No. S067394

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN LEO CAPISTRANO,

Defendant and Appellant.

SUPPLEMENTAL APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE ANDREW C. KAUFFMAN, JUDGE

MICHAEL J. HERSEK
State Public Defender

KATHLEEN M. SCHEIDEL
Assistant State Public Defender
California State Bar No. 141290

221 Main Street, Suite 1000
San Francisco, California 94105
Telephone: (415) 904-5600

Attorneys for Appellant

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INTRODUCTION

Appellant JOHN LEO CAPISTRANO filed with permission a supplemental opening brief on December 27, 2007 asserting that his Sixth Amendment right to confront and cross-examine witnesses against him was violated by, inter alia: (1) the admission of DNA expert testimony offered by Cellmark Staff DNA Analyst Anjali Swienton based on test results performed by a non-testifying witness; and (2) the admission of the expert testimony by Eugene Carpenter, M.D., a deputy medical examiner employed by the Los Angeles County Coroner's Office, who did not perform the autopsy on the homicide victim in this case. In his briefing, appellant acknowledged that this Court rejected similar contentions in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), but asked that the Court

reconsider its decision, arguing that under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the Sixth Amendment's confrontation clause required – that the individuals who actually performed the DNA testing and the autopsy testify in court.[1]

On November 10, 2008, the United States Supreme Court granted certiorari in *Melendez-Diaz v. Massachusetts*, No. 07-591 (Mar. 17, 2008). The Supreme Court issued its decision a year later in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __, 129 S.Ct. 2527 [174 L.Ed.2d 314] (*Melendez-Diaz*).

On July 2, 2010, this Court ordered respondent to file a brief in response to appellant's supplemental opening brief. Respondent's supplemental brief addresses issues appellant raised in his supplemental opening brief as well as other issues, including the impact of *Melendez-Diaz* and the current status of this Court's decision in *Geier*. Respondent now contends that *Melendez-Diaz* did not overrule or undermine *Geier*, and that the admission of the expert testimony at issue did not violate the Sixth Amendment. (Respondent's Supplemental Brief (RSB) 3.)

On December 2, 2009, this court granted review and ordered briefing in several confrontation clause cases in which one witness testifies to the results of forensic tests performed by someone who does not testify at trial, and how *Melendez-Diaz* affects this court's decision in *Geier*. (See *People v. Dungo* (S176886) [whether defendant's Sixth Amendment right to

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[1] Appellant's reply brief on appeal was filed on October 14, 2008, ten months after the filing of the supplemental opening brief. However, since respondent did not file a brief in response to the supplemental opening brief until July 2010, appellant's reply brief did not address the issues raised herein.

confrontation was violated when one forensic pathologist testified to the manner and cause of death based upon the autopsy report prepared by another pathologist]; *People v. Gutierrez* (S176620) [whether defendant's Sixth Amendment right to confrontation was violated when (a) one nurse practitioner testified as to the results of a sexual assault examination and the report prepared by another nurse practitioner, and (b) a supervising criminalist testified as to the result of DNA tests and the report prepared by another criminalist] *People v. Lopez* (S177046) [whether defendant's Sixth Amendment right to confrontation was violated when the trial court admitted into evidence the results of blood-alcohol level tests and a report prepared by a criminalist who did not testify at trial; *People v. Rutterschmidt* (S176213) [whether defendant's Sixth Amendment right to confrontation was violated when a supervising criminalist testified to the result of drug tests and the report prepared by another criminalist].)

Since almost three years have passed since appellant filed his supplemental opening brief, and given respondent's position that *Melendez-Diaz* did not overrule or undermine *Geier*, appellant will begin this reply by arguing to the contrary – that *Geier* was overruled by *Melendez-Diaz*. Appellant will then address the specific Sixth Amendment violations that occurred in this case, show why those constitutional violations were not harmless error and explain why the errors claimed herein are properly before this court.[2]

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[2] The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in appellant's supplemental opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

A. *MELENDEZ-DIAZ* OVERRULED *GEIER*

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), provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The right to 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.)

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 ["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 [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"].)

However, for a few decades preceding *Crawford*, 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 (*Roberts*).)

In order to meet the *Roberts* test, the evidence had to either "fall within a firmly rooted hearsay exception" or "have particular guarantees of trustworthiness." (*Ibid.*)

Thus, 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 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 p. 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 *Roberts.* The *Crawford* decision thus 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 pp. 42-56, 61-62, 67-69.)

In overruling *Roberts*, *Crawford* also 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 p. 61; see also *White v. Illinois* (1992) 502 U.S 346, 363, conc. opn of Thomas, J. ["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 from introducing "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 p. 68.)

The threshold issue to be resolved here is thus whether the expert DNA testimony and the testimony regarding the autopsy is "testimonial" under *Crawford*. While *Crawford* did not offer a precise definition of "testimonial statements" (*Crawford, supra*, 541 U.S. at p. 68), it did indicate that testimonial statements include those 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 p. 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 whether a statement is "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 pp. 51-52.)

The Supreme Court further elaborated on the meaning of "testimonial" in *Davis v. Washington* (2006) 547 U.S. 813 (*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 of

domestic violence 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 p. 822.)

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. (*Geier, supra,* 41 Cal.4th at pp. 593-595.) This court rejected the defendant's Confrontation Clause challenge, ruling that testimony conveying information contained in a contemporaneously-prepared report of scientific observations and recorded as "raw data" was admissible under *Crawford* and *Davis* because the report and notes were nontestimonial.

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 concluded that the technician in authoring the report was not "testifying." (*Id.* at pp. 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 p. 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, [the analyst's supervisor] ..." (*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.

