In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHESTER DEWAYNE TURNER,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S154459

Los Angeles County Superior Court Case No. BA273283
The Honorable William R. Pounders, Judge

SECOND SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

Appellant filed a second supplemental opening brief raising the additional issue of whether the medical examiner's testimony relating the weight and gestational age of Baby Girl Washington (the victim in count 5) was testimonial hearsay admitted in violation of state hearsay law and the confrontation clause. (SSAOB 9-39.) It was not.

First, autopsy reports have long been considered public records, and their contents are accordingly admissible under the public records or business records hearsay exceptions. (*People v. Sanchez* (2016) 63 Cal.4th 665, 685 [expert may "rely on nontestimonial hearsay properly admitted under a statutory hearsay exception"].) Second, even if the statements admitted here were inadmissible hearsay, they were nontestimonial. This Court has held that "anatomical and physiological observations about the condition of the body" are nontestimonial under the Sixth Amendment. (*People v. Dungo* (2012) 55 Cal.4th 608, 619, 622.) The weight and gestational age of a fetus qualify as such observations.

Given *Dungo*'s answer to this issue, appellant argues that the opinion in that case is inconsistent with other authority from this Court and from the United States Supreme Court. (SSAOB 21-32.) But there has been no further guidance from the high court, and the authority on this issue remains far from settled. Regardless, the recording of body measurements in an autopsy report, which is unsworn and uncertified, serves multiple purposes, and is not done solely or primarily as a substitute for

testimony in a criminal trial, even when the manner of death was an obvious homicide. The statements admitted here were accordingly nontestimonial under any formulation or test.

Even if the Court reconsiders its decision in *Dungo* and determines that Baby Girl Washington's weight and age were inadmissible, any possible error in admitting those facts was harmless beyond a reasonable doubt. The testifying medical examiner's independent opinion that the fetus was viable was undisputed and remains admissible. (*Sanchez*, *supra*, 63 Cal.4th at p. 685 [an "expert may still *rely* on hearsay in forming an opinion"].) Since the jury would have heard Dr. Scheinin's opinion that the fetus was viable even if the fetus's weight and age were excluded, appellant could not have been prejudiced.

ARGUMENT

Facts from an autopsy report are nontestimonial

Whether under *Dungo*'s structure of analysis or another, Baby Girl Washington's weight age and were properly admitted. Under *Sanchez*, these facts from the autopsy report were hearsay, but they remained admissible under pertinent hearsay exceptions. They were also nontestimonial because the purpose of recording them in the autopsy report was not solely or primarily for use as evidence in a criminal trial. There was accordingly no error in admitting this evidence, and any possible error was harmless.

A. Dr. Scheinin independently determined that the fetus was viable

Dr. Lisa Scheinin was a deputy medical examiner who conducted one of the 11 autopsies in this case. As to each victim, she personally reviewed the autopsy reports, as well as available photographs and diagrams, and made her own determination as to the cause of death. (12RT 1791; see 12RT 1814, 1817-1818.)

The autopsy of Baby Girl Washington revealed that Regina Washington's fetus weighed 825 grams and was about six-and-a-half months, or 27 to 28 weeks, old. (12RT 1820-1822; JN Exh. A at pp. 7, 9.)[1] At trial, Dr. Scheinin testified to those facts from the autopsy report, which had been prepared by a different examiner. (12RT 1820-1822.) The report did not mention viability. (12RT 1822; JN Exh. A.) Dr. Scheinin concluded that, "just looking at the numbers, the age of the baby would indicate that it was a viable fetus." (12RT 1822.)

Dr. Scheinin explained the medical standards for viability and found that Baby Girl Washington far exceeded them: "[T]he World Health Organization generally says that a fetus can be considered viable after the 22nd week or a weight of 500 grams. [¶] In this case we have a gestational age that is well above that. You're talking 27 to 28 weeks, and you have a weight that is 825 grams rather than 500 grams." (12RT 1822.)

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[1] Appellant's motion for judicial notice, filed concurrently with his second supplemental opening brief on June 16, 2020, includes the autopsy report for Baby Girl Washington as exhibit A, which is cited herein as "JN Exh. A."

Dr. Scheinin presented a chart (People's Exhibit No. 141), which listed different gestational ages and weights. (12RT 1823-1825.) Using the chart, she described a dividing line between fetuses that were considered viable and pre-viable:

> The most important thing is this is the line right here that says, "stage of viability." [¶] So this is the line that you have to be concerned about. Anything to the left of this line is considered a pre-viable fetus and anything to the right of it is considered viable.

(12RT 1825.) She used the chart to show the dividing line of 500 grams and fertilization age of 22 weeks, and again described Baby Girl Washington as far exceeding those minimums:

> [In the weight column], right here this little number here is 500 grams, so that's where the limit of viability is the dividing line, 500 grams. [¶] Down here we have the line going between fertilization age of 22 weeks and/or menstrual age of between 22 and 24 weeks. [¶] So the fetus in this case is about 27 to 28 weeks, so we're talking a fetus in this ballpark about here. This is seven months. The baby is about six and a half months, according to the medical examiner who did the autopsy, so we're talking somewhere around here, so the baby is in this ballpark here, and about in this ballpark here by weight, so it's clearly well into the range that's defined as viable.

(12RT 1825-1826.) Dr. Scheinin further described the fetus as what "appeared to be a normally developing healthy baby," despite the presence of cocaine and alcohol. (12RT 1826-1827, 1889-1891.)[2]

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[2] Appellant did not object on either hearsay or confrontation grounds, but his claim is not forfeited. (*People v. Perez* (2020) 9 Cal.5th 1, 9 [failure to object did not forfeit

B. The confrontation clause prohibits the admission of testimonial hearsay

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *Crawford v. Washington* (2004) 541 U.S. 36, 50-56, the United States Supreme Court held that a criminal defendant has the Sixth Amendment right to confront and cross-examine any witness who offers a testimonial out-of-court statement against him.[3] Although there is no "comprehensive definition of 'testimonial,'" "[g]enerally speaking, a declarant's hearsay statement is testimonial if made 'with a primary purpose of creating an out-of-court substitute for trial testimony.'" (*People v. Fayed* (2020) 9 Cal.5th 147, 168, quoting *Michigan v. Bryant* (2011) 562 U.S. 344, 358.)

