In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOHN LEO CAPISTRANO,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S067394

Los Angeles County Superior Court Case No. KA034540
The Honorable Andrew C. Kauffman, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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Respondent files this Supplemental Respondent's Brief pursuant to this Court's order of July 2, 2010. For consistency, respondent utilizes the argument heading number appellant employed in his briefing.

In his Supplemental Opening Brief filed with permission on December 27, 2007, appellant presented additional claims, not previously presented in his Opening Brief, asserting that his Sixth Amendment right to confront and cross-examine the witnesses against him was violated by the admission of the DNA test results obtained by Lisa Grossweiler, the admission of the expert testimony offered by Anjali Swienton, the admission of the autopsy report and two photographs taken during the autopsy process (Peo. Exhs. 34, 35), and the admission of the expert testimony offered by Dr. Eugene Carpenter, who he claims were permitted to offer an opinion based upon testing although they did not participate in the "scientific examination and testing." In that briefing, appellant acknowledged that this Court rejected a similar contention regarding DNA expert testimony in *People v. Geier* (2007) 41 Cal.4th 555, and asked that the Court reconsider its decision.

Subsequently, on November 10, 2008, the Supreme Court granted certiorari in *Melendez-Diaz v. Massachusetts*, *cert. granted*, 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*).

Respondent files this supplemental briefing to address the issues appellant raised in his supplemental briefing as well as subsequent legal developments, including the impact of *Melendez-Diaz* and the current status of this Court's decision in *Geier*.

ARGUMENT

XXIV. APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS NOT VIOLATED BY THE ADMISSION OF THE DNA TEST RESULTS, THE ADMISSION OF EXPERT TESTIMONY BY ANJALI SWIENTON AND DR. EUGENE CARPENTER, OR THE ADMISSION OF THE AUTOPSY REPORT AND AUTOPSY PHOTOGRAPHS

Appellant contends that his Sixth Amendment right to confront and cross-examine witnesses against him was violated by the admission of the results of DNA tests performed by Lisa Grossweiler, the admission of the expert testimony offered by Anjali Swienton, the admission of the autopsy report prepared by Dr. Frisby and two photographs taken during the autopsy process (Peo. Exhs. 34, 35), and the admission of the expert testimony offered by Dr. Eugene Carpenter, who he claims were permitted to offer an opinion based upon testing although they did not participate in the "scientific examination and testing." (Supp. AOB 2-31.) He further argues the errors prejudiced him. (Supp. AOB 31-33.)

First, appellant did not preserve these contentions for his appeal – he did not object to the testimony of Ms. Swienton or Dr. Carpenter on the basis that they did not perform the scientific testing, examination and/or analysis upon which they based their expert opinions on any state or federal constitutional basis, he did not object to the admission of the autopsy photographs (Peo. Exhs. 34, 35), and his belated objection to the admission of the autopsy report failed to preserve the claims raised here. Second, appellant is mistaken about the factual basis of some aspects of his contentions – for example, Anjali Swienton personally performed the STR testing and independently reviewed and interpreted the nylon strips generated as a result of the DQ Alpha polymarker testing to opine concerning what genetic markers were revealed in the test results and the photographer who took the photographs displayed in People's Exhibits 34

and 35 testified at trial – and his erroneous assumptions significantly alter his assertions. Moreover, to the extent appellant's claims address the propriety of an expert relying upon analysis, testing, or observations conducted by others, they are controlled by this Court's reasoning in *Geier* as well as Evidence Code section 801. *Melendez-Diaz* did not overrule or undermine this Court's decision in *Geier*, and no persuasive reason exists for this Court to conclude the expert testimony presented in this case violated the Sixth Amendment.[1] Finally, if any of the challenged evidence was admitted in error, the admission was harmless beyond a reasonable doubt.

A. Summary of Trial Testimony Relevant to Appellant's Sixth Amendment Challenges to the DNA Evidence and Coroner's Testimony

Because the Opening Brief filed in November 2006 did not challenge the admission of the DNA evidence or the reliance of the DNA expert upon the work of a non-testifying forensic DNA analyst or challenge the admission of the testimony of Dr. Eugene Carpenter, the admission of the autopsy report, or Dr. Carpenter's reliance upon the report and photographs

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[1] Questions whether defendant were denied their right to confrontation under the Sixth Amendment by the admission of testimony concerning the results of blood-alcohol and DNA testing performed by others are pending before this Court in *People v. Lopez* (S177046) and *People v. Gutierrez* (S176620). The question, "Was defendant denied his right of confrontation under the Sixth Amendment when one forensic pathologist testified to the manner and cause of death in a murder case based upon an autopsy report prepared by another pathologist?" is pending before this Court in *People v. Dungo* (S176886) review granted Dec. 2, 2009. In each of those cases, the Court asked the parties to address the impact of the decision in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ---, 129 S.Ct. 2527, 174 L.Ed.2d 314, upon this Court's decision in *People v. Geier* (2007) 41 Cal.4th 555.

taken by a Coroner's Office criminalist, respondent presented an abbreviated summary of the testimony of these witnesses in its Respondent's Brief. For purposes of this Supplemental Respondent's Brief, respondent provides a more detailed summary of that testimony below.

1. Relevant Trial Testimony Regarding DNA Evidence

The parties entered into a series of stipulations concerning the chain of custody of evidence items related to the DNA testing. (6RT 2703-2705.)

Prosecution witness Anjali Swienton testified that she was employed as a forensic DNA analyst by Cellmark Diagnostics, a private laboratory located in Maryland that conducts DNA testing primarily for human identification. The laboratory had two departments: one conducted paternity testing and the other forensic testing related to criminal and civil cases around the country. (6RT 2706-2707.) A forensic DNA analyst by trade, Swienton held the title "Staff DNA Analyst." (6RT 2707.) At the laboratory, her responsibilities consisted exclusively of testing biological evidence, performing laboratory analyses, and analyzing the data and summarizing her conclusions in report form. When cases on which she has personally worked come to trial, she traveled around the country to offer expert testimony on the data she generated in the laboratory. (6RT 2707.)

Ms. Swienton outlined her educational training, professional memberships, job experience, and prior experiences as an expert witness. (6RT 2707-2709.) She described the significance of DNA to human genetic composition and the types of DNA tests performed by Cellmark. (6RT 2708-2710.) She explained that less than one percent of human DNA varies among individuals; the identification testing performed by Cellmark examined that one percent of the genetic code. (6RT 2710-2711.) Swienton described the general process of evaluating whether a particular

individual could be included as a contributor to a genetic sample and the relevance of DNA testing to criminal cases. (6RT 2711-2714.)

Concerning the business practices of her laboratory, Cellmark employees generated written data and records when performing tests. Cellmark gave each case a unique case number; evidence received by Cellmark was labeled with the unique case number, and each item was given a specific item number. The analyst who personally performed a test kept daily handwritten notes documenting the testing performed. Cellmark forms specific to individual testing are generated. (6RT 2725-2726.) Some steps in testing are witnessed by another Cellmark employee. All raw data, photographs of evidence, and notations about phone conversations are placed in the case file. (6RT 2726.) The written notations are made by a Cellmark employee contemporaneous to the test as the employee performs it. (6RT 2728-2729.) Cellmark relies upon these written records in performing its business. (6RT 2729.)

Swienton described the types of genetic testing conducted by Cellmark. Of the two main types of DNA testing, restriction fragment length polymorphism (R.F.L.P) was more discriminating but required that the biological sample be fairly substantial and fresh. (6RT 2715-2716.) The second type, polymerase chain reaction (PCR), was similar to conventional ABO blood typing in that each site on the DNA molecule has a limited number of PCR marker types. (6RT 2716-2718.) PCR testing can be performed on extremely small biological samples and very old samples. (6RT 2719.)