Melendez-Diaz completely undermines *Geier's* rationale. (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 even though they were "near contemporaneous" to the events reported, sufficiently close in time to the alleged assault that the trial court had admitted the victim's statement as a "present sense impression." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2535.) Moreover, the proposed exception for "contemporaneous" observations

would eliminate a defendant's right to confront a police officer's on-the-scene description of what the officer had observed upon responding to a crime scene. (*Ibid.*)

Second, as to *Geier's* conclusion that a forensic report is not testimonial because the witness preparing it is 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 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 p. 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," reiterating its conclusion in *Crawford* that it did not matter how reliable the evidence might be. (*Id.* at p. 2536, quoting *Crawford, supra*, 541 U.S. at pp. 61-62.) The court also pointed out that it forensic testing is not inherently neutral or reliable: "Forensic evidence is not uniquely immune from the risk of manipulation." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 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 p. 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."[3] The conclusion in *Geier* that such reports are not testimonial has thus been overruled. Moreover, as discussed below, the fact that the contents and opinions contained in a testimonial forensic report are conveyed to jurors through a surrogate expert who is subject to cross-examination does not cure the Confrontation Clause violation.

Respondent asserts that the United States Supreme Court's denial of certiorari in *Geier* is "strong evidence that the high court concluded the result reached in *Geier* was constitutionally correct." (RSB 27.) 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.) The 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.) In *Geier*, this court held that if error did occur, it

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[3] The *Melendez-Diaz* court implicitly overruled the following cases referenced by this court in *Geier*: *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* (2nd Cir. 2006) 467 F.3d 227; *United States v. Ellis* (7th Cir. 2006) 460 F.3d 920.

was harmless beyond a reasonable doubt. (*Geier, supra*, 41 Cal.4th at p. 608.) Thus, there was no basis to remand the case for further consideration.[4]

B. 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 As A Business, Official, Or Medical Record, Absent Confrontation Of Its Author

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 p. 54; see also *Giles v. California* (2008) 554 U.S. __ [128 S.Ct. 2678, 2682].) Autopsy reports would have been considered testimonial at the time of the founding.

The majority in *Melendez-Diaz* acknowledged 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" than through confrontation, but also explicitly identified autopsy reports as an exception, 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 p. 2536 & fn. 5.) From this, it is plain that the Supreme Court considers autopsies to be testimonial.

Respondent has not cited, and appellant has not found, any case

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[4] The high Court did grant review, vacate, and remand two cases that had held that the prosecution could introduce one forensic analyst's statement through the in-court testimony of another. (*Barba v. California* (2009) 129 S.Ct. 2857; *Crager v. Ohio* (2009) 129 S.Ct. 2856.)

suggesting that, when the Sixth Amendment was adopted, an autopsy report prepared as part of an ongoing homicide investigation would have been admissible absent confrontation of its author, whether under a business record exception, or for the "non-hearsay" purpose of establishing the basis of expert testimony. Yet respondent persists, in reliance on *Beeler, supra*, in arguing that autopsy reports are non-testimonial because they are admissible under state evidentiary rules as business or official records. (RSB 48-49, 60.) However, the *Melendez-Diaz* Court rejected the contention that anything admissible under a jurisdiction's business records exception is 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 p. 2538, citation and footnote omitted])

In *Palmer v. Hoffman* (1943) 318 U.S. 109 (*Palmer*), cited in *Melendez-Diaz* on this point, the Supreme 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 p. 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 could

routinely record certain activities not covered under the business records exception. (*Id.* at p. 114.)

Although it is the "business" of the coroner (or companies working for the coroner) to conduct autopsies, the purpose for doing so in suspected homicide cases is for prosecutorial use, rather than for the company's own administrative use. Such reports are thus 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 p. 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 as such are nontestimonial. (RSB 49-58.) 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. Frisby was not treating Koen Witters when she conducted the autopsy and Dr. Rogers was not trying to save Witters' life when he approved her report; rather, Dr. Frisby was conducting a statutorily mandated investigation into the cause and manner of his death as an agent of the Los Angeles County Coroner's Office. (See *People v. Geier, supra*, 41 Cal.4th at p. 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 pp. 660-661 [finding statements of sexual assault

victim during examination performed pursuant to statutorily mandated protocol to be testimonial].)

In the instant case, Dr. Carpenter clearly defined the investigative, rather than medial role of a medical examiner in Los Angeles county when he testified that a medical examiner at the Department of the Coroner in Los Angeles is "a pathologist medical doctor who does autopsies *in order to determine the cause and the manner of death that might be useful in a court of criminal law.*" (7RT 2825, italics added.)

The following exchange between the prosecutor and Dr. Carpenter also clearly illustrates the People's position at trial regarding the purpose of autopsy reports – i.e., they are documents prepared for use in a future criminal prosecution:

> Question by Mr. Sortino: And does the coroner's office rely on these types of reports in the conduct of what is essentially the coroner's business, determining causes of death and testifying about them?
>
> Answer by Dr. Carpenter: Yes.

(7RT 2877.)

When the Sixth Amendment was adopted and until relatively recently (that is, until the decision in *Roberts, supra*, 448 U.S. 46 permitted statements deemed sufficiently "trustworthy" to evade confrontation), the contents of an autopsy report would not have been inadmissible absent the testimony of the pathologist who conducted the autopsy. (See *Crawford, supra*, 541 U.S. at p. 47, fn. 2, citing *State v. Houser* (1858) 26 Mo. 431, 436; see also *Palmer, supra,* 318 U.S. at pp. 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 p. 56, fn. 7.) Coroners and deputy coroners whose primary duty is to conduct inquests and investigations into violent deaths are peace officers under California law. (Pen. Code, § 830.35, subd. (c).)

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 p. 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 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. Carpenter's Testimony Conveying The Contents Of Dr. Frisby'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." (RSB 23.) 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" statements than do the other justices who joined in the decision. (RSB 23-24.) However, while Justice Thomas did file a concurring opinion, he signed the majority opinion, so *Melendez-Diaz* is not a plurality opinion. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2930.)

In any event, 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, supra*, 541 U.S. at p. 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, while he disagreed with the majority's conclusion in *Davis* 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 pp. 835-836, conc. and dis. opn. of Thomas, J.) The autopsy report here – formally memorializing the results of an autopsy initiated when police called in the 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 Confrontation Clause was intended to target. While Justice Thomas may well require "some degree of solemnity" to qualify a statement as "testimonial" (*id.* at p. 836), his analysis makes it plain that an autopsy report prepared in a homicide case in California 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 Confrontation 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 p. 361.) That is exactly what happened in this case when the prosecution presented Dr. Frisby's findings and conclusions through Dr. Carpenter.

