In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **REYNALDO SANTOS DUNGO,** **Defendant and Appellant.**	Case No. S176886

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The United States Supreme Court's opinion in *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527 (*Melendez-Diaz*), a case that did not even involve expert witness testimony, should not be unjustifiably inflated into a vehicle for effectively precluding a wide range of expert testimony in criminal trials. Expert witnesses routinely rely upon another expert's report when the original expert has died, retired, or is too ill to testify, or where the testimony of a chain of subsidiary experts whose statements are ultimately relied upon by the trial witness is impractical. Examples exist in virtually every discipline of forensic science and forensic psychology.[1]

Specifically, *Melendez-Diaz* should not be read to bar the testimony of forensic pathologists, medical doctors with four to five years of additional specialty training whose primary responsibility is to conduct an independent inquiry into the mechanism and manner of death (see Govt. Code, § 27491.4), when the original pathologist is unavailable or deceased. Doing so would create a de facto statute of limitations for murder.

To reach the conclusion advocated by defendant/appellant Dungo, namely, that the jury should have heard nothing about Dr. Bolduc's observations as recorded in his autopsy report, this Court would have to make two separate holdings. First, the Court would have to hold that an autopsy report prepared by a physician in a nonadversarial and non-law enforcement context, for primary purposes extending well beyond production of evidence for later use in court, is "testimonial" evidence as contemplated in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). Second, the Court would have to hold that Evidence Code section 801,

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[1] For a comprehensive list of forensic science disciplines, see the FBI's *Handbook of Forensic Services* (U.S. Dept. of Justice 2007) <www.fbi.gov/hq/lab/handbook/forensics.pdf>.

subdivision (b), violates constitutional protections when an expert, in open court and subject to cross-examination, renders an independent opinion based in part upon another expert's work. Both holdings would be necessary to affirm the court of appeal; only one would still require reversal. Dungo's arguments in support of both theories, however, lack merit.

In accord with statutory authority and case law from jurisdictions nationally, an autopsy report is a routine medical report prepared in a nonadversarial and non-law enforcement context for primary purposes extending well beyond production of evidence for later use in court, and as such is not testimonial in nature.

Further, Evidence Code section 801, subdivision (b), continues to permit expert witnesses to rely on otherwise inadmissible statements in forming an independent expert opinion. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.) In the wake of *Melendez-Diaz*, a number of state supreme courts have held that the confrontation clause is satisfied and the adversarial process respected when a defendant has the opportunity to test and challenge an independent opinion rendered by a medical examiner, even when it is based in part upon observations and findings made by another medical examiner and memorialized in an autopsy report. (*State v. Snellings* (2010) 588 Ariz.Adv.Rep. 20 [2010 Ariz. Lexis 38, *9-*11]; *State v. Mitchell* (2010) 2010 ME 73 [2010 Me. Lexis 76, **24-**29]; cf. *State v. Dilboy* (2010) 160 N.H. 135, 150 [same theory applied to toxicology results]; *People v. Williams* (2010) 2010 Ill. Lexis 971, *35-*38 [same theory applied to DNA test results].)

This does not mean, and respondent does not argue, that the Constitution would permit an expert to simply act as a conduit for another expert's opinion to be received into evidence without challenge.

ARGUMENT

I. AUTOPSY REPORTS ARE NONTESTIMONIAL BUSINESS RECORDS

Dungo's assertion that the contents of autopsy reports constitute testimonial hearsay (Appellant's Answer Brief on the Merits (AABM) at 23-34) is incorrect. The certificates at issue in *Melendez-Diaz* were testimonial because their "*sole* purpose" was to provide evidence of criminal activity. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532 (emphasis added).) A purpose-based analysis, however, continues to permit reference to information from autopsy reports prepared by non-testifying pathologists.

A. Autopsy Reports Are Nontestimonial Because They Are Prepared For Public Health And Medical Reasons Other Than Their Law Enforcement Applications

As respondent detailed in its opening brief (Respondent's Opening Brief on the Merits (ROBM) at 21-26), autopsy reports are prepared for specific medical purposes, set forth by state law, that exist independently of any law enforcement accusatory function. In a case involving the Medical Examiner-Coroner's Department of the County of Los Angeles, for example, the court noted that "[a]ccording to Health and Safety Code sections 10250-10252 and Government Code sections 27460-27531, the primary mission of the [Medical Examiner-Coroner's] Department is to determine the circumstances, manner, and causes of all deaths within its jurisdiction. The Department was required to perform autopsies in certain cases and to deliver death certificates as soon as possible after postmortem examinations." (*Noguchi v. Civil Service Commission* (1986) 187 Cal.App.3d 1521, 1529; see also *People v. Roehler* (1985) 167 Cal.App.3d

353, 373 [signing death certificates is a "primary responsibility" of county medical examiners].)