Several laboratory tests "map" PCR markers, including the DQ Alpha polymarker test (hereinafter "DQ Alpha") and the Short Tandem Repeats test (hereinafter "STR"). (6RT 2720-2724.) The DQ Alpha test examines six points on the DNA molecule in the region that differs among individuals. (6RT 2723.) The DQ Alpha test procedure generates a series

of long, thin nylon strips coded with a series of blue dots along the length of the strips. Examiners photograph each strip because the dots fade over time. Examiners record the information obtained from "reading" the strip on a "read sheet." (6RT 2727-2728.) The STR test examines three different sites on the DNA molecule plus a gender marker. (6RT 2723-2724.) The STR test procedure produces an autoradiograph – a photographic film showing a series of bands in a pattern that can be examined and compared. (6RT 2726-2727.) Together, the DQ Alpha test and the STR test provide nine pieces of genetic information plus gender. (6RT 2724.) The greater the number of consistent markers that exist between a known and an unknown sample, the more likely the known person donated the unknown sample. (6RT 2718-2719.)

Cellmark's records showed that in November 1996 Cellmark Senior DNA analyst Lisa Grossweiler performed DQ Alpha testing upon blood samples identified as originating from J.S., John Capistrano, Michael Drebert, Eric Pritchard, and Anthony Vera. Ms. Grossweiler also performed DQ Alpha testing upon oral and vaginal swabs identified as being taken from an examination of J.S. (6RT 2729-2731.) Ms. Swienton reviewed the nylon strips and the written notes, records, and report generated by Ms. Grossweiler. Based upon her review of these items, Ms. Swienton formed an opinion about the types identified by the DQ Alpha testing that was the same as expressed by Ms. Grossweiler in her report. (6RT 2733.)

Ms. Swienton created a chart summarizing the PCR markers produced by the DQ Alpha testing, including the results of the DQ alpha (DQA1) genetic marker test and the five polymarkers, LDLR, GYPA, HBGG, D7S8, and GC. (7RT 2741-2744; Peo. Exh. 32 [chart].) The testing detected DNA from more than one person on the vaginal swab. (7RT 2756.) Based upon Cellmark's testing, Swienton opined that Drebert,

Pritchard and Vera were conclusively excluded as donors of the sperm fraction of the sample and conveyed the basis for those opinions. (7RT 2754, 2756-2760.) She opined the DQ alpha markers were consistent with J.S. and Capistrano. (7RT 2757, 2760, 2761.) All five polymarkers also were consistent with J.S. and Capistrano being the donors. (7RT 2761-2766.)

Ms. Swienton personally performed STR testing on the vaginal swab and a second blood sample submitted for Capistrano. (7RT 2767-2768.) Swienton opined that the results of the STR testing indicated the sperm fraction contained DNA from at least two individuals. (7RT 2768-2771, 2773; Peo. Exh. 33 [chart of results].) Ms. Swienton tested for gender (XY) and three markers: CSFIPO, TPOX, and THO1. (7RT 2771.) The results for all three markers were consistent with J.S. *and* Capistrano being the donors. (7RT 2772-2779.) The gender test (XY) showed male DNA. (7RT 2779-2780.)

In summary, across the nine genetic markers tested, Capistrano could not be excluded as a donor source for the DNA on the vaginal swab that did not originate from J.S. (7RT 2780-2782.)

2. Relevant Trial Testimony Regarding the Autopsy

a. Testimony of Mark Schuchardt Regarding Autopsy Photographs

Mark Schuchardt, a criminalist employed by the Los Angeles County Coroner's Office, testified that he was the assigned criminalist in the investigation of the death of Koen Witters, that he examined Mr. Witters's body after it arrived at the Coroner's Office on December 10, 1995, and that he photographed the body prior to the autopsy. (7RT 2813-2814.) Mr. Schuchardt testified in detail concerning the wounds and was cross-examined by appellant's counsel and codefendant's counsel. (7RT 2813-

2823.) Specifically, Schuchardt described the photographs, which included People's Exhibit 34 [board of five photographs] and People's Exhibit 35 [photoboard], and described the procedures he employed in examining the body and creating the photographs. (7RT 2814-2820.)

b. Testimony of Dr. Eugene Carpenter

Dr. Eugene Carpenter, a pathologist licensed to practice medicine in California, testified in his capacity as a Deputy Medical Examiner employed by the Los Angeles County Department of the Coroner. He graduated from Tulane School of Medicine in 1972 and was licensed in California after an internship. He trained in pathology at the Coroner's Office for one year and received additional training at Long Beach Memorial Hospital and the Veteran's Administration Hospital in Long Beach. Dr. Carpenter had worked for the Coroner's Department for nine years and testified over 200 times as an expert witness. He had performed over 4,000 autopsies and supervised thousands more. (7RT 2825-2826.)

For each autopsy, the person who performed the autopsy prepared a report. (7RT 2826.) Each report was prepared contemporaneous to the autopsy and documents the autopsy surgeon's observations of the body's condition, injuries, and cause of death. Preparation of the report was part of the official duty of the person performing the autopsy, and the Coroner's Office relies on such reports in determining cause of death and when testifying. (7RT 2827.)

The Los Angeles County Department of the Coroner employed pathology fellows: qualified pathologists licensed to practice medicine in California who had completed a pathology residency and spent an extra year sub-specializing in forensic pathology. Pathology fellows performed autopsies under the supervision of a certified pathologist; a Deputy Medical Examiner reviewed their findings before they are finalized. (7RT 2826.)

Dr. Frisby performed the autopsy of Koen Witters. Dr. Frisby had been employed as a second-year pathology fellow. (7RT 2828-2829.)[2] At the time of trial, Dr. Frisby no longer resided in Los Angeles County. (7RT 2829.) Contemporaneous to the autopsy, Dr. Frisby prepared a report documenting her observations of the body's condition, injuries, and cause of death and including diagrams of the autopsy and Form 15, which concerns the cause and manner of death. (7RT 2826-2828; Peo. Exh. 36 [certified 14-page autopsy report]; IV Supp 2CT 368-381.) Dr. Christopher Rogers, the Chief of the Medical Division, approved the autopsy report authored by Dr. Frisby. (7RT 2829.)

Following established procedures, bodies are photographed before dissection begins. Additional photographs may be taken during the autopsy process. (7RT 2829-2830.) Dr. Carpenter had reviewed the autopsy report and autopsy photographs. (7RT 2830.) His testimony and expert opinion was premised upon that review. (7RT 2830-2832.)

Dr. Carpenter discussed photographs marked as People's Exhibits 34 and 35. Dr. Carpenter described People's Exhibit 35B as depicting the right hand and the cut across the wrist. (7RT 2834.) Dr. Carpenter described People's Exhibit 35C as depicting Witters's left hand and two

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[2] Respondent observes that Dr. Frisby did not testify at the preliminary hearing held on the murder charges. (See 2CT 385-536.) For "purposes of the preliminary hearing only," defense counsel stipulated

> that Doctor Shayla Frisby . . . be deemed to have been called, sworn, duly certified as a medical doctor, licensed to practice medicine in the State of California and to be an expert forensic pathologist. [¶] And to have testified that on December 11, 1995, she performed an autopsy on the victim, Koen Witters, the named victim in Count 1 of complaint number KA034540. [¶] And that she determined the cause of death to be asphyxia due to strangulation[.]