Sanchez claim]; *People v. Pearson* (2013) 56 Cal.4th 393, 462 [same re *Crawford*].)

[3] *Crawford* did not provide a definition of testimonial, but instead described: "Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Crawford, supra*, 541 U.S. at pp. 51-52, internal quotation marks and citations omitted.)

In three cases decided since 2009, the high court has applied *Crawford* to the admission of forensic evidence at trial. In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 311, the Court held that the defendant's confrontation rights were violated by the admission of sworn affidavits stating that a substance connected to the defendant was cocaine. In *Bullcoming v. New Mexico* (2011) 564 U.S 647, 658-663, the Court held that testimony of a laboratory analyst "parroting" the results of a blood alcohol test that he did not perform or observe, together with admission of a formal certified report, violated the defendant's confrontation rights. In *Williams v. Illinois* (2012) 567 U.S. 50, 83-86, the Court held that testimony by a police biologist regarding a DNA match, which relied in part on a DNA profile generated at another laboratory, was not testimonial and did not violate the confrontation clause.

The United States Supreme Court's decisions interpreting *Crawford*, and particularly the fractured 4-1-4 opinion in *Williams*, have produced conflicting opinions in the lower federal and state courts. Shortly after *Williams*, this Court decided three companion cases addressing *Crawford*'s application to various items of evidence. (See *People v. Lopez* (2012) 55 Cal.4th 569 [blood alcohol tests]; *Dungo*, *supra*, 55 Cal.4th 608 [autopsy reports]; *People v. Rutterschmidt* (2012) 55 Cal.4th 650 [toxicology analysis of victim's blood].) In his dissenting opinion in *Lopez*, Justice Liu noted:

> The nine separate opinions offered by this court in the three confrontation clause cases decided today reflect the muddled state of current doctrine concerning the

> Sixth Amendment right of criminal defendants to confront the state's witnesses against them. The United States Supreme Court's most recent decision in this area produced no authoritative guidance beyond the result reached on the particular facts of that case. (See *Williams v. Illinois* (2012) 567 U.S. [50], 132 S.Ct. 2221, 183 L.Ed.2d 89 (*Williams*).) Given the array of possible doctrinal approaches left open by *Williams*, one can only surmise that the high court will soon weigh in again.

(*Lopez*, *supra*, 55 Cal.4th at pp. 575-576 (dis. opn. of Liu, J.).)

Despite the obvious need for clarity, the proper application of *Crawford* and its progeny remains largely ambiguous. Nationally, state and federal courts are split about whether autopsy reports, or aspects of them, are testimonial. (See Pardo, *Confrontation After Scalia and Kennedy* (2019) 70 Ala. L. Rev. 757, 778 ["Courts around the country have divided sharply on the question of whether autopsy reports are testimonial and thus subject to confrontation requirements"]; Amato, *What Happens if Autopsy Reports are Found Testimonial?*, 107 J. Crim. L. & Criminology 293, 306-309 (Spring 2017) [describing severe split among state and federal courts].)

But several of this Court's decisions show that Dr. Scheinin's trial testimony was permissible, and that any error in admitting a small part of her testimony was harmless beyond a reasonable doubt. Those conclusions are not diminished by any cases from other state or federal courts.

In *Dungo*, *supra*, 55 Cal.4th at pages 620 to 621, this Court explained that statements in an autopsy report describing a nontestifying pathologist's observations about the condition of the

victim's body were not testimonial because the primary purpose of recording such facts did not relate to a criminal investigation. The Court also described such statements, which "merely record[ed] objective facts," as being "less formal than statements setting forth a pathologist's expert conclusions," about the victim's cause of death for example. (*Id.* at p. 619.) Since the testifying expert provided his own opinion as to cause of death and did not inform the jury of the report's conclusion in that regard, the testimonial aspect of a report's conclusions was not before the Court. (See *id.* at pp. 619, 622, 624.)

In *People v. Sanchez* (2016) 63 Cal. 4th 665, this Court analyzed the relationship between expert testimony and the confrontation clause under *Crawford*. *Sanchez* did not consider forensic evidence, but arose in the context of expert gang evidence. The Court held that "case-specific statements related by a prosecution expert concerning the defendant's gang membership constituted inadmissible hearsay under California law." (*Id.* at p. 670.) The statements had been recited by the expert, who presented them as true statements of fact, without independent proof. (*Id.* at p. 671.) The Court concluded that some of the hearsay statements, namely those contained in police reports and a STEP notice, were "testimonial" and thus should have been excluded under *Crawford*. (*Ibid.*) Because the erroneous admission of that testimonial hearsay was not harmless beyond a reasonable doubt, the Court reversed the jury's true findings on the gang enhancements. (*Ibid.*)

Sanchez also clarified what an expert can and cannot do when relying on hearsay or when relating hearsay to a jury: "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.) But, the Court cautioned, "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686.)

The Court adopted the following rule:

> When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing.

(*Sanchez, supra,* 63 Cal.4th at p. 686, footnote omitted.)

In *Perez* this Court applied *Sanchez* to testimony from a pathologist who did not make the original autopsy observations, and held that any error was harmless. The Court first determined that the testifying pathologist's description of the victim's wounds and postmortem condition, which were taken directly from the autopsy report, constituted hearsay under

Sanchez. (*Perez*, *supra*, 4 Cal.5th at p. 456 ["If an expert testifies to case-specific out-of-court statements on which he or she relied for their truth to form an opinion, such statements are also 'necessarily considered by the jury for their truth, thus rendering them hearsay,'" quoting *Sanchez*, *supra*, 63 Cal.4th at p. 684].) The Court noted that such statements may nevertheless be admissible under a hearsay exception, which would then require a determination of whether they were testimonial. (*Ibid.*) The Court avoided that question, and the related question of "*Dungo*'s continued viability," by holding that their admission was nevertheless harmless beyond a reasonable doubt. (*Ibid.*)

The Court concluded that an expert, like the testifying pathologist, is permitted to rely on hearsay in forming his or her opinion. (*Perez*, *supra*, 4 Cal.5th at pp. 456-457, citing *Sanchez*, *supra*, 63 Cal.4th at p. 685 & Evid. Code, § 802 [a witness testifying to an opinion may provide the reasons for it].) Since the jury would have heard the testifying pathologist's opinion about the cause of death even if the challenged hearsay statements underlying that opinion were excluded, "any error was harmless beyond a reasonable doubt." (*Perez*, at p. 457; see also *People v. Garton* (2018) 4 Cal.5th 485, 507 [assuming statements from an autopsy report were testimonial, "any confrontation clause error would have been harmless beyond a reasonable doubt"].)

