy reports prepared in cases of suspected homicide to be testimonial statements. For example, in *Wood v. State* (Tex.App. 2009) 299 S.W.3d 200, 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 210; see also *Martinez v. State*, *supra*, 2010 Tex.App. LEXIS 2124, *15 [agreeing with *Wood*].)

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* (2009) 363 N.C. 438, 452 [681 S.E.2d 293]; see also *State v. Johnson* (Minn.App. 2008) 756 N.W.2d 883, 890 [pre-*Melendez-Diaz* case holding that autopsy report prepared during pendency of homicide investigation was testimonial]; *State v. Bell* (Mo. App. 2009) 274 S.W.3d 592, 595 [same].)

D. THE CONFRONTATION CLAUSE UNQUESTIONABLY PROHIBITS PROSECUTORS FROM LAUNDERING THE TESTIMONIAL HEARSAY OF A QUESTIONABLE FORENSIC WITNESS BY PRESENTING IT THROUGH A MORE PRESENTABLE SUPERVISOR.

1. Forensic Witnesses Are Not Fungible.

The People argue that the right to confrontation was satisfied because Dr. Lawrence testified and was subject to cross-examination. (ROBM at 27.) Thus, respondent asserts,

> There is no logical reason why the confrontation clause is not satisfied ... 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. (ROBM at 34.)

Dr. Lawrence could not possibly testify to the "skill and judgment" exercised by Dr. Bolduc in performing the autopsy in this case because, as he said, "I wasn't there." (7RT 1850.) Obviously, he could not testify about whether Dr. Bolduc deviated from standard procedures or about how carefully or competently he performed the autopsy and reported his observations. (See *State v. Brewington* (N.C. App. 2010) 693 S.E.2d 182 [2010 N.C. App. LEXIS 799, *21-22] [substitute forensic analyst's testimony violated Confrontation Clause where testifying expert had no part in performing test or conducting independent analysis of the substance tested].)

Performing an autopsy is far from a simple act. In conducting and in reporting the autopsy, Dr. Bolduc was required to interpret what he saw and to exercise professional judgment. (See *Melendez-Diaz*, 129 S.Ct. at 2537-2538 [methodology used in generating affidavits "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination"]; Nat. Assn. of Medical Examiners, Forensic Autopsy Performance Stds., American J. of Forensic Medicine & Pathology (Sept. 2006) vol. 27, issue 3, stds. B4, B5, pp. 200-225 [pathologist performing autopsy exercises discretion to determine need for additional dissection and laboratory tests, and is responsible for formulating all interpretations and opinions as well as obtaining information necessary to do so]).)

The record concerning Dr. Bolduc's "baggage" in this case certainly suggests that confrontation could have been particularly illuminating with respect to the degree of credence his findings merited. Regrettably, some forensic pathologists falsify results; some are incompetent. (E.g., Hanley, *A Noted Medical Examiner Goes To Trial on Evidence-Tampering Charges*, N.Y. Times (Sept. 9, 1997), at http://www.nytimes.com/1997/09/09/nyregion/a-noted-medical-examiner-

goes-to-trial-on-evidence-tampering-charges.html?scp=26&sq=forensic%20pathologist&st=cse; Brown, *Pathologist Accused of Falsifying Autopsies, Botching Trial Evidence Forensics: His recent indictment on charges of falsifying reports and having sloppy habits has attorneys scrambling to pinpoint any wrongful convictions*, L.A. Times (Apr. 12, 1992), at http://articles.latimes.com/1992-04-12/news/mn-286_1_wrongful-convictions.) As one New York court has observed, "we must beware of putting too much trust in the man behind the curtain. Doing so threatens to undermine one of the fundamental trial protections defendants have enjoyed since the nation's founding." (*People v. Carreira* (N.Y. 2010) 893 N.Y.S.2d 844, 851.)