(2CT 529-530.)

cuts across the lower forearm. (7RT 2834-2835.) People's Exhibit 34D depicted the lower back of the decedent's head and neck, right shoulder and upper back. The distinctive red-brown areas were bruises found beneath the ligature. The bruising was when small blood vessels burst under pressure. (7RT 2835.) People's Exhibit 34E depicted the right and front face, throat, and upper chest of the victim. It depicted a sock visible in the victim's mouth and blood or "purge" dripping from the nose and across the right side of the face. (7RT 2835-2836.) People's Exhibit 34A depicted Witters's face with the neck ligature intact. Abrasions are visible on the bridge of the nose, both sides of the nose, and on the lower forehead. (7RT 2836-2837.)

Dr. Carpenter also reviewed the photographs marked as People Exhibits 23B and 23D, which depicted the victim at the crime scene. The carpet depicted in the photographs was consistent with having caused the abrasions on his face. (7RT 2837-2838.) Abrading occurs when the top layer of skin is rubbed off by a hard, rough surface. (7RT 2838.) The bruising on the back of the neck was consistent with a downward force being applied on the neck, forcing the face hard into the carpet. (7RT 2839.)

Dr. Carpenter opined that Witters's cause of death was asphyxia due to strangulation resulting from constriction of the throat and neck. The injuries to the neck muscles were consistent with, and specific to, this cause of death. (7RT 2833.) The marks visible across the back of Witters's neck were consistent with use of a ligature and, therefore, were consistent with the cause of death. The bruising suggested considerable force was applied by the ligature or the ligature combined with another force. (7RT 2833-2834.) The bruising on the back of the neck was consistent with a downward force being applied on the neck, forcing the face hard into the carpet. (7RT 2839.) Abrasions were visible on the bridge of Witters's

nose, both sides of his nose, and on the lower forehead. (7RT 2836-2837.) The carpet depicted in the crime scene photographs was consistent with having caused the abrasions on Witters's face. (7RT 2837-2838.)

B. Appellant Did Not Properly Preserve His Challenges to the Admission of the DNA Evidence or Coroner's Testimony and Autopsy Findings

"'No procedural principle is more familiar to this Court than that a constitutional right,'" or a right of any other sort, "'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (*United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1170, 123 L.Ed.2d 508]; see also *People v. Saunders* (1993) 5 Cal.4th 580, 589-590 ["'it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial'"].) As this Court has previously stated:

> a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal.

(*People v. Zapien* (1993) 4 Cal.4th 929, 979 [internal quotation marks omitted].)

This Court has previously held that a defendant may not complain for the first time on appeal that the admission of evidence violated the right to confrontation, or any other right under the federal Constitution. (*People v. Boyette* (2003) 29 Cal.4th 381, 424 [due process, reliable penalty determination, and cruel and unusual punishment]; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [confrontation]; *Zapien, supra,* 4 Cal.4th at pp.

979-980 [confrontation]; *People v. Raley* (1992) 2 Cal.4th 870, 892 [confrontation and due process].)

Melendez-Diaz specifically addressed the defendant's obligation to preserve review of Confrontation Clause issues, and held that "[t]he defendant always has the burden of raising his Confrontation Clause objection . . . ." (*Melendez-Diaz*, *supra*, 129 S.Ct. 2527, 2541, italics in original.) *Melendez-Diaz* further recognized that "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence . . . ." (*Id.* at p. 2534, fn. 3.) "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live." (*Id.* at p. 2532, fn. 1, italics in original.)

1. Appellant Did Not Properly Preserve His Challenges to the Admission of DNA Test Results or Expert Testimony

Concerning his challenge to the DNA evidence, appellant states that he "objected to Swienton's testimony based on Grossweiler's report on hearsay grounds." (Supp. AOB 3.) By implication appellant argues the objection referenced below was sufficient to preserve a Sixth Amendment Confrontation Clause objection to Swienton's testimony as well as his claim Swienton's testimony violated state law evidentiary rules by revealing the content of Grossweiler's opinion. (Supp. AOB 24.) Respondent disputes the assertion that appellant objected to Swienton's reliance upon Grossweiler's report or to any recitation of Grossweiler's test results or expert opinions. Rather, appellant's counsel made a single objection during Ms. Swienton's direct testimony, as follows:

> [The prosecutor:] Who performed the DQ Alpha polymarker test on those blood samples and on those two swabs?

[Ms. Swienton:] Another analyst at Cellmark. Her name is Lisa Grossweiler.

Q Are you familiar with Miss Grossweiler?

A Yes, I am.

Q What is her job title at Cellmark?

A I believe she just became a Senior DNA Analyst.

Q Does she have similar qualifications as you do?

A Yes.

[Defense Counsel]: Objection, hearsay.

The Court: Overruled.

(6RT 2731-2732.)

In other words, appellant's counsel objected on hearsay grounds only to Ms. Swienton reciting Ms. Grossweiler's *qualifications* as an expert. He did not object to testimony about the results of testing performed by Ms. Grossweiler. Counsel did not enter a general objection to Ms. Swienton's testimony or a more specific objection to her reliance upon the testing conducted by Ms. Grossweiler in formulating her own opinions. He did not object to any reference to the results generated from the testing Ms. Grossweiler performed. Nor did he object when Swienton mentioned her opinion was the same as stated by Grossweiler in her report. (6RT 2733.) This is not a case where a specific evidentiary objection at trial was pursued under an alternative legal theory on appeal based upon the same information presented to the trial court. (See *People v. Partida* (2005) 37 Cal.4th 428, 436 [examining limited due process claim on appeal where defendant objected to admission of gang evidence as violating Evidence Code section 352].)

Appellant claims the absence of an objection should be excused since the *Crawford* decision was a dramatic departure from pre-existing precedent. (See Supp. AOB 4, fn. 1 [citing cases].) As reflected by the cases referenced by appellant, respondent acknowledges that several lower appellate courts have concluded that the failure to specifically object at trial does not waive a *Crawford* issue where trial was held prior to the *Crawford* decision. (See, e.g., *People v. Rincon* (2005) 129 Cal.App.4th 738, 753-754 [failure to object to omission of victim's statements to police as spontaneous statements excused because *Crawford* articulated an unanticipated departure from prior jurisprudence]; *People v. Butler* (2005) 127 Cal.App.4th 49, 54, fn. 1 [no waiver for failure to object to admission of witness's prior inconsistent statements].)

However, an "excuse" for appellant's failure to object should not be reflexively extended, particularly since *Crawford* did not clearly state a departure from prior law on the legal claims appellant raises herein. This conclusion is corroborated by appellant's timing in raising these new issues – after all, the 2004 decision in *Crawford* predated Appellant's Opening Brief by nearly two years. *Crawford*'s departure from the "reliability" rule for the admission of hearsay did not address the proper scope of an expert's reliance upon hearsay in general or an expert's reliance upon scientific analyses performed by another scientist in formulating an opinion.

The *Crawford* decision affords appellant no excuse from making an argument that was clearly available had he believed Swienton's reliance upon testing performed by Grossweiler presented any concern for him at his trial. Indeed, respondent notes that in *People v. Geier*, *supra*, 41 Cal.4th 555, defense counsel objected to the admission of the expert's testimony on the ground that the expert "didn't actually run the tests herself." (*Id.* at p. 596.) According to this Court's docket in *People v. Geier*, case number S050082, the judgment of death was filed on July 21,

1995. Thus, the trial in that case preceded the *Crawford* decision by nearly a decade and the judgment in appellant's case by approximately 30 months. Thus, appellant could have chosen to preserve and litigate a challenge to the DNA testimony, as did the defendant in *Geier,* had he believed it was tactically advantageous to do so.

Appellant should not be permitted to construct an issue on appeal where none lurked at trial. The appellate record fails to reveal that defense counsel harbored any doubt concerning the testing conducted by Grossweiler or even that the prosecution would have been unable to call Grossweiler had the defense either requested her presence at trial or suggested confrontation of her as a live witness was something the defense desired to conduct.