Accordingly, the fundamental reason an autopsy is generated is to medically "develop[] accurate and adequate information about the death of each and every human being, whenever possible." (*People v. Roehler*, *supra*, 167 Cal.App.3d at p. 374.) This purpose far exceeds the much narrower and incidental function of detecting evidence of a crime. Even the secondary reasons for collecting data at autopsies similarly do not relate exclusively to the criminal justice system, but rather, "range from beliefs about the fundamental dignity of man to such practical concerns as control of disease, the keeping of statistics, and of course, the detection of negligent or intentional wrongdoing. It can be said that the safety of all members of society depends upon orderly and open procedures relative to death." (*Ibid.*) As another court observed, "'a medical examiner, although often called a forensic expert, bears more similarity to a treating physician than he does to one who is merely rendering an opinion for use in the trial of a case.'" (*Manocchio v. Moran* (1st Cir. 1990) 919 F.2d 770, 777, quoting *State v. Manocchio* (R.I. 1985) 497 A.2d 1, 7.)

In light of the broad medical and social function of autopsies, and the generation of a report to document objective medical findings (see Govt. Code, § 27491.4, subd. (a), an autopsy report is a "quintessential business record" and nontestimonial in nature. (*Rollins v. State* (Md.Ct.App. 2005) 866 A.2d 926, 953.) *Melendez-Diaz* stated that "[d]ocuments 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.) Unlike the certificates described by the *Melendez-Diaz* Court as being created and received into evidence for the singular purpose of proving the elements of the charged

offense, autopsy reports are created for the "administration of [the medical examiner's] affairs." (*Id.* at p. 2539.) Those affairs, i.e., to develop and record accurate information about human deaths, are not primarily concerned with creating evidence for use at trial. (See *United States v. Feliz* (2nd Cir. 2005) 467 F.3d 227, 237 [autopsy reports are nontestimonial business records]; *People v. Cortez* (2010) 931 N.E.2d 751 [same].)

Dungo's argument to the contrary rests upon the fallacious premise that "the purpose for conducting autopsies in suspected homicide cases is for prosecutorial use, rather than as a function of the company's administrative activities." (AABM at 24-25.) After all, an autopsy to determine the cause of death must occur before and as a condition precedent to any determination that the cause of death was homicide. (*People v. Leach* (Ill.Ct.App. 2009) 908 N.E.2d 120, 130.) Thus, the autopsy occurs before, independent of, and regardless of, any criminal prosecution.

B. Medical Examiners Are Not Agents of Law Enforcement

Moreover, Dungo is mistaken when he labels pathologists "peace officers" "whose primary duty is to conduct inquests and investigations into violent deaths." (AABM at 26.) As discussed in respondent's opening brief and above, California statutory and decisional authority puts to rest Dungo's notion about the primary function of medical examiners. In addition, the court in *Riverside Sheriffs' Association v. Board of Administration* (2010) 184 Cal.App.4th 1 clarified that "[d]eputy coroners conduct investigations into the causes of death, as opposed to investigating crimes," and most such investigations "do not involve criminal conduct." (*Id.* at pp. 6-7.) The "principal duties [of coroners and deputy coroners]," held the court, "do not clearly fall within the scope of active law

enforcement. While . . . deputy coroners are sometimes exposed to hazardous conditions . . . their primary function is to investigate causes of death in unusual (both criminal and noncriminal) cases." (*Id.* at p. 11.) A New York appellate court found similarly:

> The Medical Examiner's role is "to provide an impartial determination of the cause of death" [citation]. There is no authority for the Medical Examiner to gather evidence with an eye toward prosecuting a perpetrator [citation]. Nor is the purpose of the Medical Examiner's investigation to determine petitioner's guilt or innocence of the crime charged in the felony complaint [citation]. The Medical Examiner's investigation is not an exercise of any law enforcement power and is not a part of a criminal proceeding.

(*Scheufler v. Bruno* (N.Y.Sup.Ct.App.Div. 1999) 250 A.D.2d 268, 271.)

In fact, this Court and other reviewing courts commonly refer to a pathologist as the "autopsy surgeon" – a title entirely appropriate to his or her medical function and far removed from the image of the criminal investigator Dungo tries to convey. (See, e.g., *People v. Mills* (2010) 48 Cal.4th 158, 192; *People v. Doolin* (2009) 45 Cal.4th 390, 402.) Dungo's attempt to shoehorn medical examiners into the role of law enforcement investigators (AABM at 26-27) is belied by their actual medical function, their statutory medical responsibilities, and their accepted medical label.