C. Baby Girl Washington's weight and age, as reflected in the autopsy report, were properly relied upon and presented to the jury

Sanchez set out a two-step procedure for analyzing this issue. (*Sanchez*, *supra*, 63 Cal.4th at p. 680.) First "is a traditional hearsay inquiry," where the court determines whether the challenged statement is offered to prove the truth of the matter stated therein and, if so, whether a hearsay exception applies. (*Ibid.*) If a hearsay statement is being offered against a criminal defendant, the second step is to determine whether the statement is testimonial. (*Ibid.*) The statements admitted from the autopsy report here were admissible pursuant to hearsay exceptions and were not testimonial. There was thus no violation of state evidentiary rules or the confrontation clause.

1. Case-specific facts from the autopsy report were admissible under the public and business records exceptions to the hearsay rule

Appellant first claims that Baby Girl Washington's weight and age were case-specific hearsay with no exception, and were thus improperly admitted under *Sanchez*. (SSAOB 12-15.) It is true that the fetus's weight and age provided a basis for Dr. Scheinin's opinion that the fetus was viable, and thus constituted case-specific basis evidence that would be hearsay under *Sanchez* if no hearsay exception applied. However, these facts from the autopsy report were admissible under either the public records or business records exception to the hearsay rule, and *Sanchez* thus does not affect its admissibility.

This Court in *Sanchez* clarified that case-specific evidence forming the basis of an expert's opinion is offered for its truth, and it is thus inadmissible as hearsay unless an exception applies or unless it is independently proven by competent evidence. (*Sanchez*, *supra*, 63 Cal.4th at pp. 680-684, 686.) Beyond that, *Sanchez* did not change the law of hearsay or its well-established exceptions. (See *id*., at p. 674 ["Nothing in our opinion today changes the basic understanding of the definition of hearsay."].)

An autopsy report is a public record, and statements from such a report have long been held admissible as such. (See Evid. Code, §§ 1271 [business record exception], 1280 [public record exception]; *Perez*, *supra*, 4 Cal.5th at p. 456 [assuming without deciding that autopsy reports may be admissible as a business or public record]; *People v. Beeler* (1995) 9 Cal.4th 953, 978-981 [autopsy report, including opinion on cause of death, properly admitted in evidence under business record exception]; *People v. Clark* (1992) 3 Cal.4th 41, 158-159 [substitute pathologist permitted to testify to contents of autopsy report prepared by another under public record exception; noting "state was not required . . . to exhume the remains and perform a new autopsy after Dr. Carpenter's death"]; *People v. Wardlow* (1981) 118 Cal.App.3d 375, 388 [public record exception permitted substitute pathologist to testify to contents of autopsy report prepared by another who left office]; *People v. Demes* (1963) 220 Cal.App.2d 423, 442 [autopsy report was admissible as a public record]; *People v. Williams* (1959) 174 Cal.App.2d 364, 389-390 [substitute pathologist permissibly read findings, other than

cause of death, to jury from autopsy report, which was a public record].)[4]

Dr. Scheinin described the creation, contents, and storage of autopsy reports in the Los Angeles County Coroner's Office. They were typically dictated the same day or the day after an autopsy, secured in a file area or on microfiche "with limited access," and later typed up as needed. It was common for a pathologist to testify in place of the doctor who conducted the autopsy. (12RT 1788-1791.) Accordingly, the case-specific basis evidence here (the fetus's weight and age) was hearsay under *Sanchez* but admissible under the hearsay exceptions for business and public records.

Appellant does not address the applicability of any hearsay exceptions. (SSAOB 12-15.) In this Court's two post-*Sanchez* cases analyzing admissibility of case-specific basis evidence from an autopsy report, it has not discussed the continued

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[4] Evidence Code section 1271 states that a business record "is not made inadmissible by the hearsay rule . . . if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event [recorded]; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

And Evidence Code section 1280 provides that a public record "is not made inadmissible by the hearsay rule . . . if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

applicability of these hearsay exceptions. In *Perez*, this Court concluded that descriptions from an autopsy report were hearsay under *Sanchez*, but assumed without deciding that they were "admissible under an applicable hearsay exception." (4 Cal.5th at p. 456, citations omitted.) In *Garton*, *supra*, 4 Cal.5th at page 506, the Court found facts relayed from an autopsy report hearsay under *Sanchez* and did not mention the potential applicability of a hearsay exception.

Under *Sanchez*, the applicability of a hearsay exception permits an expert to relay case-specific basis testimony to the jury as true facts. (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) However, even if there is no applicable exception, the "expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id.* at pp. 685-686; Evid. Code, § 802.) Thus, regardless of whether the fetus's weight and age were admissible under a hearsay exception, Dr. Scheinin was permitted to rely on that information in forming her opinion that the fetus was viable and was further permitted to generally inform the jury that she did so. (See *Perez*, *supra*, 4 Cal.5th at p. 457 [testifying pathologist's opinion on cause of death was admissible, and he permissibly relied on case-specific hearsay in forming it].)

Neither *Crawford* nor *Sanchez* impacted the applicability of hearsay exceptions under state law, and this Court should thus continue to uphold the admission of statements from an autopsy report under the public or business records exceptions to the hearsay rule. (See *Ohio v. Clark* (2015) 576 U.S. 237, 245-246

[where a statement does not have a testimonial primary purpose, its admissibility "is the concern of state and federal rules of evidence"].)

2. The fetus's weight and age were nontestimonial

The case-specific evidence admitted from the autopsy report here, Baby Girl Washington's weight and age, was nontestimonial. This Court has held that "anatomical and physiological observations about the condition of the body" are "not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation right." (*Dungo*, *supra*, 55 Cal.4th at pp. 619, 621; see also *Perez*, *supra*, 4 Cal.5th at p. 456.) The challenged evidence here squarely falls into this category of evidence. However, appellant argues that this Court should reconsider this holding from *Dungo*. (SSAOB 23-33.) Since *Dungo* was decided, neither this Court nor the United States Supreme Court has altered its approach to forensic evidence under the confrontation clause, so the Court need not reconsider *Dungo* here.