While the formal affidavits in *Melendez-Diaz* may represent the "paradigmatic case" implicating the "core of the right to confrontation," the court – including Justice Thomas – has made it clear that they did not demarcate "its limits." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 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 p. 51), a formulation Justice Thomas has endorsed. (See, e.g., *Davis, supra*, 547 U.S. at p. 836, conc. & dis. opn. of Thomas, J.)

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 who shielded the work of an

inexperienced pathology fellow such as Dr. Frisby – who had been performing autopsies for just one year – from the scrutiny of cross-examination. (7RT]2826. 2828-2829.) 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 p. 839, conc. and dis. opn. of Thomas, J.; see also *Giles v. California, supra*, 128 S.Ct. at p. 2693 (conc. opn. of Thomas, J.).)

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. The autopsy was performed for the primary purpose of establishing facts – cause and manner of death – for potential use in later criminal proceedings.

Under *Melendez-Diaz*, the conclusion that the contents of Dr. Frisby's autopsy report were "testimonial" is inescapable. Dr. Frisby conducted the autopsy and prepared the autopsy report after a homicide investigation had already been initiated. (See 5RT 2359-2360 [homicide detective begins investigation in the very early hours of 12/10/95]; Peo. Exh. 36 [autopsy performed 12/11/95 at 7:45 a.m.].) The prosecution used the contents of the report, through Dr. Carpenter's testimony, to establish that the victim died at

the hands of another, and to provide the factual underpinning for Dr. Carpenter's opinion. (7RT 2877-2839.) 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* and *Melendez-Diaz.*

Dr. Frisby was thus a "witness" for purposes of the Sixth Amendment. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) Dr. Frisby, through the contents of her report, consisting of both "facts" and "opinions," "certainly provided testimony against [appellant]" by establishing facts necessary for his conviction" (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2533) – namely, the physical findings necessary to support Dr. Carpenter's opinion as to the cause and manner of death. (See summary of Dr. Carpenter's testimony in appellant's supplemental AOB 3-4.) Because there was no showing that she was unavailable to testify at trial and that appellant had a prior opportunity to cross-examine her, appellant was entitled to be confronted with Dr. Frisby at trial. (*Ibid.*)

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

Respondent argues that autopsy reports are prepared pursuant to statutory mandates that do not change and are prepared without regard to any potential criminal prosecution. (RSB 52-54.) 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.)

Respondent'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" (RSB 54) is similarly unavailing. Aside from being highly debatable in most cases, 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.

Respondent points 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." (RSB 54.)

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, supra*, 129 S.Ct. at p. 2532; *Martinez v. State* (2010) 311 S.W.3d 104, 111 [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 in light of 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. Indeed, as the court in *Melendez-Diaz* recognized, a pathologist working for the coroner, 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, supra*, 129 S.Ct. at p. 2536.)

5. A Number Of Courts Have Correctly 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 p. 210; see also *Martinez v. State, supra*, 311 S.W.3d at p. 111 [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; 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].)

6. The Confrontation Clause Prohibits Prosecutors From Presenting The Testimonial Hearsay Of A Less Experienced Forensic Witness Through The Testimony Of A More Experienced Supervisor

Respondent argues that even if Dr. Frisby's autopsy report was inadmissible, the trial court properly permitted Dr. Carpenter to testify to its contents because: (1) experts such as Dr. Carpenter are permitted to rely on testimonial or nontestimonial hearsay in forming their opinions; and (2) that the requirements of the Confrontation Clause were satisfied by allowing appellant to cross-examine Dr. Carpenter. (RSB 58-66.) Not so.

First, respondent's argument that no Confrontation violation occurred because Evidence Code section 801, subdivision (b) allows an expert to rely "on any material" reasonably relied upon by experts in the field in forming their opinions is incorrect. (RSB 59.) 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." (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*); see also Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington* (2007) 15 J.L. & Pol'y 791.)

In addition, Evidence Code section 801, subdivision (b) provides that an expert may base an opinion on evidence not otherwise admissible "unless an expert is precluded by law from using such matter as a basis for his opinion." It follows that as a matter of state law an expert may not rely on something as a basis for his or her opinion if it results in a Confrontation Clause violation.

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 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 p. 213; see also *Martinez v. State, supra*, 311 S.W.3d at p. 111 [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].)

In the instant case, the autopsy report and its contents were admitted for the truth of the matters stated therein, as no limiting instruction was provided to limit its use to the non-hearsay purpose of evaluating the reasonableness and correctness of Dr. Carpenter's conclusions.

The cases cited by respondent (see RSB 29-32, 60) are not persuasive authority for the proposition that experts may testify based on testimonial hearsay. 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. (*State v. Lui* (Wash. 2010) 168 Wn.2d 1018; see RSB 30-32.)

United States v. Johnson (4th Cir. 2009) 587 F.3d 625 (*Johnson*), also cited by respondent, is likewise unavailing. *Johnson* 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 p. 634.) However, the expert did not relay the contents of the testimonial statements to the jury. (*Id.* at pp. 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 (*Haywood*), 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 p. 85.) Holding the testimony admissible under state evidentiary rules, the appellate court found that the defendant's *Crawford* claim was waived. (*Id.* at p. 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 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 pp.

1034-1035.) In reaching this result, the court relied on *Geier* (*id.* at pp. 1035-1036), which, as explained above, is no longer good law. More important, the 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.