Under the Confrontation Clause, appellant was entitled to have *the jury*, not Dr. Lawrence, evaluate Dr. Bolduc's "honesty, proficiency, and methodology" (*Melendez Diaz*, 129 S.Ct. 2538) through the crucible of cross examination. The prosecution clearly wanted jurors to believe that Dr. Bolduc's observations were complete, accurate, and reliable. Otherwise, Dr. Lawrence's opinion was basically worthless. As a result of the prosecution's election to use Dr. Lawrence to convey to jurors the findings of the more problematic Dr. Bolduc, appellant was denied the opportunity to meaningfully test Dr. Bolduc's statements through confrontation and cross-examination.

Cross-examination of Dr. Lawrence was not an adequate substitute for questioning Dr. Bolduc, the author of the testimonial statements. Dr. Lawrence's testimony was no substitute for a jury's first-hand observations of the pathologist who actually reported the *findings* upon which Dr. Lawrence relied. As the court has observed, "[c]onfrontation is one means of assuring accurate forensic analysis." (*Melendez-Diaz*, *supra*, 129 S.Ct. at 2536.) It appears unlikely that Dr. Bolduc, whose "baggage" included

falsifying his resume, would become *more* careful about accurately and competently reporting his findings knowing that he would not have to defend his work in a court of law.

While respondent would have this court hold that forensic scientists and their testimony are fungible for purposes of the Confrontation Clause, this case provides what could be a textbook example of how prosecutors can use a surrogate pathologist to rely upon and relay to jurors facts gathered by a non-testifying pathologist precisely in order to prevent scrutiny of the actual pathologist's credibility and competence in the manner guaranteed by the Sixth Amendment. The Confrontation Clause surely prohibits the prosecution from "us[ing] out-of-court statements as a means of circumventing the literal right of confrontation." (*Davis*, *supra*, 547 U.S. at 838 [Thomas, J., concurring and dissenting].)

2. When The Sixth Amendment Was Adopted, An Expert Witness Would Not Have Been Permitted To Relay The Contents Of An Autopsy Report To Jurors To Explain The Basis Of Opinion Testimony.

Following *Crawford*, the first step in evaluating the extent to which an expert may properly rely upon and convey the substance of testimonial hearsay consistent with the Confrontation Clause is to consider whether common law courts at the time the Sixth Amendment was adopted would have understood such evidence to be admissible absent confrontation of the statement's author. (See *Crawford*, *supra*, 541 U.S. at 54.) The People's position should be rejected because they fail to demonstrate that an expert would have been permitted to relay testimonial hearsay to jurors in support of an expert opinion when the Confrontation Clause was adopted.

In fact, experts were *not* permitted to convey such hearsay to jurors when the Sixth Amendment was adopted. "A common law court in 1791 would not have admitted testimonial hearsay into evidence without a

showing of unavailability and cross-examination and similarly would not have allowed an expert to base an opinion on testimonial hearsay." (Note, Oliver, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington* (2004) 55 Hastings L.J. 1539, 1540 ["Oliver"].) At common law, an expert witness "could testify only if necessary to provide information that was beyond the ken of the average juror, could testify only in response to a hypothetical question, could not assume anything that was not already in evidence, and could not offer an opinion on the ultimate issue before the jury." (*Id.* at 1548.)

3. The United States Supreme Court Has Made It Clear That Surrogate Witnesses Do Not Satisfy The Requirements Of The Confrontation Clause.

The Sixth Amendment guarantees a defendant the right "to be confronted with *the* witnesses against him." (U.S. Const., 6th Amend. [emphasis added].) The definite article in the constitutional provision is not surplusage; it commands that if the prosecution introduces testimonial evidence against a defendant, it must give the defendant the opportunity to be confronted with the person who actually authored the statement. (*Crawford*, 541 U.S. at 68.) It is irrelevant to the Confrontation Clause analysis that the contents of Dr. Bolduc's report were conveyed to jurors through the testimony of Dr. Lawrence, rather than through the admission into evidence of the autopsy report itself, and irrelevant that the statements were admissible, under state law, to explain or support an expert opinion.

Under *Crawford* and its progeny, it is simply not enough that the defendant gets to cross-examine *someone*. In response to the suggestion that the Confrontation Clause guaranteed only the right to confront those witnesses who actually testify at trial, the *Crawford* court wrote, "we once again reject the view that the Confrontation Clause applies of its own force

only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'" (*Crawford*, *supra*, 541 U.S. at 50-51, quoting 3 Wigmore, § 1397, at 101.)