C. There Is No Historical Basis To Assume That Autopsy Reports Are Testimonial Documents

At two points in his answering brief on the merits, Dungo posits that autopsy reports have always been considered formal testimonial material subject to Sixth Amendment confrontation. (AABM at 28-29, 37-38.) Dungo references the trial of Sir Walter Raleigh as discussed in *Crawford* (AABM at 28), and cites a law student note making the unsubstantiated assertion that an expert testifying in 1791 would not have been permitted to

rely on testimonial hearsay in forming an opinion (AABM at 37-38.) Dungo misses the historical point.

Crawford's historical rationale involved the confrontation clause protecting an accused from testimonial statements made to and relayed by justices of the peace or law enforcement; in other words, the prosecution. (*Crawford, supra*, 541 U.S. at p. 53 ["The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace"], p. 56, fn. 7 ["Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse"].) This historical paradigm, however, does not include concern about medical examiners who, as discussed above and in respondent's opening brief, are physicians whose public health mandates eclipse any impact their work may have on law enforcement efforts. (See Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement* (2008) 96 Cal. L.Rev. 1093, 1123-1126 (hereafter *Autopsy Reports*).)[2]

[2] In addition, there is evidence that "[f]raming-era authorities did not articulate a general rule regarding the admissibility of depositions of unavailable witnesses." (Davies, *Symposium: Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: What Did the Framers Know, and When did They Know It? Fictional Originalism in Crawford v. Washington* (2005) 71 Brooklyn L.Rev. 105, 107; Davies *Revisiting the Fictional Orginalism in Crawford's Cross-Examination Rule": A Reply to Mr. Kry* (2005) 72 Brooklyn L.Rev. 557, 564 ["framing era authorities simply indicated that the written record of a sworn Marian examination was admissible if the witness had become genuinely unavailable prior to trial . . . "].)

II. THE CONFRONTATION CLAUSE DOES NOT PRECLUDE AN EXPERT OPINION THAT RELIES, IN PART, UPON ANOTHER EXPERT'S OBSERVATIONS

Dungo argues in addition that expert witnesses are not "fungible," such that their out-of-court statements can be "laundered" through the testifying expert. (AABM at 34-37.) His choice of language may have been inspired by the dissent in *People v. Szeto* (1981) 29 Cal.3d 20, which stated that, "The prosecutor should not be permitted to launder inadmissible hearsay into admissible evidence . . . by the simple expedient of passing it through the conduit of purportedly 'expert' opinion." (*Id.* at p. 40 (dis. opn. of Bird, C.J.).) This view was echoed by Justice Scalia in *Crawford*, who observed that the Sixth Amendment is not satisfied by the mere opportunity "to confront those who read" an out-of-court statement into the record. (*Crawford v. Washington*, *supra*, 541 U.S. 36, 51.) Dungo's application of this reasoning, however, rests on the false premise that Dr. Lawrence did not testify as a true expert, but rather was a mere "conduit" for—or a "reader" of—observations and conclusions recorded in Dr. Bolduc's autopsy report. This was not the case.

A. Dr. Lawrence, Not Dr. Bolduc, Provided the Probative Expert Opinion in This Case

As a factual matter, Dr. Lawrence was not a "substitute" (AABM at 36) or a "surrogate" (AABM at 38) for Dr. Bolduc, and Dungo's rhetoric cannot create that role for Dr. Lawrence retroactively. Only Dr. Lawrence's interpretation skills and professional judgment were at issue because only Dr. Lawrence's opinion had evidentiary value. The reason was that Dungo confessed to strangling Ms. Pina. Thus, Dr. Bolduc's ultimate conclusion that the victim was strangled (5 RT 1492) was not a

fact in dispute.[3] The only truly pertinent physiological question was the duration of the strangulation act, because the longer it took Dungo to strangle Ms. Pina to death, the weaker a "crime of passion" defense would become. (AABM at 15.) Dr. Bolduc in his autopsy report drew no conclusion about how long the strangulation lasted. (See 7 RT 1869 ["Dr. Bolduc, in his autopsy report, didn't put an amount of time on it, correct? A: Correct."].) Only Dr. Lawrence so opined, and did so at trial, as follows:

> Q: [by District Attorney]: And how long would your opinion be of how long it took for her to die?
>
> A: [by Dr. Lawrence]: It would be at least several minutes.
>
> Q: Why do you say that?
>
> A: She did not have a fractured voice box or hyoid bone. She did have some hemorrhages in the neck organs consistent with fingertips during strangulation. She had signs of lack of oxygen. So she probably died over a period of minutes, not hours, and certainly more than two minutes.

(7 RT 1846; see also 1843, 1850, 1851.)