As set out above, there remains a lack of clarity regarding the confrontation clause's applicability to autopsy reports. The high court's post-*Crawford* confrontation clause cases have focused on two points: formality and purpose. However, the Court's approach to those two points has differed significantly depending on whether the challenged statements are the result of police questioning or appear in a forensic report.

The primary purpose test was developed in the context of police questioning of victims and witnesses. (See *Crawford*,

supra, 541 U.S. at p. 51-52 [a testimonial statement is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact," such as "[s]tatements taken by police officers in the course of interrogations," which are "testimonial under even a narrow standard"]; *Davis*, *supra*, 547 U.S. at p. 822 [statements to police are nontestimonial when an interrogation occurs "under circumstances objectively indicating that the primary purpose" is to respond to an ongoing emergency, but they are "testimonial when the circumstances objectively indicate . . . that the primary purpose" is to obtain evidence for a potential criminal prosecution]; *Bryant*, *supra*, 562 U.S. at p. 360, 374 [noting that circumstances other than an ongoing emergency may make a statement nontestimonial, and clarifying that the primary purpose is determined objectively based on "the purpose that reasonable participants would have had" based on the circumstances and the participants' statements and actions, rather than any subjective purpose].)

In its consideration of the circumstances surrounding police questioning to determine its primary purpose, the query is similar to determining whether an interrogation was custodial. (See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 663 ["the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views" of the participants].) The primary purpose test does not comfortably fit within the context of forensic reports, which is likely the reason it was not even mentioned in either *Melendez-Diaz* or *Bullcoming*.

Rather than discussing the forensic reports' primary purpose, *Melendez-Diaz* and *Bullcoming* emphasized the fact that the reports were created for the "sole purpose" of providing evidence at trial. (*Bullcoming*, *supra*, 564 U.S. at pp. 663-664 ["A document created solely for an 'evidentiary purpose,'. . . made in aid of a police investigation, ranks as testimonial"]; *Melendez-Diaz*, *supra*, 557 U.S. at p. 311 ["under Massachusetts law the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance"].) As set out below, the autopsy report here was not created for the sole purpose of providing prosecution evidence, so it does not rise to the testimonial level of the reports considered in *Melendez-Diaz* and *Bullcoming*.[5]

After the three forensic report cases, the high court decided *Clark*, *supra*, 576 U.S. at pages 245 to 246, wherein it returned to the primary purpose test when evaluating statements by a child victim to his teacher. The Court considered the applicability of

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[5] Although the divergent opinions in *Williams* make it difficult to discern useful guidance from that case, it is notable that a majority found the report nontestimonial, albeit for different reasons. The plurality found it nontestimonial both because it was not admitted for its truth but to help explain the testifying expert's opinion, and because its primary purpose was to locate a rapist who was still at large rather than to accuse a targeted individual. (*Williams*, *supra*, 567 U.S. at pp. 57-58, 84-85 (plur. opn. of Alito, J.).) Justice Thomas, who is the primary advocate for the formality approach, found the report "lack[ed] the solemnity of an affidavit or deposition"; it was signed and requested by law enforcement but was not sworn or certified and did not attest to its accuracy. (*Id.* at p. 111 (conc. opn. of Thomas, J.).)

the confrontation clause to statements made to people who were not law enforcement, and found that such statements "could conceivably raise confrontation concerns." (*Id.* at p. 246.) After "considering all the relevant circumstances," it found the victim's statements "nothing like the formalized station-house questioning in *Crawford*," and "not made for the primary purpose of creating evidence for Clark's prosecution." (*Id.* at pp. 246-247.)

The *Clark* Court also summarized and clarified the primary purpose test: "a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." (*Clark*, *supra*, 576 U.S. at p. 245 [the existence of an ongoing emergency and the "informality of the situation and the interrogation" were factors to consider in determining a statement's primary purpose].) "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence." (*Id.* at pp. 245-246, citation and quotation marks omitted.)

Notably, the *Clark* Court did not rely on or discuss *Bullcoming*, *Melendez-Diaz*, or *Williams* in its decision, which further suggests that the approach to forensic reports is necessarily different than in interrogation cases. As noted above, the only two cases to exclude a forensic report on confrontation grounds found that the certified reports were created for the "sole purpose" of providing evidence in a criminal trial. Accordingly, to the extent that the purpose of a forensic report's statement is to be considered, the statement should be found not to violate the

confrontation clause unless its sole purpose is to create prosecution evidence.

The *Clark* court also clarified that, at least in interrogation cases, formality is part of the determination of a statement's primary purpose, rather than a separate inquiry. (See *Ohio v. Clark* (2015) 576 U.S. 237, 245 [formality is one factor of the primary purpose test].)

In the forensic report context, the United States Supreme Court's formality analysis has focused on the preparer's certification of the report's contents. In both *Melendez-Diaz* and *Bullcoming*, the analysts certified the report contents as true. (*Bullcoming*, *supra*, 564 U.S. at pp. 653, 665; *Melendez-Diaz*, *supra*, 557 U.S. at p. 308.) That made the reports akin to affidavits, which were specifically included "within the 'core class of testimonial statements'" described in *Crawford*. (*Bullcoming*, at p. 671 (conc. opn. of Sotomayor, J.) ["formality derives from the fact that the analyst is asked to sign his name and 'certify' to both the result and the statements on the form," which "require[d] one '[t]o attest' that the accompanying statements are true"]; *Melendez-Diaz*, at p. 310 [the certificate, sworn before a notary, was "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact," quotation marks omitted].)

Regardless of the test or standard that should be used to evaluate the facts admitted from the autopsy report here, they were nontestimonial.

a. Neither the autopsy report nor the facts admitted from it were sufficiently formal

Viewing the autopsy report as a whole, it was not sufficiently formal or solemn to be testimonial. The report was merely signed and dated by the examining pathologist. (JN Exh. A at pp. 15, 17, 19, 21.) Unlike the reports in *Bullcoming* and *Melendez-Diaz*, the autopsy report here did not certify or affirm the truth of the statements contained therein, it was not notarized, it did not contain information supplied by the arresting or investigating officer, and it did not reference any statutory authority permitting its admission in court. (*Bullcoming*, *supra*, 564 U.S. at pp. 653, 660 [report included information from the arresting officer, including the reason for the stop, the date and time of the blood draw, and affirmation of arrest, as well as certifications by chain-of-custody witnesses, and the analyst's affirmation that the sample was sealed, that the statements about blood alcohol content were true, and that procedures set out on the form were followed]; *Melendez-Diaz*, at pp. 308, 311 [certificate was sworn before a notary and state law designating certificate as prima facie evidence was printed on form].) It therefore did not rise to the level of formality that made it "functionally identical to live, in-court testimony." (*Melendez-Diaz*, at p. 311.)