Crawford also made it clear that it does not matter that state law permits a testifying witness to relay to the jury another person's testimonial statement: "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." (*Id.* at 51.) Moreover, "ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." (*Ibid.*)

The court repeated the point in *Davis*, observing:

> we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it. (*Davis*, *supra*, 547 U.S. at 826.)

In *Melendez-Diaz*, the court again indicated that substitute cross-examination is not constitutionally adequate. It specifically observed that, where the results of a forensic analysis are introduced in a criminal case, the prosecution's failure to call the witness *who performed the analysis* prevents the defense from exploring the possibility that the analyst lacked proper training or had poor judgment, or from testing the analyst's "honesty, proficiency, and methodology." (*Melendez-Diaz*, *supra*, 129 S.Ct. at 2538.) The dissent in *Melendez-Diaz* also recognized that the court in *Davis* had made it clear "that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second." (*Melendez-Diaz*, 129 S.Ct. at 2546 [Kennedy, J., dissenting].)

As with a policeman reading the statement of an absent declarant, it is inconceivable that the Framers contemplated having the protections of the Confrontation Clause evaded by allowing the prosecution to present the observations and conclusions of a non-testifying pathologist through the testimony of his more jury-friendly supervisor. "The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits" (*Melendez-Diaz*, *supra*, 129 S.Ct. at 2542), and the court has made it eminently clear that the analysis is the same whether the document itself is introduced (*Melendez-Diaz*) or the statement is conveyed through another witness's testimony (*Davis*).

As the appellate court astutely observed, the Confrontation Clause trumps evidentiary rules where testimonial statements are concerned. (Slip op. at 23, fn. 14.) It follows that an expert's testimony conveying autopsy findings that are testimonial and introduced for their truth are admissible only when the pathologist who performed the autopsy and wrote the report is subject to confrontation.

4. It Does Not Matter That The Contents Of Dr. Bolduc's Report Were Ostensibly Admitted For A Non-Hearsay Purpose.

Testimony concerning the contents of Dr. Bolduc's autopsy report is not exempt from *Crawford's* ban on the admissibility of testimonial hearsay because Dr. Bolduc's statements were ostensibly used for a non-hearsay purpose. Lawrence conveyed in detail Dr. Bolduc's reported findings regarding the injuries to Pina, and he relied upon the truth of those findings in reaching his own opinion. The record contains no foundation for Dr. Lawrence's opinions *other* than Dr. Bolduc's findings. For example, Dr. Lawrence relied explicitly on Dr. Bolduc's description of the injuries to the victim's neck muscles, which were not apparent in the autopsy photos. (7RT 1848-1850.) There is no doubt that the jury considered Dr. Bolduc's

findings for the truth, as it was expressly instructed to determine whether the "information on which [Dr. Lawrence] relied was true and accurate." (1CT 272; 11RT 2901.)

"[A]s a practical matter, there are times when the expert's opinion has essentially no probative value unless the jury assumes the truth of some or all" of the testimonial hearsay supporting it. (*Vann v. State* (Alas.App. 2010) 229 P.3d 197, 209.) Under the circumstances present in this case, it would be impossible for the jury to credit Dr. Lawrence's opinion without accepting that the testimonial statements of Dr. Bolduc, the percipient witness to the state of the body at autopsy, were in fact true. In such a case, "the factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around the Constitutional prohibition." (Kaye et al., The New Wigmore: Expert Evidence (Supp 2005) § 3.7, at 19.)

California courts have recognized that "any expert's opinion is only as good as the truthfulness of the information on which it is based." (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 618.) If an opinion

> is only as good as the facts on which it is based, and if those facts consist of testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the defendant is expected to "demonstrate that the underlying information was incorrect or unreliable."[] According to *Crawford*, the only constitutionally sanctioned manner in which the reliability of testimonial hearsay may be tested is by cross-examination.[] (Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony* (2008) 96 Georgetown L.J. 827, 847-848 [footnotes and citations omitted].)