Aside from his generalized conclusion about the cause of death as set forth in the autopsy report, Dr. Bolduc recorded in his materials the requisite observations about the postmortem condition of Ms. Pina's body. (See *United States v. Feliz*, *supra*, 467 F.3d at p. 236, fn. 6 [distinguishing autopsy report observations from conclusions].) Dr. Bolduc's basic observations that the victim's larynx and hyoid bones were not fractured, by themselves and unexplained, were not probative or relevant because they would have had no significance to a layperson. It was Dr. Lawrence, in

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[3] Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact . . . ." (Evid. Code, § 210.)

open court and subject to cross-examination, who gave evidentiary relevance to Dr. Bolduc's observations by interpreting the condition of the larynx and hyoid bones to mean that the strangulation would have taken at least two minutes to complete. Dr. Lawrence's expertise was necessary to assist the jury because his explanation and interpretation was "sufficiently beyond common experience . . . ." (Evid. Code, § 801, subd. (a) [defining role of expert witness].)

The United States Supreme Court has held that an out-of-court statement which is not "incriminating on its face," but becomes incriminating "only when linked with evidence introduced later at trial," is not subject to Sixth Amendment confrontation requirements. (*Richardson v. Marsh* (1987) 481 U.S. 200, 208 [co-defendant's confession admissible where contained no reference to existence of principal defendant or implication as to his culpability]; *Gray v. Maryland* (1998) 523 U.S. 185, 191, 196.) Likewise, Dr. Bolduc's recorded observations of the victim's neck had no incriminating value by themselves, before they were "linked" at trial with Dr. Lawrence's expert interpretive opinion about the duration of the strangulation act. Consequently, Dr. Lawrence—not Dr. Bolduc—was the adverse witness.

B. Cross-Examination of Dr. Lawrence Satisfied Dungo's Confrontation Right

Dungo's cross-examination of Dr. Lawrence satisfied the Sixth Amendment. When evidence is received in the form of an expert opinion, the adversarial process as informed by the confrontation clause is undiminished as long as that opinion can be tested and challenged on cross-examination. (See *United States v. Wade* (1967) 388 U.S. 218, 227-228 ["the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-

examination of the Government's expert witnesses and the presentation of the evidence of his own experts"].)

California law has long permitted an expert to rely on otherwise inadmissible matter in forming an opinion if it is "of a type that reasonably may be relied upon" by such an expert. (Evid. Code, § 801, subd. (b); see also Fed. Rules Evid., rule 703.) For example, in a context analogous to that presented in this case, "[a] physician in many instances cannot make a diagnosis without relying on the case history recited by the patient or in reports from various technicians or other physicians." (Cal. Law Revision Com. Com., Thompson/West Evid. Code (2008 ed.) foll. § 801, p. 127; *Kelly v. Bailey* (1961) 189 Cal.App.2d 728, 737-738 [contents of medical report "admissible not as independent proof of the facts but as a part of the information upon which the physician based his diagnosis and treatment"]; see also *Capehart v. State* (Fla. 1991) 583 So.2d 1009, 1013 [pathologist's expert testimony admissible where opinion based on review of another pathologist's autopsy report and other available information].)

Rules of evidence of this type were not abrogated by *Crawford* or *Melendez-Diaz*. (See, e.g., *United States v. Turner* (7th Cir. 2010) 591 F.3d 928, 933-934; *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 634-635.) Specifically, *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*) remains valid authority because the expert opinion evidence presented in *Geier* and subject to cross-examination was far removed from the sworn certificates, which the defendant was forced to take at face value, at issue in *Melendez-Diaz*. (ROBM at 41-42.) In *Geier*, the trial court had found that Dr. Cotton's testimony was admissible despite depending in part upon test results generated by another analyst because the courtroom witness "could . . . rely on [the test results] for purposes of formulating her opinion as a DNA expert." (*Id.* at pp. 596, 608, fn. 13.) This application of Evidence Code section 801, subdivision (b), continues to be a valid evidentiary

principle when an expert independently reaches a conclusion and is exposed to cross-examination that may, among its other uses, serve to challenge the weight of the opinion by questioning out-of-court and uncorroborated factual assertions upon which it relies.