Respondent also errs in arguing that the requirements of the Confrontation Clause were satisfied because appellant was allowed to cross-examine Dr. Carpenter. (RSB 62-64.) Forensic witnesses are not fungible. Dr. Carpenter could not testify to the "skill and judgment" Dr. Frisby exercised in performing the autopsy because he was not there – in fact, Dr. Carpenter was not even the supervisor who approved Dr. Frisby's report.[5] (7RT 2825-2830.) Obviously, he could not testify about whether Dr. Frisby deviated from standard procedures or about how carefully or competently she performed the autopsy and reported her observations. (See *State v. Brewington* (N.C. App. 2010) 693 S.E.2d 182 [2010 N.C. App. LEXIS 799] [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. Frisby was required to interpret what she saw and to exercise professional judgment. (See *Melendez-Diaz*, 129 S.Ct. at pp. 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*

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[5] The supervisor who did sign off on Dr. Frisby's report did not testify, and no proffer of his unavailability was made. (7RT 2825-2830.)

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].)

Under the Confrontation Clause, appellant was entitled to have the jury, not Dr. Carpenter, evaluate Dr. Frisby's "honesty, proficiency, and methodology" (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2538) through the crucible of cross examination. The prosecution clearly wanted jurors to believe that Dr. Frisby's observations were complete, accurate, and reliable. Otherwise, Dr. Carpenter's opinion was basically worthless. As a result of the prosecution's election to use Dr. Carpenter to convey to jurors the findings of the inexperienced Dr. Frisby, appellant was denied the opportunity to meaningfully test Dr. Frisby's statements through confrontation and cross-examination. Cross-examining Dr. Carpenter was not an adequate substitute for questioning Dr. Frisby, the author of the testimonial statements. Dr. Carpenter's testimony was no substitute for a jury's first-hand observations of the pathologist who actually reported the findings upon which Dr. Carpenter relied. As the court in *Melendez-Diaz* observed, "[c]onfrontation is one means of assuring accurate forensic analysis." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2536.) 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 p. 838 (conc. & dis. opn. of Thomas, J.).)

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 p. 54.) Respondent's position should be rejected because it fails 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, supra*, 55 Hastings L.J. at p. 1540.) 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 p. 1548.)

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., italics 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, supra,* 541 U.S. at p. 68.) It is irrelevant to the Confrontation Clause analysis that the contents of Dr. Frisby's report were conveyed to jurors through the testimony of Dr.

Carpenter, 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 pp. 50-51, quoting 3 Wigmore, § 1397, at p. 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 p. 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:
> [W]e 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 p. 826.)

In *Melendez-Diaz*, the court made clear 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 p. 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, supra*, 129 S.Ct. at p. 2546 (dis. opn. of Kennedy, J).)

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 a more jury-friendly experienced pathologist who was twice removed from the actual autopsy. That is precisely what occurred here, as Dr. Carpenter was not the supervisor who signed off on Dr. Frisby's report. "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 p. 2542), and the court has made it 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*).

In sum, the Confrontation Clause trumps evidentiary rules where testimonial statements are concerned. It follows that an expert's testimony conveying autopsy findings, as well as the autopsy report relied upon, are testimonial and are admissible only when the pathologist who performed the autopsy and wrote the report is subject to confrontation.

7. The Error In Admitting The Autopsy Report And Dr. Carpenter's Testimony Was Not Harmless

The error in admitting the autopsy report and Dr. Carpenter's testimony was not harmless. No physical evidence connected appellant to the homicide of Koen Witters. The evidence against appellant as to the sole homicide in this case rested entirely on the testimony of Gladys Santos; Santos testified that appellant confessed to her and told her details of the homicide that respondent asserts "could only have been known by the killer or someone present when the murder occurred." (RSB 66.)

Respondent argues the incriminating details consist of the following statements appellant allegedly made to Santos which allegedly were corroborated by evidence found at the crime scene: (1) appellant told Santos that the victim was shaving prior to entering the apartment and shaving cream and stubble were found in Witter's bathroom sink; (2) appellant said he strangled and cut the victim and investigating officers testified that Witters was "found bound, gagged, strangled, and his wrists cut, and the small quantity of blood suggested Witters was dead or dying when the cuts were made;" (3) after the homicide appellant asked Santos if she knew anyone who wanted an Apple computer and an Apple computer was stolen from Witter's apartment; and (4) appellant told Santos that Witters "likes to travel to Europe" and liked Asian women, and Witters was a Belgian citizen who had photographs of Asian women among the belongings found in his apartment. (RSB 67.)

Assuming arguendo that these details were those that only the killer or someone present at the scene would have known, respondent fails to acknowledge that Santos learned the details of the homicide from former codefendant Drebert prior to any alleged conversation she had with

appellant. (5RT 2462-2476.) The details of the crime that she attributed to appellant were actually provided to her by Drebert, so those facts do not constitute "independent" corroboration of appellant's alleged confession.

And contrary to respondent's assertion, investigating officers did not testify that they found Witters "strangled." (RSB 67, citing 5RT 2368, 2370, 2382, 2389-2390.) Nor could they properly testify to such as such a conclusion as it would be outside the area of expertise of any lay person. Witters also had knife wounds and was bleeding from the mouth. (5RT 2370.) Only a forensic pathologist would be qualified to render an opinion that Witters died from asphyxia due to strangulation rather than from other causes.

Respondent concedes that "Dr. Carpenter's testimony concerning the cuts on Witter's body and the strangulation was the cause of death (7RT 2830-2839) served as evidence corroborating Capistrano's confession to Santos." (RSB 67.) However, respondent argues that "the observation of the luggage strap wrapped tightly around Witters' neck at the crime scene [RT cites omitted] strongly and independently suggested that same conclusion and provided sufficient corroboration to Capistrano's personal opinion, as stated in his confession to Santos, that he had strangled his victim." (RSB 67.) However, as previously explained, Santos learned about the use of a "belt" from Drebert (5RT 2436, 2462-2476), so it did not constitute "independent" evidence corroborating the alleged confession. Dr. Carpenter's testimony thus provided the only truly independent evidence of appellant's alleged confession that he strangled the victim. And his testimony that the injuries to Witters' neck and the pallor about the neck were consistent with ligature strangulation (5RT 2833-2834) provided the only independent corroboration of the alleged confession that appellant

strangled man with a belt, as the testimony of investigating officers and the photographs contained in People's Exhibit 34 establish only that Witters was bound about the neck, not that he was strangled to death.