It follows that courts "must prohibit an expert from testifying to an opinion in those cases where the opinion relies upon testimonial hearsay to such an

extent that it substantially transmits to the jury the content of the hearsay, unless the defendant has an opportunity to test the hearsay by cross-examination." (Oliver, *supra*, 55 Hastings L.J. at 1540; see also Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington (2007) 15 J.L. & Pol'y 791.)

Recent appellate decisions applying the analysis compelled under *Crawford* and *Melendez-Diaz* have held that expert testimony based on an autopsy report is inadmissible absent confrontation of the pathologist who performed the autopsy. In *Wood v. State*, *supra*, 299 S.W.3d 200, the testifying expert testified not only to his own opinion, but also disclosed to the jury the testimonial statements in the autopsy report upon which those 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 213; see also *Martinez v. State*, *supra*, 2010 Tex.App. LEXIS 2124, at *19 [same]; *State v. Bell* (Mo.App. 2009) 274 S.W.3d 592, 595 [autopsy report or testimony concerning autopsy report not admissible absent confrontation of pathologist who prepared report] *State v. Davidson* (Mo.App. 2007) 242 S.W.3d 409, 417 [same].)

The cases cited by respondent (see ROBM 29) are not persuasive authority for the admission of Dr. Lawrence's testimony. On March 30, 2010, the Washington Supreme Court granted review in *State v. Lui* (Wash.App. 2009) 153 Wn.App. 304 [221 P.3d 948], the only post-*Melendez-Diaz* case cited by respondent holding that there was no Confrontation Clause violation when a pathologist testified about an

autopsy report prepared by someone else.[6] (*State v. Lui* (Wash. 2010) 168 Wn.2d 1018 [228 P.3d 17]; see ROBM at 29-30.)

United States v. Johnson (4th Cir. 2009) 587 F.3d 625 was a drug conspiracy case in which an expert testified to the meaning of terms used in the recorded conversations between members of the conspiracy. His opinion was based, in part, on testimonial hearsay. (*Id.* at 634.) However, the expert did not relay the *contents* of the testimonial statements to the jury. (*Id.* at 635-636.) *Johnson* thus does not support respondent's contention that an expert may convey testimonial hearsay to jurors without violating the Clause.

In *Haywood v. State* (Ga.App. 2009) 689 S.E.2d 82, a forensic chemist testified that the substance seized from the defendant was cocaine. The chemist had prepared the samples for the tests about which she testified, but a lab technician had conducted one actual test and "sequenced" the machine used for another test. The chemist testified that she had reviewed the testing done by the technician to ensure that "everything was working properly" and "everything checked out." (689 S.E.2d at 85.) Holding the testimony admissible under state evidentiary rules, the appellate court found that the defendant's *Crawford* claim was waived. (*Id.* at 86.)

While the court did state, in dicta, that the confrontation argument was foreclosed by other cases, the rationale of the cited cases cannot be

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[6] An Illinois appellate court recently held that admission of an autopsy report did not implicate the defendant's confrontation rights. This conclusion was based on a pre-*Melendez-Diaz* holding that "autopsy reports are business records and do not implicate *Crawford*." (*People v. Cortez* (Jun. 22, 2010) 2010 Ill.App. LEXIS 625, *13.) As explained in section I.C.1, *ante*, this analysis is untenable. The *Cortez* court also held in the alternative that admission of the report was harmless beyond a reasonable doubt because the cause and manner of death were undisputed; the only issue at trial was the identity of the shooter. (*Id.* at *15.)

squared with the analysis mandated by *Crawford* and *Melendez-Diaz*. (See *Reddick v. State* (Ga. App. 2009) 679 S.E.2d 380, 382 [right to confrontation not violated by substitute chemist's testimony because she had supervised testing chemist and herself reviewed test results]; *Rector v. State* (Ga. 2009) 681 S.E.2d 157, 160 [relying on state evidentiary rules to allow testimony of substitute toxicologist]; *Bradberry v. State* (Ga.App. 2009) 678 S.E.2d 131, 133-134 [no confrontation clause violation because no "conclusions" of absent witnesses were submitted to the jury]; *Dunn v. State* (Ga.App. 2008) 665 S.E.2d 377, 379-380 [same].) Also, it is not clear from the *Haywood* opinion whether the testifying expert actually conveyed any testimonial hearsay to jurors in the course of explaining her "independent" opinion.