The Court in *Dungo* differentiated between physiological observations, "which merely record objective facts," and conclusions, typically about cause of death. (*Dungo*, *supra*, 55 Cal.4th at p. 619.) The Court found objective observations about

the body's condition, which are the kinds of facts at issue here, less formal than the pathologist's opinions. (*Ibid.*) The Court compared them to similar observations in a physician's medical record, which the high court had indicated are nontestimonial. (*Id.* at pp. 619-620, citing *Melendez-Diaz*, *supra*, 557 U.S. at p. 312, fn. 2 ["medical reports created for treatment purposes . . . would not be testimonial"].)

Justice Werdegar's concurring opinion, in which three justices concurred, explained that an autopsy is governed by "*medical* standards rather than by legal requirements of formality and solemnity," and is structured like a medical examination. (*Id.* at p. 624 (conc. opn. of Werdegar, J.).) She also determined that the signed and dated autopsy report "was not sworn or certified in a manner comparable to the chemical analyses in *Melendez-Diaz* and *Bullcoming*." (*Id.* at p. 623.) She concluded that objective observations in an autopsy do "not resemble the ex parte examinations of historical example or the structured police interrogations of *Crawford* and *Davis*." (*Ibid.*)

The facts admitted from the autopsy report here, the fetus's weight and age, were the most basic kinds of objective measurements. They did not relate to any injuries or to the cause of death. They were so basic that they may have been completed by an assistant. (See Gov. Code, § 27522, subd. (b) [although an autopsy must be performed by a licensed surgeon, trained personnel are permitted to take body measurements].) They were even more basic and objective than the observations permitted in *Dungo*, which included "the hemorrhages in Pina's

eyes and neck organs, the purple color of her face, the absence of any natural disease causing death, the fact that she had bitten her tongue shortly before death, and the absence of any fracture of the hyoid bone." (*Dungo*, *supra*, 55 Cal.4th at p. 619.) The autopsy evidence admitted here was thus not sufficiently formal to be testimonial under *Melendez-Diaz*, *Bullcoming*, or *Dungo*.

Appellant asserts that *Dungo*'s differentiation between observations and conclusions came from the distinction between basis testimony and opinion, a distinction that was extinguished by *Sanchez*. (SSAOB 23-24.) But the *Dungo* Court did not reference or rely on the basis/opinion distinction, did not cite any cases discussing the distinction to support its decision, and did not suggest that objective observations lacked formality because they were not admitted for their truth. (See *Dungo*, *supra*, 55 Cal.4th at pp. 619-620.)[6] Instead, the Court compared observational facts to similar statements that the high court had declared nontestimonial—medical reports. (See *Melendez-Diaz*, *supra*, 557 U.S. at p. 312, fn. 2.) Accordingly, this Court's later *Sanchez* opinion did not affect *Dungo*'s formality analysis.

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[6] This is particularly notable because the Court recognized that the *Williams* plurality rested its decision in part on the ground that the challenged report "was admitted not for its truth but only for the limited purpose of explaining the basis of Lambatos's independent conclusion, based on her expertise." (*Dungo*, *supra*, 55 Cal.4th at p. 618.) The *Dungo* Court, however, did not follow that reasoning. Justice Corrigan's dissent noted that the *Williams* plurality's reasoning in this regard was rejected by a majority of the high court, foreshadowing the Court's *Sanchez* decision. (*Id.* at p. 635 & fn. 3 (diss. opn. of Corrigan, J.).)

b. The fetus's weight and age were not recorded for the sole or primary purpose of creating a substitute for live testimony

When the purpose of the autopsy report is considered, it is also decidedly nontestimonial. Unlike the reports in *Melendez-Diaz* and *Bullcoming*, its sole purpose was not to take the place of live testimony in a criminal trial. And even if only its primary purpose is considered, an autopsy report does not fit that criterion. That is true whether considering autopsy reports generally or the specific report in this case, and particularly when viewing the two specific facts admitted here.

The United States Supreme Court explained that the certifications of blood alcohol content and drug analysis at issue in *Bullcoming* and *Melendez-Diaz*, respectively, were created *solely* for the purpose of criminal prosecution. (See *Bullcoming*, *supra*, 564 U.S. at pp. 657, 664-665 [lab report of defendant's blood alcohol content was "made in order to prove a fact at a criminal trial"; "A document created solely for an 'evidentiary purpose' . . . made in aid of a police investigation, ranks as testimonial"]; *Melendez-Diaz*, *supra*, 557 U.S. at pp. 311, 321-324 ["sole purpose" of certificates identifying drug in submitted sample was to provide prima facie evidence of the analyzed substance].) Appellant does not assert that the autopsy report here was created solely to be an out-of-court substitute for testimony in a criminal trial, nor could he. Autopsy reports have many overlapping purposes, discussed further below, and so producing evidence for a criminal trial is not its sole purpose.

Accordingly, to the extent that a forensic report may be testimonial only if its sole purpose is to create prosecution evidence, an autopsy report is decidedly nontestimonial.

However, even if the primary purpose test is applied to forensic reports, an autopsy report is not primarily intended or designed to replace testimony in a criminal trial.

An autopsy report is a record created to preserve knowledge of the condition of a dead body, a record that potentially serves many diverse purposes, only one of which is a possible criminal trial. The Los Angeles County Medical Examiner-Coroner's website explains the purpose of autopsies:

> The Medical Examiner-Coroner's concern is to determine cause and manner of death. Determining the cause of death in a person may help identify family histories, contagious disease, and help prevent further premature or preventable deaths within the community. In criminal cases, autopsies help courts to reach a just verdict. Finally, autopsies help families understand how the death occurred and provide closure. This can be an important step in the grieving process.