Dr. Carpenter's testimony provided additional independent evidence purporting to corroborate appellant's alleged confession to Santos. For example, Santos testified that appellant said that he had difficulty strangling the man and called Drebert in to hold the other side of the belt. (5RT 2443, 2446.) Dr. Carpenter's opinion that the abrasions on Witters' face were cause by rubbing Witters' face back and forth on the carpet (5RT 2838-2839) was offered to corroborate the struggle in the alleged confession.

Also, Santos testified that appellant said the man would not die, so appellant cut him. (5RT 2443, 2446.) The investigating officer testified that the small amount of blood found near the wrist wound suggested the wounds were likely inflicted post-mortem. (5RT 2389-2390) This testimony was contradicted by Dr. Carpenter's opinion that the bleeding indicated the wounds were inflicted before death; thus, Dr. Carpenter's testimony corroborated the alleged confession to Santos that Witters was alive when the cutting wounds were inflicted. (7RT 2832.)

In sum, Dr. Carpenter's testimony and the autopsy report provided the only independent evidence purporting to corroborate appellant's alleged confession to Gladys Santos. Without such corroboration, the prosecution would have had no case for convicting appellant of the homicide of Koen Witters. The state cannot carry its burden of proving the error in admitting the testimony and the report, singularly or individually, were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Reversal of his conviction and his death sentence is required.

8. Appellant's Sixth Amendment Claim Regarding The Admission Of The Challenged DNA Test Results And Expert Testimony Is Preserved For Review

Respondent argues that appellant waived his Sixth Amendment claim by failing to object below. (RSB 15-17.) However, appellant did object to the admission of the autopsy report on hearsay grounds and pursuant to Evidence Code section 352; those objections were overruled. (8RT 3175-3176.) In any event, respondent fails to address appellant's argument in his supplemental opening brief that California precedent establishes that any failure to object on Confrontation Clause grounds would be excusable, since governing law at the time of the hearing afforded scant grounds for objection. (Supp AOB 4, fn. 1) Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later "changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.) The rule announced in *Crawford* is such a rule, and the courts of appeal have applied it retroactively to cases pending on appeal. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208; *People v. Song* (2004) 124 Cal.App.4th 973, 982; *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400; also see *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 [no waiver of confrontation challenge to hearsay evidence of a proof of service to establish service of a summons or notice, because "[a]ny objection would have been unavailing under pre-*Crawford* law"]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2 ["failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].)

In addition, because appellant's arguments raise only questions of law, this court may and should exercise its discretion to address the *Crawford* and *Melendez-Diaz* issues. (See *People v. Mattson* (1990) 50 Cal.3d 826, 854, superseded by statute on another ground as noted in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173.)

Respondent's assertion that the constitutional claims are not properly before this court thus is contrary to precedent and must be rejected.

C. EVEN IF THIS COURT HOLDS THAT *GEIER* REMAINS THE LAW OF THIS STATE, THE INTRODUCTION OF DR. CARPENTER'S TESTIMONY CONSTITUTES REVERSIBLE ERROR UNDER *GEIER*

In *Geier, supra*, 41 Cal.4th at p. 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* because the report and notes were not testimonial. Thus 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. (*Id.* at pp. 593-595.)

In finding the laboratory report to be non-testimonial, this court found "critical" the fact that the laboratory technician had contemporaneously recorded her observations and analysis. The court relied on *Davis*, in which the Supreme Court characterized as nontestimonial a 911 call describing an "unfolding event," in contrast to a police officer's report of a witness interview about potentially criminal past events. Because the laboratory technician who authored the DNA report had contemporaneously recorded her observations and analysis, this court concluded that she was not

"testifying." (*Id.* at pp. 605-606.) The court also reasoned that the technician was simply doing her job, rather than trying to incriminate the defendant. "Records of laboratory protocols followed and the resulting raw data acquired are not accusatory." (*Id.* at p. 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, [the analyst's supervisor] ..." (*Ibid.*)

Thus, this case is distinguished from *Geier* in two critical ways. First, contrary to respondent's assertion (RSB 27-28, 55-56), the autopsy report was not prepared "contemporaneous" with the autopsy itself. The autopsy report is dated February 26, 1996 - more than two months after the autopsy was performed. (Peo. Exh. 36, page 9.) Under *Davis* and *Geier*, this fact alone makes the "statement" (i.e., the autopsy report) testimonial in that it was made when there was no ongoing emergency and its primary purpose was to prove past events which were potentially relevant to later criminal prosecution. (*Davis, supra*, 547 U.S. at p. 822; see *Geier, supra*, 41 Cal.4th at p. 605 [statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial].)

Moreover, in *Geier* this Court found that the data from DNA testing was not prepared for trial but for the benefit of supervisors who would analyze the data and perform subsequent testing, and that it was such supervisors who, when they testify, would bear witness against the accused. (*Geier, supra*, 41 Cal.4th at pp. 602-607.) Here, in contrast, in the instant case, the supervisor of the pathology fellow who performed the autopsy – whose approval was a prerequisite to finalizing the report (5RT 2829) – did not testify. Rather, another deputy medical examiner, who had no

involvement in the autopsy, testified. (5RT 2855-2830.) Given these circumstances, Dr. Carpenter was more of a parrot than a direct supervisor of the sort this court found to be an acceptable witness in *Geier*. Allowing Dr. Carpenter to transmit Dr. Frisby's testimonial hearsay to the jury effected an end run around *Crawford* and thus violated appellant's Sixth Amendment right to confront witnesses against him.

Thus, the admission of Dr. Carpenter's testimony and the autopsy report violated appellant's Sixth Amendment rights under *Geier* and the error was prejudicial for the reasons stated in section B.7., above, incorporated by reference as if set forth fully in this paragraph.