In *People v. Johnson* (Ill.App.2009) 915 N.E.2d 845, an Illinois appellate court ruled admissible DNA expert's testimony about a DNA profile created by others, based on the dubious rationale that the report containing the data upon which the expert's opinion was based was not admitted for its truth, but rather to explain the expert's opinion. (*Id.* at 1034-1035.) In reaching this result, the court relied on *Geier* (*id.* at 1035-1036), which, as explained above, is no longer good law. More important, the *Johnson* court made no effort to determine whether testimony at issue would have been admissible absent confrontation when the Sixth Amendment was adopted, thus entirely missing the crucial first step in any post-*Crawford* Confrontation Clause analysis.

***

In sum, the Third District 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, and that substituted cross-examination was not constitutionally adequate. (Slip op. at 23-24.)

II. THE PEOPLE'S HARMLESS ERROR ARGUMENT IS NOT PROPERLY BEFORE THIS COURT.

The People argue that any error in allowing Dr. Lawrence's testimony was harmless. (ROBM at 42 et seq.) This Court should not reach the issue, as it was not "fairly included" in the issues on which the court granted review.

California Rules of Court, rule 8.516(a)(1) provides: "On or after ordering review, the Supreme Court may specify the issues to be briefed and argued. *Unless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in them.*" (Emphasis added.) Here, in its December 2, 2009 order, the court specified the issues to be briefed. (See page 1, *ante*.)

While the parties may brief any issue "fairly included" in the issues on which this court granted review (Cal. Rules of Court, rule 8.516(a)(1); see *DeTomaso v. Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, 520, fn. 2), the harmless error issue is not "fairly included" in the issues specified by this court. This court should therefore decline to address it.

III. THE APPELLATE COURT CORRECTLY HELD THAT THE STATE CANNOT SHOW THAT THE VIOLATION WAS HARMLESS BEYOND A REASONABLE DOUBT.

In the event this court chooses to address the issue, the admission of evidence in violation of a defendant's right to confrontation requires reversal unless the prosecution can demonstrate that it was harmless beyond a reasonable doubt. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [119 S.Ct. 1887, 144 L.Ed.2d 117]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) The Third District correctly found that the prosecution cannot carry that burden in this case.

The only factual issue concerning Pina's death concerned how long she was strangled before she died. (See 1CT 189.) Appellant in his confession said he had not strangled Pina "very long." (2CT 538.) At trial, he testified that he did not know how long he had strangled her but "[i]t didn't seem long." (9RT 2559.)

Respondent baldly asserts that "the jury found Dungo's uncorroborated testimony unpersuasive based on his numerous admissions of untruthfulness, and omissions in his earlier statements" (ROBM at 44), but cites to nothing in the record that *proves* this, much less *proves it beyond a reasonable doubt.* The prosecution was required to prove beyond a reasonable doubt that appellant did *not* act in the heat of passion when he strangled Pina. Establishing that the victim was strangled for a lengthy period of time thus was perhaps the most vital part of the prosecution's case.

As the Third District correctly observed, "[t]he prosecution's argument that defendant was guilty of intentional murder, and not voluntary manslaughter, was based in large part on the theory that during the time it took for defendant to strangle Pina, what may have begun as passion shaded into intent." (Slip op. at 26.) Furthermore, "[t]he *only* evidence offered by the prosecution in support of [its] theory was Dr. Lawrence's

testimony that Pina was strangled for at least two minutes before she died, which he based on Dr. Bolduc's report." (Slip op. at 26. [emphasis added]) Jurors asked for and received readback of Dr. Lawrence's testimony (11RT 2933, 2939 et seq.), suggesting that it was important to their decision.