Moreover, even assuming the then-existing state of the law excuses appellant's waiver of the Sixth Amendment challenge, no such excuse applies to his state-law claim that Swienton's testimony violated California's evidentiary rules by conveying the content of Grossweiler's out-of-court opinion. (Supp. AOB 22-24.) The basis for that state-law evidentiary claim long pre-dated *Crawford* and remains independent of a Sixth Amendment claim. Appellant failed to preserve this state-law evidentiary claim for purposes of appeal.

2. Appellant Did Not Preserve His Challenges to Carpenter's Testimony, the Admission of the Autopsy Report, or to the Coroner's Use of People's Exhibits 34 and 35

At trial, appellant did not object *on any basis* to the admission of Dr. Carpenter's testimony and did not object to the admission of photographs taken of Witters's body by personnel employed by the Coroner's Office.

When the prosecutor stated during a scheduling discussion that he would call the Coroner's investigator to describe Witters's injuries and the

supervising medical examiner, rather than the coroner who performed the autopsy, to testify regarding the autopsy findings, defense counsel entered no objection. (6RT 2574.) Nor did Capistrano's counsel object when Dr. Carpenter testified the next day. (7RT 2824-2842.) During his testimony, a copy of the certified autopsy report prepared by Dr. Frisby was marked. (7RT 2826-2828; see IV Supp 2CT 368-381 [Peo. Exh. 36].) The defense did not object to the report or its use when the prosecution marked it as an exhibit for identification, and did not object to Dr. Carpenter's use of or reliance upon the contents of the autopsy report. Defense counsel did not object to Dr. Carpenter's use of or reference to People's Exhibits 34 and 35. However, after all testimony concluded, appellant's counsel then objected to the admission of the autopsy report trial on the grounds that it constituted hearsay and pursuant to Evidence Code section 352. (8RT 3175-3176.) The prosecutor offered the report as a business record. (8RT 3175-3176.) Without stating the basis for its ruling, the trial court overruled the defense objections and admitted the autopsy report. (8RT 3176.)

Although appellant acknowledges he did not timely object to this evidence and testimony at trial, he argues that the waiver doctrine should not be imposed because the rule announced in *Crawford* was an unforeseeable change in the pertinent law. (Supp. AOB 4, fn. 1.) But because appellant did not object *in any manner* to Dr. Carpenter's testimony, we cannot be certain that the failure to object resulted from uncertainty about the status of the law rather than a reasonable tactical choice. For instance, although Dr. Carpenter testified that Dr. Frisby no longer resided in Los Angeles County (7RT 2829), the trial record does not reveal whether Dr. Frisby could be subpoenaed as a witness or that defense counsel perceived any utility in questioning Dr. Frisby about any specific finding she made. And, of course, the absence of an objection to the photographs is explained by Schuchardt's testimony concerning them.

Additionally, the belated and narrowly tailored objection to the admission of the autopsy report on the ground it was hearsay and pursuant to Evidence Code section 352 did not preserve a Sixth Amendment objection to the autopsy report. Notably, defense counsel did not request that any of Dr. Carpenter's testimony be struck – the absence of such a request is significant since it strongly supports a finding that defense counsel had a tactical basis for targeting the report but not the expert pathologist's testimony. If defense counsel lacked any tactical reason for failing to object and, instead, failed to object based upon his understanding of the applicable law, appellant may properly present counsel's reasons for the absence of an objection in his habeas corpus petition. Where no factual issue existed for the defense at trial, appellant should not be permitted to invent one on appeal.

To the extent appellant also argues that the autopsy report did not qualify as a "business record" under California law because there was no foundational testimony addressing the reliability of the procedures under which the autopsy report was generated (see Supp. AOB 30-31, citing Evid. Code, § 1280(c)), this state-law claim was waived by appellant's failure to respond to the prosecution's assertion of that hearsay exception at trial. Indeed, the alleged state-law deficiency appellant references (Supp AOB 22-24) most certainly could have been corrected had appellant made a timely objection during Dr. Carpenter's testimony.

C. Summary of Relevant Sixth Amendment Legal Principles Concerning the Right to Confrontation

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him[.]" (U.S. Const., Amend. VI.) Under prior Sixth Amendment jurisprudence, the admissibility of an out-of-court statement depended upon

its reliability. (See *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597].) But, in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 36, 158 L.Ed.2d 177] (*Crawford*), the United States Supreme Court abandoned the reliability analysis in favor of an inquiry into whether the witness's statement is "testimonial." Although the high court declined to set out a comprehensive definition of "testimonial," it provided examples of statements that would fall into this category. The Supreme Court explained that "testimonial" statements include "'ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"; "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'"; "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'"; and statements made in interrogations by law enforcement agents. (*Crawford*, *supra*, 541 U.S. at pp. 51-52.) The Court opined that, at the very least, "'testimonial'" means "testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." (*Id.* at p. 68.)

In the two consolidated cases decided together in *Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*), the United States Supreme Court provided additional guidance narrowing the scope of what qualified as "testimonial":

> 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 objectively 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.

In *Davis*, the Supreme Court held that a statement made by a domestic violence victim to a 911 operator did not fall within the definition of "testimony," in that it was not made to detail some past event. (*Id.*, 547 U.S. at p. 826.) Rather, the victim described the events as they were occurring in an ongoing emergency, and the 911 operator's questions were asked in an effort to resolve the emergency. (*Ibid.*) Therefore, the Supreme Court held that the victim was not testifying, but rather was announcing an emergency and seeking help.

In *Hammon v. Indiana*, the case consolidated with *Davis*, the Supreme Court concluded that the victim's statement was testimonial. (*Davis*, *supra*, 547 U.S. at pp. 829-830.) In *Hammon*, the police responded to the scene of a reported domestic disturbance and found the victim alone and frightened. The victim told the officer that her husband attacked her. The officer had the victim complete and sign an affidavit. (*Id.* at pp. 819-820.) The Supreme Court found that the officer's questioning of the victim was clearly part of an investigation into possible past criminal conduct, which the testifying officer expressly acknowledged. The officer did not face an emergency in progress; the officer "was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.'" Thus, the primary, if not the sole, purpose of the interrogation was to investigate a possible crime, rendering the statements testimonial. (*Davis*, *supra*, 547 U.S. at pp. 829-832.)

In *People v. Cage* (2007) 40 Cal.4th 967, this Court summarized *Davis*'s principles:

> First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out of court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn

> under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the purpose ascribed to testimony–to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined "objectively," considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.

(*People v. Cage, supra*, 40 Cal.4th at p. 984, fns. omitted, italics in original.)

Later, in *People v. Geier* (2007) 41 Cal.4th 555, this Court examined a claim that *Crawford* precluded a DNA expert (Dr. Robin Cotton) from rendering an opinion based upon analyses performed by a subordinate. This Court summarized the relevant facts as follows: "Dr. Robin Cotton, the prosecution's DNA expert, testified that in her opinion DNA extracted from vaginal swabs taken from Erin Tynan matched a sample of defendant's DNA." (*Id.* at p. 593.) Dr. Cotton did not analyze the biological samples used in the testing; she reviewed the paperwork an analyst completed at various points in the testing protocol, the analyst's handwritten notes, as well as all the other data in the case, including the autoradiograph. (*Id.* at p. 596.) In addition, Dr. Cotton had cosigned the report prepared by the biologist who personally performed the analysis. (*Ibid.*) At trial, the defendant objected to Dr. Cotton testifying about the DNA analysis that resulted in the match between defendant's DNA and DNA extracted from the vaginal swabs on the ground that Dr. Cotton

"didn't actually run the tests herself." (*Id.* at p. 596.) The trial court overruled the objection, concluding that the testing "results were a business record" and "that, even if Yates's analysis was 'hearsay,' Dr. Cotton could nonetheless rely on it for purposes of formulating her opinion as a DNA expert." (*Ibid.*)

During his automatic appeal the defendant renewed this claim, arguing that under *Crawford*, admission of Dr. Cotton's testimony violated his Sixth Amendment right to confrontation because "her opinion regarding the match between defendant's DNA and DNA extracted from the vaginal swabs was based on testing that she did not personally conduct." (*Id.* at p. 594.) He contended that the DNA report forming the basis of the admitted testimony was "testimonial" because it was understood the report would be used at a later trial. (*Id.* at p. 598.)