D. UNDER *CRAWFORD* AND *MELENDEZ-DIAZ*, GROSSWEILER'S TEST RESULTS AND REPORT CONSTITUTE TESTIMONIAL HEARSAY

Respondent made essentially the same assertions, rebutted above, with respect to appellant's argument that Anjali's Swienton's testimony regarding DNA evidence was admitted in violation of appellant's Sixth Amendment right to confrontation. (See, e.g., RSB 28-38 (Arguments D.2.a. through D.2.c.).) Appellant therefore incorporates by reference sections A. and B., *ante*, as if fully set forth in this paragraph and will not repeat those arguments in this section.

Respondent also asserts that the report of Linda Grossweiler constituted "raw data" and was not a testimonial statement within the meaning of *Crawford* or *Melendez-Diaz*, and thus no Sixth Amendment error occurred when Swienton rendered an opinion at trial based upon Grossweiler's report. (RSB 38-46.) However, as explained below, that DNA test results are not simply mined "raw data;" rather, the tests done and the data produced are the product of many subjective judgment calls of the tester.

1. Grossweiler's Testing And Report Were Testimonial Under *Melendez-Diaz* As The Sole Purpose Of The Testing And The Report Was For Their Use In Court Against Appellant

Respondent argues that the nylon strips produced by Grossweiler as the result of her DQ Alpha testing "were not prepared for the sole purpose of providing prima facie evidence of the charged offense at trial" and were thus unlike the affidavits deemed testimonial in *Melendez-Diaz*, which were prepared exclusively for use in court as evidence against the accused. (RSB 38, 45) Respondent asserts that "the purpose of Grossweiler's notes and internal reports (which were not offered into evidence but were reviewed by Swienton) was to record the data produced by the DNA testimony, not to offer testimony against appellant." (RSB 45.) The record belies these assertions.

Swienton testified that Cellmark Diagnostics had two departments – a paternity department and a forensic department. (6RT 2706.) She described the purpose of the forensic department as follows:

> [O]ur forensic department where we primarily receive cases from all over the country in criminal and civil matters, where we test evidence from crimes that have occurred and attempt to match up that biological evidence either victims or suspects in those cases.

(6RT 2706-2707.) She described her job responsibilities as including testifying at trials in cases she had "personally worked on," to offer her "expert testimony on that data that I generated in the laboratory." (6RT 2707.) She testified that in a criminal case such as this one where she is provided with a "rape kit" containing swabs from a victim, the purpose of the testing is to identify the individual who left that information there. (6RT 2712.) Swienton also testified that in sexual assault cases, forensic analysts assume that they are going to find DNA from at least two people and that

what they are doing in the laboratory is to identify the donor of the semen or sperm. (7RT 2744-2745.) Finally, People's Exhibit 32, reflecting Grossweiler's DQ Alpha testing, was described as a chart based on Swienton's notes "which were in turn based on Grossweiler's report." (7RT 2742.) Given these circumstances, it defies credulity to assert that the purpose of Grossweiler's notes and internal reports "not to offer testimony against appellant" (RSB 45) within the meaning of *Melendez-Diaz*.

2. DNA Analysis Is Subjective, Not Rote

Respondent contends that the "nylon strips" were not testimonial in that they were only created to "provide an observable record of the contents of the biological samples; the notes and reports were created to document the scientific process involved in creating the strips and in evaluating the significance of the results."[6] (RSB 38.)

In support of this proposition, respondent relies in part on several pre-*Melendez-Diaz* cases and two post-*Melendez-Diaz* cases from other states which found that instrument-generated data were not "statements" of a person who could "bear testimony" against a defendant and did not "establish or prove a past event," but simply reflected the "current condition" of the biological sample in the machines. (RSB 39-46.)

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[6] Respondent is correct that Swienton herself conducted the STR testing on the vaginal swab and a second blood sample submitted for Capistrano, and thus no confrontation claim may be asserted in that regard. (RSB 2-3, 7.) Respondent's characterization of the end result of the contested DQ Alpha Polymarker test performed by Grossweiler as "nylon strips"is not exactly accurate, since that test identifies DNA types by a series of blue dots contained on nylon strips; the STR test identifies types that are present by a series of bands on a piece of film. (6RT 2727-2728; 7RT 2741.) Since the terms "strips" and "bands" can be interchangeable, to avoid confusion appellant will refer to the DQ Alpha test results as a series of "blue dots."

Of those cases, only one, *People v. Brown* (2009) 13 N.Y.3d 332 (*Brown*), analyzed the whether a DNA report, introduced through a non-testing forensic biologist, was "testimonial" within the meaning of *Crawford, Davis and Melendez-Diaz*. Thus, *Brown* is the only relevant case, as it will be shown below that the DNA analysis done by Grossweiler was qualitatively different from the work done by technicians who use machines such as gas chromatographs, infrared spectrometers, and computers to generate data spreadsheets and statistical analyses.

In *Brown*, the New York Court of Appeals held that a defendant's right to confrontation was not violated by the admission into evidence of reports generated by two private laboratories, each of which consisted of a DNA profile developed from blood samples extracted from the crime scenes. New York's high court held that these reports were not "testimonial" within the meaning of *Crawford* because they "consisted of merely machine-generated graphs" and raw data. (*People v. Brown*, *supra*, 13 N.Y.3d at p. 340.) The reports contained no conclusions, interpretations, comparisons, or subjective analyses. (*Ibid.*) The court held that the state was not required to present the testimony of each technician who actually developed the reports, as they "would not have been able to offer any testimony other than how they performed certain procedures." (*Ibid.*). They did not perform any analyses of the DNA samples involved in the case, and played no role in linking the defendant's DNA to the profiles developed from the samples extracted from the crime scene. (*Ibid.*)

In fact, the record in this case demonstrates that DNA analysis consists of much more than just pouring genetic material into a machine which that in turn generates raw data. An examination of the work

Grossweiler did shows that her subjective analysis played a large role in shaping the evidence presented against appellant.