(Los Angeles County Medical-Examiner-Coroner's Website, FAQ's <https://mec.lacounty.gov/faqs/#1525897228029-98150236-c25f> [as of July 14, 2020] (hereinafter "L.A. Coroner website").) Notably, there is no mention of assisting law enforcement or catching criminals or creating prosecution evidence. The only mention of the medical examiner's role in criminal cases is to help the court reach a just verdict. Their primary focus is to assist families and the community as a whole, usually in cases

that have nothing to do with crime or prosecution.[7] The coroner's duty to investigate is the same regardless of the manner of death or whether a crime was involved. (*Dungo*, *supra*, 55 Cal.4th at p. 621.)[8]

An autopsy is statutorily defined as "an examination of a body of a decedent to generate medical evidence for which the cause of death is determined." (Gov. Code, § 27522, subd. (b), emphasis added.) It is intended to document the condition of a

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[7] In 2016, the most recent year for which statistics are available from the Los Angeles County Medical Examiner-Coroner Office, homicides represented just eight percent of all cases handled and 21 percent of all completed autopsies. (L.A. Coroner's website, 2016 Annual Report, at pp. 15-16, 19 <https://mec.lacounty.gov/wp-content/uploads/2020/03/LA-County-Medical-Examiner-Coroner-2016-Annual-Report.pdf> [as of July 15, 2020] [of 8,856 total cases and 3,330 completed autopsies, 707 were determined to be homicide].) Less precise information is available from 1990 to 1991, the years closest in time to the autopsy in this case, but it appears that homicides constituted approximately 16 percent of total cases. (Biennial Report Fiscal Years 1990-1991, at pp. 22-23 <http://file.lacounty.gov/SDSInter/Coroner/219919_1990-92.pdf> [of approximately 12,030 total cases, 1,940 were homicide].)

[8] The coroner is generally charged with determining "the circumstances, manner, and cause of all" deaths that are violent, sudden, or unusual; unattended; where the deceased has not seen a doctor within 20 days; related to a self-induced or criminal abortion; homicide, suicide, or accidental poisoning; accident or injury; drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration, or sudden infant death syndrome; occasioned by criminal means; associated with a rape or crime against nature; in custody; contagious disease and public hazard; occupational diseases or hazards; in state mental hospitals; circumstances related to a crime; and reported by physicians or others with knowledge of the death. (Gov. Code, § 27491.)

body at death and to "determine the circumstances, manner and cause" of the death. (Gov. Code, § 27491.) It must be performed by a licensed physician and surgeon, except that trained personnel are permitted to take body measurements and retrieve fluid samples under the physician's supervision. (Gov. Code, § 27522, subds. (a), (b).)

These statutory definitions and requirements show that an autopsy's primary purpose is medical, not legal. It is performed by a licensed medical doctor and surgeon to generate medical evidence to help determine the circumstances, manner, and cause of death. There is not a different standard when the cause of death is homicide. Additionally, the statutory permission for someone other than a physician to take body measurements, which were the only facts admitted from the autopsy here, demonstrates their basic and objective nature. It also supports *Dungo*'s determination that these kinds of facts are less formal and thus less testimonial than the pathologist's opinion. (See *Dungo*, *supra*, 55 Cal.4th at pp. 619-620.) In short, an autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the cause and manner of death, which, if determined to be homicide, could potentially result in charges being brought.

Of course, for those in the criminal justice system—police, prosecutors, defense attorneys, and judges—an autopsy report is primarily used in investigating, charging, and trying a potential defendant. And, when the cause of death is homicide, the pathologist will naturally be aware that an autopsy report may

be used in that way. But the simple fact that it may primarily be *used* in a particular way does not transform its primary *purpose*.

One would have to believe that whenever an autopsy is conducted in a potential homicide case, the pathologist suddenly shifts her primary purpose and perspective from a medical focus to one of law enforcement. This is simply unrealistic. [9] There is no basis to suggest that a medical examiner performs their job differently when an autopsy is part of a homicide investigation compared to when it is conducted for another reason. Even in cases of obvious homicide, like here, an autopsy has many potential purposes aside from creating evidence for a possible prosecution, including a wrongful death action, life insurance, to provide information and comfort to the family, and to provide health and safety information to the community. Because one cannot say that an autopsy report's *primary* purpose is to substitute trial testimony, its admissibility "is the concern of state and federal rules of evidence." (*Clark*, *supra*, 576 U.S. at pp. 245-246.)

An autopsy report is like a doctor's medical treatment record and is nontestimonial for the same reason. (See *Melendez-Diaz*, *supra*, 557 U.S. at p. 312, fn. 2 ["medical reports created for treatment purposes . . . would not be testimonial"].) Like autopsy reports, medical records have many potential uses that can

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[9] In a 2007 interview, Medical Examiner Pedro Cortiz said, "When I conduct an autopsy, catching the perpetrator is far from my mind." (Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement* (Aug. 2008) 96 Cal. L.Rev. 1093, 1126.)

include criminal prosecution, but neither are primarily concerned with creating evidence for trial. Most medical examinations and autopsies have nothing to do with crime and are never used in a criminal prosecution. Both medical records and autopsy reports are prepared by medical doctors who follow set medical standards. If the circumstances suggest that the person examined is a potential crime victim, whether dead or alive, the medical doctor or pathologist will often be aware of that.

For example, if Washington had survived appellant's attack and been taken to the hospital where her unborn baby was safely delivered, it would have been clear to all that they were crime victims and that any observations or treatment could be used in a future prosecution. However, the primary purpose of the observations (like the baby's weight) and treatment would remain medical. That is true whether she was taken to the hospital or the coroner's office. (See *People v. Edwards* (2013) 57 Cal.4th 658, 708 ["That a break appears 'incisional,' a nose appears to be broken, or residue appears to be from adhesive tape, are expert medical observations of the body's condition—assessments like those a doctor would make to determine the proper treatment of a live patient."].)

The two basic facts admitted from the autopsy in this case demonstrate how similar an autopsy report is to a medical record. Any living patient examined by a doctor will have basic measurements taken, such as weight, height, blood pressure, and temperature. That is true whether the patient is being examined as a crime victim or for injuries inflicted in a noncriminal

manner. Similarly, any person being autopsied will have basic measurements taken, including weight and gestational age for a fetus.[10]

Additionally, an autopsy report's status as a public or business record (*ante*, Arg. C.1) further suggests that autopsy reports are properly considered nontestimonial. In *Bryant*, decided after *Williams*, the United States Supreme Court recognized that many hearsay exceptions, including those for public and business records, "rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions." (*Bryant*, *supra*, 562 U.S. at p. 362; see also *Crawford*, *supra*, 541 U.S. at p. 56 ["Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy"].)