When examining this question on appeal, this Court reviewed the Supreme Court's decisions in *Crawford* and *Davis* and held as follows:

> For our purposes in this case, involving the admission of a DNA report, what we extract from [*Crawford* and *Davis*] is that a 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. Conversely, a statement that does not meet all three criteria is not testimonial.

(*Id.* at p. 605, italics added.)

This Court found that the DNA report satisfied the first and third criteria because it was requested by a police agency and it could reasonably be anticipated that it would be used at the criminal trial. (*Geier*, *supra*, 41 Cal.4th at p. 605.) However, based upon the distinction made by the Supreme Court in *Davis*, 547 U.S. at 830, this Court concluded the report did not meet the second criteria required for a testimonial statement because the analyst's observations constituted "a contemporaneous recordation of observable events rather than the documentation of past events." (*Geier,*

supra, at p. 605.) Specifically, the analyst "recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (*Id.* at pp. 605-606.) The Court also reasoned that lab reports and other types of forensic evidence were non-testimonial in nature given the circumstances under which the statements were made, including that such analyses are generated as part of a standardized scientific protocol, are conducted pursuant to the analyst's profession and during a routine, nonadversarial process meant to ensure accurate analysis, and the results are neutral rather than accusatory. (*Id.* at p. 607.) The accusatory statements were made not through the analyst's notes but rather, through the testifying witness. (*Geier*, *supra*, 41 Cal.4th at p. 607.)[3]

Nearly two years later, in *Melendez-Diaz*, *supra*, 129 S.Ct. 2527, the United States Supreme Court applied the Sixth Amendment principles articulated in *Crawford* to the admission of results of forensic testing. In that case, police arrested the defendants on suspicion of drug dealing, and the police submitted suspected drug samples to a state laboratory that was required, under Massachusetts law, to test samples upon police request. (*Id.*, 129 S.Ct. at p. 2530.) At trial, in lieu of live testimony, the prosecution submitted three "certificates of analysis," sworn to before a notary public and signed by the crime laboratory analysts, stating that material seized by police and connected to the defendant was cocaine. (*Id.* at p. 2531.) Massachusetts law sanctioned use of the certificates. (See Mass. Gen. Laws ch. 111 § 13.)

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

The Supreme Court held that the admission of the certificates violated the defendant's Sixth Amendment right to confront the witnesses against him. The Court held that the "certificates," despite their label, were in fact *affidavits*, i.e., "'declarations of fact written down and sworn to by the declarant before an officer authorized to administer oaths' [citation]." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.) The Court concluded the certificates were the functional equivalent of live testimony because they asserted "the precise testimony the analysts would be expected to provide if called at trial." The documents were "functionally identical to live, in-court testimony," and their sole purpose was to provide evidence against the defendant. (*Ibid.*) The Court characterized its decision as a "rather straightforward application of our holding in *Crawford*." (*Id.* at p. 2533.) In addressing arguments put forward by the dissent and the respondent party, the opinion authored by Justice Scalia observed, [f]orensic evidence is not uniquely immune from the risk of manipulation." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.)

Melendez-Diaz, however, was a five-to-four decision. Justice Thomas, who provided the fifth majority vote via a concurring opinion, explained that he concurred in the majority opinion *only* because the certificates of analysis were "quite plainly affidavits" and thus fell "'within the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).) Justice Thomas explained that the Confrontation Clause is limited to "extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions." (*Ibid.*, internal quotations and citation omitted.)

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the

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

D. The Prosecution DNA Expert's Testimony Satisfied the Requirements of the Confrontation Clause

Appellant seemingly attacks all of the admitted DNA evidence by claiming his constitutional right to confront the witnesses against him was violated by the admission of Anjali Swienton's expert opinion testimony that was, in turn, based upon testing, notes, and reports generated by Lisa Grossweiler, who did not testify. (Supp. AOB 6-24.) Appellant further claims that Swienton's testimony violated state law in that it conveyed the out-of-court opinion of another expert. (Supp. AOB 24.) Even assuming appellant's Sixth Amendment claims are properly preserved for appeal, this Court's decision in *Geier* controls.

1. The Admission of Grossweiler's Test Results through Swienton's Testimony Did Not Violate State Law

Addressing the state-law claim first, appellant complains that the test results generated by Lisa Grossweiler were improperly admitted for their truth and not simply to show the basis for Anjali Swienton's expert opinion.

(Supp. AOB 22-24.) As discussed above, at trial appellant failed to enter an objection on this long-standing state-law ground and, therefore, has failed to preserve this claim for appeal. In any event, it lacks merit.

This Court has long held that although experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court *statements* of another person as independent proof of the fact. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 893-896.) In other words, an expert witness "may not under the guise of reasons bring before the jury incompetent hearsay evidence." (*People v. Coleman* (1985) 38 Cal.3d 69, 92.)

Contrary to appellant's assertion, Swienton *personally performed* the STR testing. (7RT 2768-2780.)[4] Swienton testified about the STR testing she personally conducted, the autoradiograph produced as a result of that testing, and her interpretation of the autoradiograph. (7RT 2726-2727, 2767-2780.) Swienton did not, however, personally perform the DQ Alpha testing. The DQ Alpha testing performed by Grossweiler produced thin nylon strips. Swienton reviewed the nylon strips in addition to the documents generated by Grossweiler and formed her own opinions about the genetic markers shown on the strips. (See 7RT 2767-2768.) The nylon

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[4] Appellant's mistaken assertions include the following: "Swienton, however, was not the person who conducted these tests and she had no personal knowledge regarding the manner of testing or the accuracy of the information contained in the test results (Supp. AOB 3); "all of the steps in the DNA testing were performed by Grossweiler alone" (Supp. AOB 20); "nothing even suggests Swienton . . . even came into contact with the case until she testified at trial" (Supp. AOB 20); and finally, by stating that Swienton "relied on the data forms and notes Grossweiler performed and placed in the case file" (Supp. AOB 20), appellant seemingly ignores that Swienton reviewed the nylon strips (and photographs of the strips) generated by the DQ polymarker testing and independently interpreted the strips to opine concerning the genetic markers that were revealed by the testing. The trial record rebuts these erroneous assertions.

strips did not qualify as "statements"[5] and, therefore, were not "hearsay." (Evid. Code, § 1200.)[6] Ms. Grossweiler's reports and notes were *not* offered or admitted into evidence.

Although Ms. Swienton testified that her interpretation of the results shown on the nylon strips were consistent with the conclusions Lisa Grossweiler reached concerning the results of the DQ Alpha testing, her testimony made clear that the "results" introduced at trial were the product of her independent expert interpretation of the strips. (6RT 2733.) Should appellant complain concerning the absence of a full and detailed explanation of Swienton's foundation for her opinion, any such omission directly results from his failure to object at trial or examine that foundation through his cross-examination of Swienton.