The Seventh Circuit pointed out in *Unites States v. Turner* that *Melendez-Diaz* does not control when the witness "testified as an expert witness presenting his own conclusions . . . to the jury." (591 F.3d at p. 934; see also *State v. Hough* (N.C.Ct.App. 2010) 690 S.E.2d 285, 290-291 [expert's opinion, based in part on another analyst's testing, was admissible because "her expert opinion was based on an independent review and confirmation of test results"]; *People v. Williams*, *supra*, 2010 Ill. Lexis 971, *35-*38.) The New Hampshire Supreme Court reached the same conclusion in *State v. Dilboy*, *supra*, 160 N.H. 135, 150, holding that the confrontation clause was not violated by the testimony of an expert witness who relied upon the results of toxicology testing performed by other analysts in rendering an independent opinion which was subject to challenge on cross-examination. Other recent state supreme court holdings are in accord, and relate specifically to expert testimony by medical examiners. (*State v. Snellings*, *supra*, 2010 Ariz. Lexis 38, *9-*11; *State v. Mitchell*, *supra*, 2010 Me. Lexis 76, **24-**29.)

Fourth Circuit Court of Appeals precedent is in agreement. In *United States v. Johnson*, *supra*, 587 F.3d 625, an expert witness for the government testified about code words used by drug traffickers. The opinion was based in part upon otherwise inadmissible hearsay statements from a confidential informant. (*Id.* at pp. 633-634.) The appellate court held that the informant's statement was likely testimonial, but the expert's opinion was admissible absent confrontation of the informant. (*Id.* at pp. 634-635.) Writing for the majority, the Honorable J. Harvie Wilkinson III explained:

> An expert witness's reliance on evidence that *Crawford* would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation. Allowing a witness simply to parrot out-of-court testimonial statements . . . to the jury in the guise of expert opinion would provide an end run around *Crawford*. For this reason, an expert's use of testimonial hearsay is a matter of degree. The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem. The expert's opinion will be an original product that can be tested through cross-examination.
>
> This is as it should be because expert witnesses play a valuable role in our criminal justice system. As recognized in Federal Rule of Evidence 702, experts often assist the trier of fact to understand the evidence or to determine a fact in issue. To better fulfill this role, experts are permitted to consider otherwise inadmissible evidence as long as it is of a type reasonably relied upon by experts in the particular field. (Fed. R. Evid. 703.) Some of the information experts typically consider surely qualifies as testimonial under *Crawford*. Were we to push *Crawford* as far as [the defendant] proposes, we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases.

(*Id.* at p. 635 (internal quotation marks and citations omitted).)

Dungo's own cited case law demonstrates that his opportunity to confront and cross-examine Dr. Lawrence was constitutionally sufficient. As Dungo notes, the quality of an expert opinion depends upon the quality of its predicate facts. (AABM at 41, citing *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; *People v. Gardeley*, *supra*, 14 Cal.4th at 618.) Here, Dungo was fully capable of demonstrating through cross-examination that Dr. Lawrence was taking Dr. Bolduc's observations on faith, and had no way of independently confirming them. So too could Dungo have cross-

examined Dr. Lawrence about Dr. Bolduc's questionable employment history and alleged incorrect conclusions in two previous autopsies. (See AABM at 4-5.) The trial court ruled specifically that all these topics were admissible on cross-examination. (5 RT 1264-1265.) Of course, had Dungo attacked Dr. Bolduc's qualifications, the jury would have also learned that Dr. Bolduc was without criticism from anyone in the forensic pathology community (5 RT 1496) and had Dr. Lawrence's, his employer's, full confidence (5 RT 1510-1512).

Dungo was likewise free to question observations set forth in the autopsy report not corroborated by, for example, photographs or instrument readings, and as a result argue that the jury should discount or even reject those aspects of Dr. Lawrence's opinion that relied on such observations. (See, e.g., *People v. Phillips* (1981) 122 Cal.App.3d 69, 85 [fact that expert's testimony "based in large measure upon reports by others rather than upon his personal observations of the defendant . . . may affect the weight of his testimony but does not render that testimony inadmissible . . . "]; see also *People v. Coleman* (1985) 38 Cal.3d 69, 92 [broad cross-examination of expert about hearsay basis for opinion is means to "test and diminish" weight of opinion]; *People v. Cooper* (2007) 148 Cal.App.4th 731, 747 [same]; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 56-57 [same]; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210 [same].) Dungo chose to pursue none of these tactics as a matter of strategy, though not from the lack of a constitutionally adequate opportunity.[4]

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[4] In fact, one commentator suggested that cross-examining a pathologist's supervisor is actually more effective than confronting the pathologist who performed the autopsy: "Confronting the chief medical examiner is arguably more effective for revealing any ambiguity in the findings, variations in standard procedure, or problems in the office, as the chief medical examiner is in the best position to know the standard

(continued...)