In sexual assault cases, a vaginal swab, such as that taken from the victim in this case,[7] will have both the semen, if any, from the perpetrator and cells from the victim. (7RT 2744-2745.) Grossweiler attempted to separate the sperm cells from the other cells present, in an effort to isolate the DNA of the perpetrator, by placing the sample in a test tube and placing it in a centrifuge. Because sperm cells are much tougher than other types of cells, and do not break apart, the intact sperm cells sink to the bottom of the test tube and the broken cells float on top. (7RT 2744-2749, 2773.) The sperm fraction is then separated from the non-sperm fraction, and DNA of the perpetrator is expected to be found in the sperm fraction. (7RT 2747.) However, when there are few sperm present, the process does not separate them completely and DNA from the victim can also be found in the sperm fraction. (7RT 2748.) In this case, Grossweiler was unable to completely separate the sperm fraction from the non-sperm fraction, but the sperm fraction did contain the DNA of more than one person. (7RT 2756.) Complex DNA mixtures must be interpreted, and such interpretation is complicated by technical issues that can make genotype assignment and subsequent statistical evaluation of the results a challenging task for the analyst. (Ladd, et al., *Interpretation of Complex Forensic DNA Mixtures*, Croatian Medical Journal (2001) Vol. 42, pp. 244-246.) Such interpretation involves subject judgment calls, and are not simply the product of a machine's computation.

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[7] The oral swab taken from the victim in this case contained DNA consistent only with the victim. (7RT 2749.)

Next, Grossweiler chose the DNA test to perform on the non-sperm fraction. Several DNA tests were available. (6RT 2708.) The first DNA test Grossweiler performed was a restriction fragment length polymorphism (RFLP) test on the vaginal swab. RFLP is the most conclusive DNA test that can be performed, but it requires a large biological sample in order to get results. (6RT 2715-2716; 7RT 2739.) Grossweiler performed that test and determined that it was inconclusive – i.e., she determined that the DNA that she could analyze using that test was only consistent with that of the victim. (7RT 2737-2738.) There was no testimony as to what criteria Grossweiler used to make that determination. In any event, this constituted subjective judgment call. Much of Swienton's cross-examination focused on why the RFLP test could not be performed successfully in this case when it had been done with success in other cases; Swienton could only defer to Grossweiler's judgment call. (7RT 2784-2804.)

The next DNA test Grossweiler performed was a polymerase chain reaction (PCR) test. (6RT 2716-2717.) A PCR test is not as discriminating as RFLP, but it can be performed on a very small sample. (6RT 2717-2719.)

There are three steps to a PCR test. (7RT 2739.) The first step is called "extraction and isolation," where the tester obtains the DNA out of whatever is being tested. The second step is called "amplification," where the tester copies the DNA by somehow making a "genetic xerox" of the DNA. The third step is the typing step. (7RT 2740-2741.)

PCR testing is more prone to error than RFLP testing. (Riley, Donald E., Ph.D., *DNA Testing: An Introduction For Non-Scientists* (April 6, 2005) Scientific Testimony: An Online Journal, <http://www.scientific.org/tutorials/articles/riley/riley.html> (as of August 31, 2010), section entitled "Forensic DNA Testing" (Riley).) The

importance of contamination in PCR testing is key to reliable results: since a single DNA molecule can become millions of molecules in a few hours through the amplification process, the copies are only accurate if the original DNA source for the amplification is in good condition and not contaminated. (*Id.*, at section entitled "PCR Contamination.") Small amounts of extraneous DNA can infect a PCR test and lead to false and misleading results. (*Ibid.*) DNA samples of known individuals must be kept well out of range of other items of evidence at all stages. (*Ibid.*) The only protection PCR testing has from contamination is the technique of the analyst. (*Ibid.*) Grossweiler, however, was not available to cross-examine about the steps she took to prevent contamination nor manner in which she conducted the tests.

There are many different ways to do DNA typing, and different tests look at different areas of the DNA. (6RT 2720-2721; 7RT 2741.) In this case, Grossweiler chose to use the DQ Alpha polymarker test – the name of the test refers to the genetic site which is being typed. (6RT 2721, 2732.) Why she chose that test was not explained. The end result of the DQ Alpha test is a series of blue dots contained on nylon strips. (6RT 2727-2728.) The blue dots indicate the presence of DNA. (6RT 2728.) One has to be trained to interpret the strips; and since the blue dots fade over time, a color photograph must be taken close in time to the test in order to preserve the result. (*Ibid.*) Swienton testified that she reviewed Grossweiler's written notes and the original data that Grossweiler generated from the test, and reached the same opinion as Grossweiler expressed in her report as to the types identified along the six points that the DQ Alpha polymarker tests types. (6RT 2733.) However, there was no testimony that any photographs were actually taken or that Swienton reviewed and relied on photographs in

forming her opinion; thus, we do not know whether Swienton simply relayed Grossweiler's interpretation of the results of the testing.

Swienton testified that if she had been the analyst performing the case, she would have had another analyst witness several of the steps of the process "just to ensure that we've got two sets of eyes that are looking at what's being done, sort of as a check." (6RT 2726.) Also, negative controls in PCR testing must be used in order to detect contamination and prevent false results. (Riley, *supra*, section entitled "PCR Contamination.") Grossweiler was not available to ask whether she followed the protocol Swienton used or whether she used negative controls during the DQ Alpha polymarker testing.

When Swienton performed the STR test in April of 1997, she ordered a new blood sample from appellant because, in her opinion, the sample that Grossweiler had used had degraded too much to use in DNA testing. (7RT 2766-2768.) She did not know why or when it had degraded. (7RT 2768.) As mentioned above, degradation of the original DNA can lead to test results error. (Riley, *supra,* at section entitled "PCR Contamination"; see also Rudin and Inman, An Introduction To Forensic DNA Analysis (2nd ed. 2002) pp. 117-118.) Grossweiler was not available to cross-examine as to why, in her opinion, the first blood sample taken from appellant was of sufficient quality for use in the DQ Alpha test.