Swienton did not merely regurgitate the findings made by Grossweiler; she was more than a "conduit" as appellant suggests. Because the prosecution offered Swienton's testimony that offered her personal interpretation of the genetic markers revealed by the DQ Alpha testing, no out of court statement was offered for its truth; rather, Grossweiler's apparent concurrence with Swienton's subsequent findings served merely as one element properly weighed and considered by an expert in reaching her ultimate opinion. Neither Swienton's consideration of Grossweiler's work nor Swienton's testimony about that reliance violated state law evidentiary prohibitions.

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[5] A "statement" includes "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225.)

[6] Evidence Code section 1200 provides, "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."

2. The Admission of Swienton's Testimony Did Not Violate Appellant's Sixth Amendment Right to Confront Witnesses

The Sixth Amendment issue is whether the test results and reports generated by Grossweiler were "testimonial," and if so, whether allowing Swienton to testify based upon her review of the test results generated by Grossweiler and the facts in Grossweiler's documentation of the tests she performed violated appellant's right of confrontation under the Sixth Amendment. This Court rejected a similar claim in *Geier*. Appellant asks this Court to revisit its decision in *Geier* as misinterpreting *Crawford* and *Davis*. (Supp. AOB 6-10, 14.) No persuasive reason exists for this Court to conclude the expert testimony presented in this case violated the Sixth Amendment.

First, the Supreme Court's decision in *Melendez-Diaz* did not overrule this Court's decision in *Geier*. Indeed, four days after deciding *Melendez-Diaz*, the Supreme Court denied certiorari in *Geier*. (*Geier v. California* (2009) 129 S.Ct. 2856.) The Supreme Court's denial of the certiorari petition in *Geier* is strong evidence that the high court concluded the result reached in *Geier* was constitutionally correct.

Nor did *Melendez-Diaz* undercut this Court's reasoning in *Geier*. California does not follow the procedure outlawed in *Melendez-Diaz*, i.e., introducing witness affidavits instead of live testimony. Further, the nylon strips produced as the end result of the DQ polymarker testing in this case were not "formalized testimonial materials"; nor were Grossweiler's contemporaneous notes of the procedures she employed to produce the nylon strips. Thus, *Melendez-Diaz* has no impact on *Geier* or on California's practices. Although improper introduction of forensic evidence may violate a defendant's Sixth Amendment rights, proper introduction of such evidence does not. *Melendez-Diaz* was concerned

with a particular type of evidentiary practice, i.e., introduction of an after-the-fact declaration made under penalty of perjury as prima facie evidence against the accused, without supporting testimony. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2531, 2537.) Like the present case, *Geier* involved raw data, contemporaneous recordation of observable events, an expert relying on work performed by others, and live testimony by a witness subject to cross-examination. Because these circumstances were not present in *Melendez-Diaz*, the Supreme Court had no occasion to consider them.

The Supreme Court in *Melendez-Diaz* once again declined to provide a comprehensive definition of "testimonial" or a framework for determining whether a statement is testimonial in a particular case. In the absence of further guidance from the high court, the *Geier* three-part test remains a valid formula for evaluating the "testimonial" nature of an out-of-court statement. As can be readily seen, all three *Geier* criteria were met in this case. First, there was no statement made to a law enforcement agency. Instead, data were generated through a series of scientific protocols that resulted in a physical product (the nylon strips) for evaluation by a qualified scientist. Second, the nylon strips did not describe a past fact relating to criminal activity. Rather, they documented the contemporaneous presence of specific genetic markers in the blood and fluid samples submitted to Cellmark. The notes and reports created by Grossweiler (and reviewed by Swienton) were a contemporaneous documentation of the steps performed by the scientist. In other words, the supporting documentation "merely recount[ed] the procedures [used] to analyze the samples." (*Geier*, *supra*, 41 Cal.4th at p. 607.) Third, the purpose of the test was not necessarily for use at a later trial. The test itself "[was] not [itself] accusatory, as [such] analysis can lead to either incriminatory or exculpatory results." (*Ibid.*)

Finally, as discussed further below, even when a statement is found to be testimonial, neither *Geier* nor *Melendez-Diaz* abrogated the longstanding

rule that an expert may rely on hearsay in forming his or her opinion. (See *United States v. Floyd* (11th Cir. 2002) 281 F.3d 1346, 1349-1350.)

a. The DNA Expert Could Properly Rely on Testimonial or Non-Testimonial Hearsay in Forming Her Opinion

In the opinion authored by Justice Scalia, the Court observed, [f]orensic evidence is not uniquely immune from the risk of manipulation." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.) *Melendez-Diaz* recognized that evidence involving scientific testing is not necessarily exempt from the confrontation requirement. Rather, confrontation "is one means of assuring accurate forensic analysis." (*Id.* at p. 2536.)

But *Melendez-Diaz* did not invalidate statutes like Evidence Code section 801[7], subdivision (b), that provide for the admission of evidence through expert testimony. (*United States v. Turner* (7th Cir. 2010) 591 F.3d 928, 934 ["*Melendez-Diaz* did not do away with Federal Rule of Evidence 703"].) An expert may base his opinion on any material, "whether or not admissible," reasonably relied upon by experts in the field in forming their opinions; and, if questioned, the expert may relate the basis on which he formed his opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; Evid. Code, § 801.) Appellant does not claim that the material at issue in this case is not of a type reasonably relied upon by experts in the field.

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

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

California courts have long held that experts may testify based on hearsay that may itself be testimonial in nature. (E.g., *People v. Thomas*, *supra*, 130 Cal.App.4th at pp. 1208-1210.) Even after *Melendez-Diaz*, courts continue to reach the same conclusion. (E.g., *United States v. Johnson* (4th Cir. 2009) 587 F.3d 625, 634-637; *Haywood v. State* (2009) 301 Ga.App. 317 [2009 WL 4827842 at * 5]; *State v. Lui* (2009) 153 Wash.App. 304, 318-325 [221 P.3d 948]; *People v. Johnson* (Ill. App. 2009) 915 N.E.2d 845, 851-854.) As the court explained in *United States v. Johnson*:

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

(*United States v. Johnson*, *supra*, at p. 636, quoting *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538.)

A situation analogous to the instant case was presented to the Washington Court of Appeals in *State v. Lui*. There, the appellate court held that *Melendez-Diaz* did not render testimony by a pathologist's supervisor and the director of the DNA lab who reviewed the work of technicians who performed the tests inadmissible. (*State v. Lui*, *supra*, 221 P.3d at pp. 955-959.) The court noted that, in *Melendez-Diaz*, certificates

were used in lieu of live testimony whereas, in the case before it, the jury heard testimony from two experts. (*Id.* at pp. 955-956.) Further, the court observed that the disputed evidence in *Melendez-Diaz* was a "bare bones" affidavit that said nothing about the testing methods or the tests conducted. In *Lui*, by contrast, the experts testified extensively about their experience and training, as well as about the tests performed in the defendant's case. Thus, "the very live testimony absent in *Melendez-Diaz* was present." (*Ibid.*) Additionally, the court observed that nothing in *Melendez-Diaz* changed the general rule that an expert may rely on otherwise inadmissible facts, including testimonial statements, as a basis for the expert's opinion. (*Id.* at pp. 956-957.) Finally, the defendant had the "full opportunity to test the basis and reliability of the experts' opinions and conclusions 'in the crucible of cross-examination.'" (*Id.* at p. 959, quoting, *Crawford*, 541 U.S. at p. 60; accord, *People v. Johnson*, *supra*, 915 N.E.2d at p. 854 [the experts "each testified in person as to their opinions based on the DNA testing and were subject to cross-examination"].)