Other case law cited by Dungo likewise runs contrary to his own argument. He notes that the court in *Vann v. State* (Alaska Ct.App. 2010) 229 P.3d 197, 209 observed that accepting an expert's opinion at times requires the jury to accept the truth of underlying hearsay facts. (AABM at 41.) What Dungo fails to mention is that the court in *Vann* held that a DNA expert was properly allowed to testify to another analyst's test results as a basis for her expert opinion, and the defendant's confrontation rights were satisfied by the opportunity to cross-examine the witness on the witness stand. (229 P.3d at p. 210.) The defendant in *Vann* had a "fair opportunity to explore the type of testing that was performed and the procedures that were used in that testing. This cross-examination also gave Vann the opportunity to identify or highlight any potential sources of error in the testing and any potential for misinterpretation of the test results." (*Ibid.*) In addition, the expert opinion offered in court was based on an independent interpretation of machine-generated test results. (*Ibid.*)

As in *Vann*, nothing in this case prevented Dungo from highlighting the lack of corroborating evidence for Dr. Bolduc's observations as a way of attacking the weight of the evidence, i.e., Dr. Lawrence's opinion.

C. The Constitution Does Not Entitle Dungo to Cross-Examine Dr. Bolduc

1. Dr. Bolduc's observations were not offered as independent facts

Because Dr. Bolduc's observations at the autopsy were irrelevant absent Dr. Lawrence's expert interpretation, they were not offered as proof

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(...continued)
procedures, ambiguities within those procedures, and any past problems with the office or the unavailable medical examiner." (*Autopsy Reports*, *supra*, 96 Cal. L.Rev. 1093, 1116-1117.)

of independent and freestanding facts with a corresponding right to challenge them directly via cross-examination. Accordingly, Dungo's assertion that Dr. Bolduc's observations during the autopsy were inadmissible hearsay because they were offered for their truth, without an opportunity for cross examination, fails. (AABM 40-44.)

Dungo's point might have had merit if (1) Dr. Lawrence had testified merely as a conduit for transmitting the contents of Dr. Bolduc's autopsy report into evidence as independent facts without more, *and* (2) an autopsy report is testimonial evidence. As discussed above, however, the only part of Dr. Lawrence's testimony that had real evidentiary value was his expert opinion that the strangulation lasted at least two minutes—testimony that negated a "crime of passion" defense and supported the prosecution's theory of a deliberate killing. Dr. Bolduc's observations during the autopsy, while providing a factual basis for Dr. Lawrence's opinion, would have been meaningless evidence without that opinion and hardly worth exploring on cross examination.

Dungo's discussion of the need to cross-examine Dr. Bolduc about his interpretation of "what he saw" and his "exercise [of] professional judgment" (AABM at 35) is inapposite. Interpretation was the province of Dr. Lawrence. The original autopsy report was relied upon only as a source of medical facts that supported Dr. Lawrence's independent expert opinion. *That* opinion was the evidence offered for its truth. Thus, Dr. Lawrence was not a "surrogate witness" (AABM at 38-40); he was the primary witness. It was Dr. Lawrence alone who offered an opinion on the one probative question, and Dr. Lawrence's opinion that had the sole evidentiary value. Dr. Lawrence, not Dr. Bolduc, was the proper subject of cross-examination.

Moreover, trial courts possess well-established evidentiary controls, predating *Crawford* and *Melendez-Diaz*, to preclude an expert witness from

simply relaying otherwise inadmissible out-of-court statements to the jury as independent true facts rather than as the basis for opinion evidence. As this Court noted in *People v. Coleman*, *supra*, 38 Cal.3d 69, 92, "while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence."

For example, trial courts may weigh the probative value of any inadmissible evidence underlying an expert's opinion against the danger that the jury will accept testimonial statements as independent proof of those facts. (*People v. Bell* (2007) 40 Cal.4th 582, 608; Evid. Code, § 352.) In addition to section 352 assessments, courts may issue limiting instructions to the jury. (See, e.g., *People v. Coleman*, *supra*, 38 Cal.3d at p. 92 ["Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth"].) These mechanisms continue to operate to alleviate the concern expressed by Dungo that testimonial statements relied upon by experts will be received as stand-alone evidence immune from confrontation.

2. Dr. Bolduc's observations were not in the class of forensic analyses addressed by *Melendez-Diaz*

Moreover, Dungo's claim that the Sixth Amendment required an opportunity to cross-examine Dr. Bolduc about his basic anatomical observations regarding the condition of two bones belies common sense as well as long-established evidentiary principles unaffected by *Melendez-Diaz*. Such observations do not invoke the need to test the observer's "'honesty, proficiency, and methodology'" as Dungo asserts. (AABM at 36, 39, citing *Melendez-Diaz*, *supra*, 129 S.Ct. 2527, 2538.) Rather, a licensed, board-certified, and experienced pathologist's observations that

two bones were unbroken is precisely the kind of routinely and repeatedly performed medical task that led the courts in *Baber v. State* (Fla. 2000) 775 So.2d 258, 261-262, and *State v. Garlick* (Md. 1988) 545 A.2d 27, 34-35, to hold that medical records may nonetheless be admitted without the testimony of their author(s).