Given the foregoing, respondent's contention that Grossweiler was a mere technician who fed data into a machine is contradicted by the record. It is clear that "at least some of" the methodology used in the testing in this case "require[d] the exercise of judgment and present[ed] risks of error that might be explored on cross-examination." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2537.) For all the foregoing reasons, as well as those set forth in his

supplemental opening brief, appellant was denied his Sixth Amendment confrontation right when Swienton testified instead of Grossweiler.

3. The Error In Admitting The Challenged DNA Was Not Harmless

Respondent asserts a number of reasons why the error in admitting the DQ Alpha testing performed by Grossweiler was harmless. (RSB 46-48.) None are availing.

Respondent first contends that "Ms. Swienton independently reviewed the data produced by the scientific tests performed by Grossweiler and reached an independent conclusion" that was admissible under Evidence Code section 801. (RSB 46.) This is simply a reassertion of propositions that have been addressed above. As explained, DNA testing is not a rote, mechanical generation of "data" but rather involves subjective analysis and judgment calls. (see Argument D.2., *ante*.) The DNA report prepared by Grossweiler was therefore testimonial hearsay (see Argument D.1., *ante*); *Crawford* and *Melendez-Diaz* prohibit prosecutors from presenting such testimonial hearsay through a supervisor. (See Argument B.6., *ante*.)

Respondent next argues that "other circumstantial evidence sufficiently linked appellant to the J.S./E.G. offenses to render any erroneous admission of evidence harmless beyond a reasonable doubt." (RSB 46-47.) However, like the capital crime, the only evidence linking appellant to the J.S./E.G. offenses is the testimony of Gladys Santos, a witness of dubious credibility who shifted the blame from herself (as she was in possession of the stolen items) to appellant in order to avoid criminal charges. (See RSB 47.) As respondent acknowledges, neither J.S. nor E.G. identified appellant as one of the perpetrators (*ibid.*) and appellant's anatomy did not match that of the perpetrator. (9RT 3318-3319, 3332.) Respondent's speculation that appellant must have been involved in that crime because Pritchard and Vera

were involved (RSB 47) is just that – speculation, and not evidence. Absent the results of Grossweiler's DQ Alpha testing, the only remaining evidence was that appellant could not be excluded by the STR testing performed by Swienton. That testing showed only that male DNA was present and that three other markers were consistent with both appellant and the victim. (7RT 2772-2780.) That evidence is far from "abundant" evidence of appellant's guilt (RSB 48) as the evidence of a match means nothing without evidence of the statistical significance of the match. As this Court explained in *People v. Soto* (1999) 21 Cal.4th 512, 523:

> [A] match of one or more of the suspect's bands with those of the sample places the suspect within a class of persons from whom the sample could have originated. The fact finder's determination of guilt may then turn on the degree of probability that the suspect was indeed the source of the sample. [. . .]
>
> The question properly addressed by the DNA analysis is therefore this: Given that the suspect's known sample has satisfied the "match criteria," what is the probability that a person chosen at random from the relevant population would likewise have a DNA profile matching that of the evidentiary sample?

(See also *People v. Nelson* (2008) 43 Cal.4th 1242, 1258 [once a match is found, the next question is the statistical significance of the match, citing *People v. Wilson* (2006) 38 Cal.4th 1237, 1242.) In fact, Swienton testified that the frequency of the STR markers found in appellant's DNA was quite common: 1 in 1300 in the Caucasian population and 1 in 2700 in the Hispanic population. (7RT 2801-2802.) On redirect, Swienton opined that if she factored in the six DQ Alpha Polymarkers that appellant exhibits (which she did not in fact do), that would increase the statistics "significantly," making appellant a more likely donor of the DNA. ((7RT 2807.) Thus, Grossweiler's work, which was not subject to cross-

examination, prejudicially added to the evidence against appellant as to the crimes against J.S. and E.G.

The applicable standard is whether the state has carried its burden of proving the error was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) For all the foregoing reasons as well as those stated in appellant's supplemental opening brief, the state has failed to carry its burden of establishing that the error in admitting Grossweiler's report, notes, etc. regarding her DQ Alpha Polymarker testing through the opinion testimony of Swienton was harmless beyond a reasonable doubt. Reversal is required.

4. Appellant's Sixth Amendment Claim Regarding The Admission Of The Challenged DNA Test Results And Expert Testimony Is Preserved For Review

Respondent argues that appellant has forfeited his Sixth Amendment claim of error for failing to object on that ground at trial. (RSB 12-15.) Appellant incorporates by reference section B.8., *ante*, as if fully set forth in this paragraph. Respondent's assertion that the constitutional claims are not properly before this Court is contrary to precedent and must be rejected.

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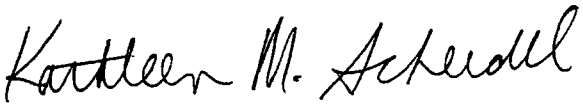
CONCLUSION

For all the reasons stated in appellant's opening brief, his reply brief, his supplemental opening brief and herein, appellant's convictions and death judgment must be reversed.

DATED: October 5, 2010

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender



KATHLEEN M. SCHEIDEL
Assistant State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630(b)(2)

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant John Capistrano in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 13, 593 words in length.

DATED: October 5, 2010

Kathleen M. Scheidel

KATHLEEN M. SCHEIDEL
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. John Leo Capistrano* No.: KA 034540
Calif. Supreme Ct. No. S067394

I, CARY JOHNSON, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; and that on October 6, 2010, I served a true copy of the attached:

SUPPLEMENTAL APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
Margaret Maxwell, Supervising D.A.G
300 South Spring St., 5th Floor
Los Angeles, CA 90013

Los Angeles Co. Superior Court
ATTN: Addie Lovelace
Death Penalty Appeals Clerk
210 W. Temple St.
Los Angeles, CA 90012
(For delivery to the Honorable Andrew C. Kauffman, Judge)

Michael Satris
P.O. Box 337
Bolinas, CA 94924

John L. Capistrano
(Appellant)

Each said envelope was then, on October 6, 2010, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 6, 2010, at San Francisco, California.

Cary Johnson
DECLARANT