Nothing in *Melendez-Diaz* conflicts with this analysis. *Melendez-Diaz* did not hold that a defendant's confrontation rights are satisfied only if every person who provides a link in the chain of information relied upon by a testifying expert is available for cross-examination. Nor does it require that the prosecution call every person who can offer information about a forensic analysis. Rather, the United States Supreme Court stated that the defendant must be able to challenge the "honesty, proficiency and methodology" of the analyst who did the laboratory work in order to "weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2537-2538.) There is no logical reason why the Confrontation Clause is not satisfied in this regard where the testifying witness possesses sufficient qualifications and knowledge about the forensic testing process and test results, about the sufficiency of

the training received by the original analyst, about what tests were performed, whether those tests were routine, and the skill and judgment exercised by the testing criminalist. (*Ibid.*)

This reading of *Melendez-Diaz* is consistent with *Crawford*'s observation that the purpose of the Confrontation Clause is "to ensure reliability of evidence" by exposing it to the "crucible of cross-examination." (*Crawford, supra*, 541 U.S. at p. 61.) The Sixth Amendment right to confrontation is satisfied if a defendant can adequately test the reliability of a scientific conclusion or result by engaging in cross-examination. The identity of the expert cross-examined is and should be beyond the purview of the Constitution. (See *United States v. Turner, supra*, 591 F.3d at p. 933 ["'the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself'"], quoting *United States v. Moon* (7th Cir. 2008) 512 F.3d 359, 362.)

b. The Requirements of the Confrontation Clause Were Satisfied by Allowing Appellant to Cross-Examine Swienton

In this case, the availability of Swienton for cross-examination addressed each of the Confrontation Clause concerns posed by the United States Supreme Court. Appellant had ample opportunity to cross-examine Swienton about the test results, the general procedures for performing the tests, the documentation of those results, the collection and preservation of samples, and any other issue he deemed appropriate. (7RT 2784-2804, 2808-2811.) Defense counsel chose to highlight that Capistrano's combination of STR markers occurred 1 in 1300 in the Caucasian population and 1 in 2700 in the Hispanic population, and Cellmark did not compare its results to E.G's genetic profile. (7RT 2801-2802, 2804.)

Swienton was clearly qualified to testify as to the nature of the laboratory testing both generally and as was specifically done in appellant's case. Swienton testified concerning her personal qualifications, and appellant did not challenge her qualifications as an expert. (6RT 2707-2709.) She personally performed STR testing on a vaginal swab submitted for J.S. and blood samples submitted by Capistrano, and she personally reviewed the nylon strips and photographs generated as the end product of the scientific testing performed by Grossweiler. (6RT 2733, 2766-2768.) Her expert opinions concerning whether appellant, Drebert, J.S., E.G. Vera, Pritchard or Capistrano were contributors to the genetic material submitted to Cellmark resulted from her own training, experience, and knowledge.

Swienton was equally capable of addressing appellant's concerns than analysts whose testimony presumably would have been based entirely on the written report. (See *Geier*, *supra*, 41 Cal.4th at p. 602.) Nothing in *Melendez-Diaz* precluded Swienton from relying upon the analysts' test results in forming his opinion. And, "[b]ecause [Swienton] was a highly qualified expert employed by the lab who was familiar with the particular lab procedures and performed the peer review in this particular case, then gave an independent expert opinion, her presence was sufficient to satisfy [appellant's] right to confrontation." (*State v. Williams* (2002) 253 Wis. 99, 116 [644 N.W.2d 919].)

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

A defendant's Sixth Amendment right to cross-examination is satisfied as long as the opportunity for cross-examination is adequate – that is, as long as the "defense is given a full and fair opportunity to probe and

expose. . . infirmities [in testimony] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness's testimony." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 22 [106 S.Ct. 292, 88 L.Ed.2d 15].) Although "the main and essential purpose of confrontation is to secure for the [defendant] the opportunity for cross-examination" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 89 L.Ed.2d 674]), a defendant has no right to "cross-examination that is effective in whatever way, and to whatever extent, the defense may wish" (*Delaware v. Fensterer*, *supra*, at p. 20).

This concept was illustrated in *Pendergrass v. State* (Ind. 2009) 913 N.E.2d 703 (cert. petition pending, filed Jan. 19, 2010, No. 09-866, 78 USLW 3447), in the context of testimony by a forensic analyst who did not perform the actual test. In *Pendergrass*, a supervisor at the Indiana State Police Laboratory testified that another analyst had performed a DNA analysis and reached certain results. The supervisor had supervised the analyst and checked her work for accuracy. (*Id.* at p. 705.) The prosecution also called an expert witness who interpreted the results for the jury. (*Ibid.*) The defendant claimed that the Sixth Amendment guaranteed him the right to confront the analyst who performed the testing. (*Id.* at p. 708.) The Indiana Supreme Court disagreed. The court noted that in essence, the defendant was complaining that the prosecution "did not call the right – or enough – witnesses." (*Ibid.*) The court stated that, while *Melendez-Diaz* did not address this question, its language was useful in analyzing the claim. Specifically, the *Melendez-Diaz* dissent expressed concern that the opinion required "in-court testimony from each human link in the chain of custody." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2546 (dis. opn. of Kennedy, J.).) The *Melendez-Diaz* plurality rejected this assertion, making it clear that it would be up to prosecutors to decide which witnesses to call, as long as their testimony was presented live. (*Pendergrass v. State*,

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

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

In this case, Swienton's testimony satisfied the requirements of the Sixth Amendment. Evidence may be admitted through expert testimony, and an expert may base his opinion on hearsay, whether that hearsay evidence is "testimonial" or not. The availability of an expert for cross-examination satisfies the requirements of the right to confrontation. Unlike in *Melendez-Diaz*, where no witness was called to testify in connection with the sworn certificates, Swienton testified here an analyst who had personally performed the STR testing and had independently analyzed the

nylon strips produced by the DQ Alpha test analysis performed by Grossweiler. Further, Swienton was cross-examined by appellant's counsel. (7RT 2784-2804, 2808-2811.)

Swienton's testimony concerning the DQ Alpha testing was not a mere regurgitation of Grossweiler's test results. Due in part perhaps to the absence of an objection at trial, the appellate record does not support a claim that Swienton merely recited or conveyed Grossweiler's notes of the DQ Alpha testing or relied solely or substantially upon Grossweiler's interpretation of the test results to form her own expert opinion. Ms. Swienton's testimony clearly reflects that the nylon strips produced by the DQ Alpha testing were subject to interpretation, and although Swienton did state (without objection) that she reached the same conclusions as Grossweiler (see 6RT 2733), Ms. Swienton personally examined the raw data (the nylon strips) produced by the DQ Alpha testing process and her testimony conveyed her *personal* expert findings and opinion of the neutral scientific analysis results.

Because appellant had an opportunity to cross-examine Ms. Swienton, there was no Confrontation Clause violation.

c. Decisions Suggesting a Different Conclusion Are Not Persuasive

Appellate opinions suggesting a different conclusion are not persuasive, as they fail to address the key distinctions between the affidavits in *Melendez-Diaz* and circumstances involving expert testimony presented from the witness stand. For instance, in *State v. Locklear* (2009) 363 N.C. 438 [681 S.Ed.2d 293], the North Carolina Supreme Court found error – albeit harmless error – in the admission of testimony by a forensic pathologist about the results reached by another forensic pathologist and a forensic dentist, and in the admission of the autopsy report itself. The court

stated that, under *Melendez-Diaz*, "forensic analyses" are "testimonial statements," analysts are witnesses, and the state did not show the non-testifying witnesses were unavailable or that the defendant had a prior opportunity to cross-examine them. (*State v. Locklear*, *supra*, 681 S.Ed.2d at pp. 304-305.)