The record fully supports the Third District's finding that the prosecutor relied on Dr. Lawrence's testimony in arguing that appellant had the mental state required for murder, not voluntary manslaughter. For example, she argued:

> And importantly you heard from Dr. Lawrence, who ... told us about the cause of death. ... It took several minutes of applied pressure for her to die. ...
>
> First, he said it took her more than two minutes because her body showed signs of a lack of oxygen. *Remember, he's basing his opinions just based on the medical evidence that he's seeing from the pictures and the autopsy report.*
>
> He said there was evidence of neck compression. She bit her tongue, which he said indicates a struggle. ...
>
> ... Remember, she didn't have a broken larynx, didn't have a broken hyoid, that means he had to squeeze and apply pressure longer, because there was no broken bone helping him to kill her. He had to squeeze longer.
>
> Dr. Lawrence said it takes at least two minutes to strangle someone. That was two minutes. ... Don't you think that in that two-minute period of time, this defendant, if he didn't form it before, sometime within those two minutes, while Lucinda is passing out of consciousness and he is continuing, continuing to hold pressure to her neck, don't you think that he made the decision to kill Lucinda? (10RT 2749-2751 [emphasis added].)

The prosecutor returned to the theme in her rebuttal, arguing that the offense was not committed in the heat of passion:

> ... This wasn't a sudden heat of passion. He did not act rashly and with obscured judgment and emotion. [¶]

> Remember that [two-minute] demonstration I did where I sat here for two minutes, just two. Remember how long that seemed? That's a long time to have your hands around someone's neck while they're struggling. He had to hold onto her, and not just for two minutes, it could have been longer, that's the minimum for an average person. Remember, Dr. Lawrence said three minutes given these injuries. ...
>
> So the two minutes, three-minute minimum that Dr. Lawrence gave us should be considered. ... [¶] The defendant had to make the conscious decision to hold onto her neck, to keep his grip while she's struggling and to overcome her resistance. He had time to reflect and to let go. (11RT 2863-2864.)

The prosecutor's reliance on Dr. Lawrence's testimony and opinion, based on the absent Dr. Bolduc's ex parte autopsy report, in itself shows that the error cannot be deemed harmless. Without the improperly admitted evidence, jurors would have little basis for concluding that the prosecution had met its burden of proving beyond a reasonable doubt that appellant did not act in the heat of passion.

However, there is more. There is the testimony by Dr. Lawrence at the pretrial hearing establishing that the defense had good reason to question Dr. Bolduc's honesty *and* competence – his firing and "under a cloud" resignation, his falsified resume, his questioned conclusions in a number of cases. On this record, it is impossible for the prosecution to carry its burden of establishing, beyond a reasonable doubt, that the violation of appellant's right to confront Dr. Bolduc, and to explore his "honesty, proficiency, and methodology" (*Melendez-Diaz, supra,* 129 S.Ct. at 2538) through the crucible of cross-examination, did not affect the verdict. Indeed, Dr. Lawrence indicated that the prosecution *chose* not to present Dr. Bolduc as a witness precisely because putting Dr. Bolduc on the witness stand would make it "awkward" to try the case (5RT 1501), i.e.,

they feared that Dr. Bolduc's "baggage" was such that putting him on the stand *would* affect the verdict.

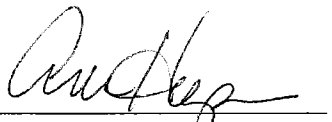
There is no support in the record for the argument that jurors would have rejected appellant's testimony as to heat of passion had appellant been able to confront his accuser, Dr. Bolduc. The Third District correctly found that the error cannot be shown to be harmless beyond a reasonable doubt.

CONCLUSION

For the reasons discussed, this court should affirm the judgment of the Court of Appeal.

Dated: July 1, 2010

Respectfully submitted,



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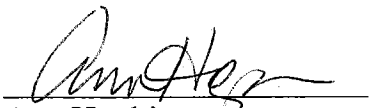
CERTIFICATE PURSUANT TO CRC RULE 8.504(D)(1)

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 13,850 words, excluding the tables, the quotation of issues required by rule 8.520(b)(2), 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.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Oakland, California, on July 1, 2010.



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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 APPELLANT'S ANSWER BRIEF ON THE MERITS 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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I declare under penalty of perjury the foregoing is true and correct. Executed this 1st day of July, 2010, at Oakland, California.

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