Appellant suggests that the Court should look to the circumstances of and reason for an autopsy in a given case to determine its primary purpose. In appellant's view, any autopsy report completed as part of a criminal investigation or under circumstances suggesting a possible homicide would be

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[10] In addition to age and weight, many other measurements were taken during Baby Girl Washington's autopsy, including her head circumference, chest circumference, crown-to-rump length, crown-to-heel length, foot length, and hair length, as well as the length of attached umbilical cord and the weight of several organs. (JN Exh. A at pp. 9, 11, 13.)

testimonial. (SSAOB 30-33.) This view is flawed for the reasons discussed above.

Looking at the specific circumstances of the autopsy here, there was nothing to suggest that Baby Girl Washington's autopsy was conducted with criminal prosecution as its sole or primary purpose. The circumstances on which appellant relies to suggest otherwise are those that are present in any case of an obvious homicide—the presence of a coroner's investigator at the crime scene, a detective witnessing the autopsy, and the requirement that law enforcement receive a copy of the report. (SSAOB 33-34.) Of course, the homicidal manner of Washington's and her fetus's deaths was never in dispute. As to the only issue here, the fetus's weight and age were unrelated to cause of death, and the examining pathologist offered no opinion on viability.

Appellant's suggestion that the specific circumstances of Washington's murder somehow removed any possibility that the report's primary purpose was for wrongful death, insurance, or public information (SSAOB 34), is presumptuous and speculative. There is nothing in the record to suggest that there was no life insurance or lawsuit issues, or that the report would not be used to warn the public. Washington had family, including an 11-year-old daughter and a mother (7RT 1055-1056), and she was brutally killed by what would later be determined to be a serial killer who posed a serious threat to the women in that community for decades. (See Danielle, *The Grim Sleeper and the Invisibility of Black Female Victims* (May 6, 2016) Ebony

<https://www.ebony.com/news/grim-sleeper-case/> [as of July 20, 2020] [describing concern of South Central Los Angeles residents and activists in the 1980s because of unsolved serial murders in the area]; Leonard, *Jury decides death for convicted serial killer Chester Dewayne Turner* (June 24, 2014) Los Angeles Times <https://www.latimes.com/local/la-me-chester-turner-penalty-20140627-story.html> [as of July 20, 2020] [appellant "was one of at least five serial killers who prowled South L.A. in the 1980s and '90s"].) But regardless of how the report may or may not have been used here, its later use does not dictate its primary purpose.

Additionally, other factors make the autopsy report here even less connected to law enforcement and a criminal investigation than the circumstances in *Dungo*. The autopsy there was performed by the combined office of the Sheriff-Coroner of San Joaquin County.[11] (*Dungo*, *supra*, 55 Cal.4th at p. 640-641.) Unlike in that county, the Los Angeles County Medical Examiner-Coroner's Office, which conducted the autopsy here, is an independent agency; it is not a part of the Los Angeles County Sheriff's Department or any other law enforcement agency. And,

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[11] The San Joaquin Sheriff-Coroner is the subject of an article cited by appellant, which exemplifies the dangers of having an elected coroner who is also the sheriff. (SSAOB 35, citing Balko, *It's time to abolish the coroner* (Dec. 12, 2017) Wash. Post.) Since 1956, Los Angeles County has required its coroner to be a certified pathologist, and that is an appointed position rather than an elected one. (L.A. Coroner website <https://mec.lacounty.gov/department-history/> [as of July 17, 2020].)

unlike in *Dungo* where the detective informed the medical examiner about the defendant's confession (*Dungo*, at p. 620), there was no suspect here yet and no such information provided that could have somehow skewed the autopsy results.[12] Finally, the examining pathologist in *Dungo* had serious credibility concerns that do not exist here, having been fired from one county and having "resigned 'under a cloud'" from another. (*Id.* at p. 613-614, 646.)

As a practical matter, there is generally no meaningful difference between the pathologist who conducted an autopsy and another pathologist testifying about body measurements recorded in the autopsy report almost 20 years prior to trial. Typically, a pathologist would not remember such details from an autopsy after the fact. Dr. Scheinin testified that she had conducted about 3,000 autopsies in 16 years. (12RT 1788.) Dr. Scheinin provided her own independent opinion about viability, which was

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[12] Appellant cites a few recent situations of biased or incompetent coroners (SSAOB 35-36), but autopsy reports are not nontestimonial based on the notion that all medical examiners are above reproach or act with complete neutrality. It is notable that in none of the examples provided by appellant were the issues revealed through confrontation or cross-examination. Indeed, in *In re Figueroa* (2018) 4 Cal.5th 576, 583-585, examining doctors who recanted their testimony from the defendant's trial did so based on reviewing the complete medical records, including the autopsy report. And the Court in that case also relied on observational information of past injuries from the autopsy report to support its grant of habeas relief on the murder conviction. (See *id.* at pp. 590-591.) The experts' and Court's reliance on the autopsy report, despite its "absurd" conclusion on cause of death, supports the objective nature of an autopsy report's descriptions and observations. (See *id.* at p. 585.)

fully amenable to confrontation, and the confrontation clause demands no more. (See *Bullcoming*, *supra*, 564 U.S. at p. 662 [noting that substitute analyst did not provide "any 'independent opinion' concerning Bulllcoming's BAC"].)

For all of the reasons discussed herein, the autopsy report here was nontestimonial. Appellant's assertion that additional state and federal rights were violated by Dr. Scheinin testifying about the fetus's weight and age should likewise be rejected. (SSAOB 36-37; *People v. Nelson* (2011) 51 Cal.4th 198, 210, fn. 5, citations omitted [no separate discussion required "when rejection of a claim on the merits necessarily leads to rejection of any constitutional theory or "'gloss"' raised for the first time here"]; accord *People v. Bryant* (2014) 60 Cal.4th 335, 364.)