Melendez-Diaz did not invalidate this reasoning. In fact, the *Melendez-Diaz* plurality cited *Baber* and *Garlick* as principal authority for its pronouncement that medical reports created for treatment purposes are not testimonial evidence. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2533, fn. 2; see also *People v. Beeler* (1995) 9 Cal.4th 953, 980-981 [direct, objective observations made during an autopsy and recorded in the autopsy report admissible as business records, as distinguished from subjective, interpretive opinions that are not admissible].)[5]

Further, the constitutional concerns expressed in *Melendez-Diaz* were not grounded in the need to cross-examine about routine observations that have no independent probative value. Instead, the plurality discussed the right to confront the analyst about "the results of a forensic test" (*Melendez-Diaz*, *supra*, 129 S.Ct. 2527, 2536 & fn. 5), when it involves "exercise of judgment and presents a risk of error . . . ." (*Id.* at p. 2537.) As Maine's Supreme Court noted recently, "[c]ross-examination has far less utility" and has "little, if any, practical benefit" with respect to information that is "not subject to any serious interpretation, judgment, or analysis" and "is not obtained by use of specialized methodology . . . ." (*State v. Murphy* (Me. 2010) 991 A.2d 35, 43 [public motor vehicle records not testimonial].) And this Court noted in *People v. Geier*, *supra*, 41 Cal.4th 555, 607 that

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[5] Dungo's argument that "*Crawford* effectively overruled *Beeler*" (AABM at 17) is unconvincing because *Beeler* did not consider Evidence Code section 801, subdivision (b), in its analysis. (See *People v. Beeler*, *supra*, 9 Cal.4th at pp. 980-981.)

"the circumstances under which statements were made in laboratory reports and other types of forensic evidence" can indicate that "those statements [are] nontestimonial under *Crawford*, notwithstanding their possible use at trial."

Dr. Bolduc's observations that Ms. Pina's larynx and hyoid bones were intact were routine medical observations. There is no realistic possibility that cross-examination of Dr. Bolduc about his employment history or interpretive judgments in other autopsies would have led him to recant those simple visual observations. (See, e.g., *Lyons v. Barrazotto* (D.C.Ct.App. 1995) 667 A.2d 314, 326, fn. 21 ["Admissibility of hospital or medical reports containing observations of a physician or diagnostician who is not present to testify turns on whether it is a simple routine observation"]; see also *Autopsy Reports*, *supra*, 96 Cal. L.Rev. 1093, 1116 [describing how cross-examination of a pathologist about the details of an autopsy has little practical utility].) Furthermore, there is no evidence that Dr. Bolduc ever misdiagnosed a broken hyoid bone, or a cause of death, following an autopsy. (See 5 RT 1497-1511.) In fact, Dungo did not even attempt to impeach or dispute the accuracy of Dr. Bolduc's observations about Ms. Pina's neck postmortem during the trial. His failure to do so illustrates vividly his lack of concern about those routine observations.

III. ANY ERROR WAS HARMLESS BECAUSE THERE IS NO DISPUTE THAT DEFENDANT FATALLY STRANGLED VICTIM PINA, AND THE JURY DID NOT FIND DEFENDANT DUNGO'S HEAT OF PASSION ARGUMENT CREDIBLE

Dungo claims that the issue of harmless error is not before this Court because it was not specifically set forth among the issues to be considered and is not "fairly included" in them. (AABM at 45, citing Cal. Rules of Court, rule 8.516(a)(1).) Dungo is incorrect.

Alleged violations of the confrontation clause are subject to harmless-error analysis, and a reviewing court's consideration of the issue is appropriate where the court below did likewise. (*Coy v. Iowa* (1988) 487 U.S. 1012, 1021-1022.) Here, the court of appeal did indeed consider whether Dr. Lawrence's testimony was harmless under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Dungo* (2009) 176 Cal.App.4th 1388, 1404-1405.) Moreover, the issue of harmless error is always "fairly included" among the issues granted review because such analysis is often necessary to distinguish immaterial error from error that impacted the fairness of the trial, and determine the ultimate outcome of the case. (*People v. Flood* (1998) 18 Cal.4th 470, 507, citing *Rose v. Clark* (1986) 478 U.S. 570, 577.) This Court may thus consider harmless error arguments presented by respondent.