D. Any possible error was harmless

"[I]mproper admission of hearsay may constitute state law statutory error." (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) When that hearsay is testimonial, amounting to a violation of the confrontation clause, it must be shown to be harmless beyond a reasonable doubt. (*Ibid.*) Even assuming the fetus's weight and age constituted testimonial hearsay, their admission here was harmless beyond a reasonable doubt. Although viability was a critical finding for the jury's guilty verdict in count 5, the expert's opinion on viability remains admissible. (*Id.* at pp. 685-686; *Perez*, *supra*, 4 Cal.5th at p. 457.) The underlying facts of the fetus's weight and age were otherwise meaningless to the jury and their admission could not have prejudiced appellant.

In the aftermath of *Dungo*, this Court has repeatedly and consistently held that it was harmless error for a testifying pathologist to reference and describe facts from the autopsy report of a nontestifying pathologist, even when the report's conclusions were admitted. (See *Garton*, *supra*, 4 Cal.5th at p. 507; *Perez*, *supra*, 4 Cal.5th at pp. 456-457; *People v. Leon* (2015) 61 Cal.4th 569, 604; *People v. Trujeque* (2015) 61 Cal.4th 227, 276-277; *People v. Capistrano* (2014) 59 Cal.4th 830, 874; *Edwards*, *supra*, 57 Cal.4th at p. 707.) It should do so again here for several reasons.

First, Dr. Scheinin's opinion that the fetus was viable was admissible regardless of the admissibility of the underlying facts supporting that opinion, and appellant has not contended otherwise. The Court in *Sanchez* explained that an "expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686; see also Evid. Code, § 802.) Accordingly, in *Perez*, the Court held that any error in admitting potential testimonial hearsay from an autopsy report was harmless beyond a reasonable doubt because "[t]he jury would have . . . heard [the testifying pathologist's] opinion about the cause of death even if the trial court had denied admission of the challenged hearsay statements." (*Perez*, *supra*, 4 Cal.5th at p. 457.) The same is true here.

Second, there was no dispute about Baby Girl Washington's viability, let alone the underlying facts of her weight and age. (See *Garton*, *supra*, 4 Cal.5th at p. 507 [admission of possible

testimonial hearsay harmless where "the state of Carole's body and the manner in which she died were not disputed at trial"]; *Leon*, *supra*, 61 Cal.4th at p. 604 [admission of "a large portion of [the autopsy report's] observations *and conclusions*" was harmless where the cause of death was undisputed].)

Additionally, other independently admissible evidence supported the conclusion that the fetus was viable. Washington's daughter testified that before her mother's death, Washington's pregnancy was showing enough for her as an 11-year-old to know that she was pregnant and that the baby was going to be a girl. (7RT 1055.) Although such evidence alone likely would not be sufficient to find viability, it suggested that Washington was far enough along in her pregnancy to infer viability. (See Gamache, *Gender Determination at only 9 weeks* (May 1, 2018) < https://www.mothernurtureultrasound.com/gender-determination-at-only-9-weeks/#:~:text=In%20the%201980%27s%20and%201990%27s,20%20weeks%20in%20the%20pregnancy> [as of July 13, 2020] ["In the 1980's and 1990's . . . couples didn't usually find out the sex until their anatomy scan around 20 weeks in the pregnancy"].) This evidence thus supported the expert's and jury's conclusions and minimized any possible prejudice from admission of the fetus's weight and age.

Third, Baby Girl Washington's weight and age had no evidentiary value aside from permitting an expert determination of viability. Other than providing a basis for Dr. Scheinin's expert opinion, the basic facts of weight and age were

meaningless to the jury. There could thus be no prejudice from admitting these undisputed facts in addition to the expert's opinion. (See *Perez*, *supra*, 4 Cal.5th at p. 457 ["The exact depth of the stab wounds, the fact that the victim's eyes contained hemorrhages, and the details on her internal injuries, in light of the other evidence at trial, were such minor pieces of evidence that they had no effect on the jury's ultimate determination of Perez's guilt"].)

Fourth, the only mention in closing arguments about viability was the following from the prosecutor's argument:

> As to count 5, in order for you to find there is a fetal murder, you have to believe that Regina [Washington]'s baby girl was a viable fetus, and viability is defined as the ability of that fetus to have life independent of the mother.
>
> Dr. Scheinin told you that Baby Girl died, she died because [Washington] was strangled, that that baby girl had the chance to exist, the chance to have life outside of the womb. That is the definition of a viable fetus.

(17RT 2452.)

And finally, viability simply played no part in appellant's defense of reasonable doubt that he was the killer. (See 17RT 2464-2492; see *Garton*, *supra*, 4 Cal.5th at p. 507 [admission of hearsay from an autopsy report harmless where manner of death was undisputed and defense counsel acknowledged in closing arguments that there was no issue about how the victim was shot; the only issue was how involved was the defendant].)

For all of these reasons, even if the statements from the autopsy report are considered testimonial hearsay, their admission did not prejudice appellant.

CONCLUSION

Accordingly, the judgment should be affirmed.

Dated: July 30, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Century Schoolbook font and contains 9,295 words.

Dated: July 30, 2020

XAVIER BECERRA
Attorney General of California

BLYTHE J. LESZKAY
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF ELECTRONIC SERVICE
AND SERVICE BY U.S. MAIL & E-MAIL

Case Name: *People v. Turner*
No.: **S154459**

I declare:

I am employed in the Office of the Attorney General, 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 Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On July 30, 2020, I electronically served the attached **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on July 30, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

The Honorable William R. Pounders
Assigned Judge
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street
Los Angeles, CA 90012-3210

Maria Elena Arvizo-Knight
Death Penalty Appeals Clerk
Los Angeles County Superior Court
Criminal Appeals Unit
Clara Shortridge Foltz Criminal Justice Center
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Los Angeles, CA 90012

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

On July 30, 2020, I electronically served the attached **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system addressed as follows:

Mary McComb
Office of the State Public Defender
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William Whaley
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On July 30, 2020, I served the attached **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy via electronic mail to:

Robert Grace
Deputy District Attorney
Courtesy copy by e-mail

California Appellate Project – SF
345 California St., #1400
San Francisco, CA 94105
filing@capsf.org

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 July 30, 2020, at Los Angeles, California.

Marianne A. Siacunco
Declarant

Signature

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

Case Name: **PEOPLE v. TURNER (CHESTER DEWAYNE)**
Case Number: **S154459**
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Date

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Signature

Leszkay, Blythe (221880)
Last Name, First Name (PNum)

CA Attorney General's Office - Los Angeles
Law Firm