The error, if any, was harmless, because the issue presented to the jury was not the *manner* of the killing, i.e., strangulation, but whether there was *provocation* for the killing, i.e. heat of passion, which mitigated the malice element of murder. There is no doubt that Dungo strangled victim Lucinda Correia Pina from all the evidence presented at the trial, including Dungo's confession and trial testimony. Dungo correctly states in his brief that the prosecutor argued about the length of time during the strangulation. But these arguments went to Dungo's intent and premeditation and deliberation, the elements of first degree murder, which the jury did not find. This is separate and apart from "heat of passion" which mitigates malice and reduces a murder to manslaughter. The jury chose not to believe this scenario, and abundant evidence supported their conclusion. Specifically, the sole witness in support of a "heat of passion" killing was Dungo himself, who lied at every opportunity throughout the investigation. Dungo's trial testimony directly conflicted with his statements to the detectives at the time of his arrest. Thus, the real issue during the trial was

not how long the strangulation lasted, but Dungo's credibility as a witness. Therefore, any error in allowing Dr. Lawrence's testimony, was harmless beyond a reasonable doubt.

CONCLUSION

Precluding expert opinion testimony that relies upon facts recorded in another pathologist's autopsy report would severely limit the prosecution of homicide cases, particularly older crimes that were solved years later with DNA evidence or by other means and after the original coroner has died.[6] Nor would doing so serve the purposes behind the confrontation clause. As long as the defendant is able to cross-examine the "witnesses against him," namely, the expert who provides the opinion that possesses evidentiary value, the Constitution is satisfied. Here, that witness was Dr. Lawrence, and Dungo had the opportunity to challenge the basis for Dr. Lawrence's opinion.

Moreover, the medical record known as an autopsy report is prepared by a physician for statutory and public health reasons independent of any criminal justice implications it may have, and is thus admissible in any event as a nontestimonial business record.

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[6] For example, Dr. Boyd Stephens died in April 2005 after serving as the Chief Medical Examiner for the City and County of San Francisco since 1971. (*Obituary – Dr. Boyd Stephens*, S.F. Chronicle (April 5, 2005) p. B5.) Dr. Pierce A. Rooney, Jr. died in January 2009 after serving as a pathologist for the Sacramento County Coroner's Office since 1969. (*Obituary – Dr. Pierce A. Rooney, Jr.*, Sac. Bee (Jan. 25, 2009).) Dr. Robert G. Richards died in 2001 after serving as a medical examiner for Orange County from 1957 to 1988. (*Obituary – Dr. Robert Richards*, L.A. Times (Jan. 11, 2001) p. B-8.) Dr. Jose Jesus Ferrer died in 1993 after a career as a medical examiner in San Francisco, San Mateo, and Yolo counties. (*Obituary – Dr. Jose Ferrer*, Cleveland Plain Dealer (Oct. 13, 1993) p. 8E.)

Finally, the error, if any, was harmless because overwhelming evidence proved that defendant Dungo fatally strangled victim Pina in accord with Dr. Lawrence's testimony. Dungo's arguments for the lesser offense of manslaughter hinged, not on the length of the strangulation, but the provocation. Dungo's inconsistent testimony that the killing was committed in the heat of passion was found not credible by the jury.

Accordingly, respondent respectfully requests that this Court reverse the court of appeal and affirm Dungo's conviction.

Dated: September 16, 2010

Respectfully submitted,

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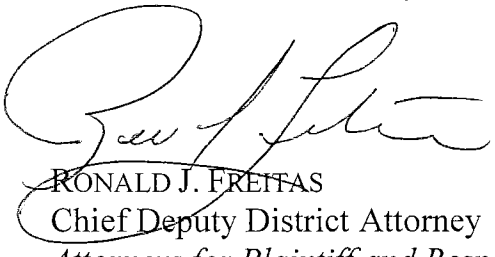
Assistant District Attorney



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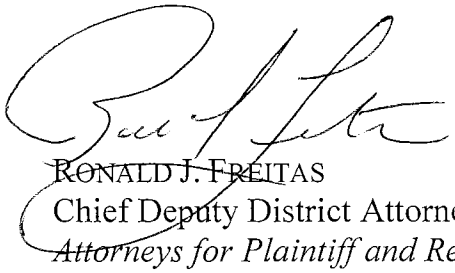
CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Reply Brief on the Merits** uses a 13 point Times New Roman font and contains 6,368 words.

Dated: September 16, 2010

JAMES P. WILLETT
District Attorney of San Joaquin County



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DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

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

On September 16, 2010, I served the attached RESPONDENT'S REPLY BRIEF ON THE MERITS by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the District Attorney, San Joaquin County, at 222 East Weber, Room 202, Stockton, CA 95202, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 16, 2010, at Stockton, California.

Kelly McDaniel
Declarant