In *People v. Payne* (2009) 285 Mich. App. 181, 194 [774 N.W.2d 714], documents described in the opinion only as "laboratory reports containing the results of DNA testing" and prepared by a non-testifying analyst were admitted into evidence as business records. A witness testified that the reports concerned the basics of DNA testing and the methods used to prepare the reports. But the witness had not personally conducted the testing, had not examined any of the evidence in the case, and had not reached any of his own scientific conclusions. (*Id.* at p. 726.) A Michigan appellate court held that under *Melendez-Diaz*, admission of the reports violated the defendant's Sixth Amendment rights because he was not afforded his opportunity to be confronted with "the analyst" at trial. (*Ibid.*)

Neither of these opinions contains any discussion about an expert's province of relying on outside material as a basis for his or her opinions. Nor does it appear that any such issue was raised in either case.[8] Moreover, the decisions fail to recognize that *Melendez-Diaz* did not deal with forensic analyses per se, but rather with affidavits attesting to the results of those analyses. Further, the courts in *Locklear* and *Payne* assumed, without explanation, that the Confrontation Clause would be satisfied only by the production of the technician who actually performed the forensic test.

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[8] Perhaps this is because, in *Locklear* and *Payne*, the forensic or laboratory reports themselves were admitted into evidence, unlike in this case, where the toxicology reports were not admitted into evidence.

Melendez-Diaz, however, espouses no such requirement. Finally, the cases ignore the fact that there was live testimony presented at trial, by a forensic analyst available for cross-examination. This Court should decline to follow these decisions.

d. The Evidence of the DQ Alpha Polymarker Test Results Does Not Fall Within the *Melendez-Diaz* Majority's Holding Because Such Raw Data Is Not Testimonial Evidence

Whether or not an expert witness may rely on testimonial evidence, Swienton's opinion properly relied on non-testimonial evidence consisting of the nylon strips and photographs produced as the end products of the DQ polymarker testing. These items were not "statements" or "hearsay." Such evidence is not witness testimony, and hence is not testimonial within the meaning of *Melendez-Diaz*, *Crawford*, or the Sixth Amendment.

Here, again in contrast to *Melendez-Diaz*, the reports and notes generated by Grossweiler (and reviewed by Swienton) were not introduced at trial. Rather, the results of the biological testing (the nylon strips) were introduced into evidence through Swienton's expert opinion testimony. As discussed previously, this testimony did not constitute inadmissible testimonial evidence under *Crawford*. Regardless, unlike the certificates in *Melendez-Diaz*, the nylon strips here were not prepared for the sole purpose of providing prima facie evidence of the charged offense at trial. The nylon strips were 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.

They were instead prepared in the regular course of business for Cellmark. The notes detailed the contemporaneous observations of Grossweiler at the time she performed the various procedures necessary to

create the nylon strips. The strips, the notes and the report did not document a past event. This data did not constitute testimonial evidence under *Melendez-Diaz.*

The Sixth Amendment gives the defendant the right "to be confronted with the *witnesses* against him." (U.S. Const., Amend. VI, emphasis added.) Thus, for the Confrontation Clause to apply, the evidence must consist of a testimonial statement by a witness. "Evidence that is not a statement from a human witness or declarant is not hearsay" and is therefore not subject to the Confrontation Clause. (*Luginbyhl v. Commonwealth* (2005) 46 Va.App. 460, 466-467 [618 S.E.2d 347]; accord, e.g., *State v. Weber* (2001) 172 Or.App. 704, 708-709 [19 P.3d 378]; *Caldwell v. State* (1997) 230 Ga.App. 46, 47 [495 S.E.2d 308]; *Stevenson v. State* (Tex. App. 1996) 920 S.W.2d 342, 343-344; *State v. Van Sickle* (1991) 120 Idaho 99, 102-103 [813 P.2d 910].)

Several cases predating *Melendez-Diaz* illustrate this point. For instance, in *United States v. Washington* (4th Cir. 2007) 498 F.3d 225, the defendant was arrested for being under the influence of PCP, and technicians placed the defendant's blood into a gas chromatograph for testing. The gas chromatograph generated raw data, which the lab director used in testifying to his conclusion about the results of the tests. The defendant argued that his confrontation rights were violated because "the machine-generated data amounted to testimonial hearsay statements of the machine operators[.]" (*Id.* at p. 228.) The Fourth Circuit rejected the contention, finding that the data was neither a statement by a witness nor testimonial. The court noted that the 'statements' at issue – that the defendant's blood contained PCP and alcohol – were not made by a person but rather by an instrument. "The machine printout was the source of the statement, no *person* viewed a blood sample and concluded that it contained PCP and alcohol." (*Id.* at p. 230, emphasis in original.) The

inculpating data were on the printouts themselves, the only source of the "statement." The technicians could not independently confirm the test results; rather, they simply viewed the printout. In other words, the statements did not come from the technicians but from the printout itself. And "statements made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause." (*Id.* at p. 230.) Thus, "[a]ny concerns about the reliability of such machine-generated information is addressed through the process of authentication not by hearsay or Confrontation Clause analysis." (*Id.* at p. 231.)

Relying on *Davis*, *supra*, 574 U.S. 813, the Fourth Circuit also concluded that the instrument-generated data were not "testimonial." The court noted that the data "did not involve the relation of a past fact of history as would be done by a witness [citation]." (*United States v. Washington*, *supra*, 498 F.3d at p. 232.) The instrument-generated data were not relating past events but, rather, "the current condition of the blood in the machines." (*Ibid.*) While there was testimony linking the blood with past behavior, it was supplied by a witness – the laboratory director – who was subject to cross examination as required by the Confrontation Clause. (*Ibid.*) Because "the machine's output did not 'establish or prove past events' and did not look forward to 'later criminal prosecution' – the machine could tell no difference between blood analyzed for health care purposes and blood analyzed for law enforcement purposes – the output could not be 'testimonial.'" (*Ibid.*, citing *Davis*, *supra*, at p. 821.)

A similar situation was presented in *United States v. Lamons* (11th Cir. 2008) 532 F.3d 1251. There, an airline employee was charged with conveying a false bomb threat. At trial, the prosecution introduced raw billing data generated by CTI Group, a company that prepared billing CD's for Sprint. To make the CD's, CTI used an automated processing system. A senior technical representative for CTI identified an exhibit as a

spreadsheet representing the data on the CD. The spreadsheet showed calls made by the defendant to the airline on the dates and times in question. (*Id.* at p. 1262.) The defendant claimed that admission of the spreadsheet violated his Sixth Amendment rights. The Eleventh Circuit disagreed, noting that the Confrontation Clause applies only to "'witnesses' against the accused—in other words, those who 'bear testimony.'" (*Id.* at p. 1263, quoting *Crawford*, *supra*, 541 U.S. at p. 51.) Furthermore, the purpose of the Confrontation Clause was protection from "'ex parte examinations as evidence against the accused.'" (*United States v. Lamons*, *supra*, at p. 1263, quoting *Crawford*, *supra*, at p. 51.) The Court concluded:

> In light of the constitutional text and the historical focus of the Confrontation Clause, we are persuaded that the witnesses with whom the Confrontation Clause is concerned are *human* witnesses, and that the evidence challenged in this appeal does not contain the statements of human witnesses.

(*United States v. Lamons*, *supra*, at p. 1263, emphasis in original.)

The *Lamons* court further noted that the Federal Rules of Evidence defined a "statement" in terms of a declaration of action by a person,[9] and that this definition was helpful in determining the scope of the Confrontation Clause. (*United States v. Lamons*, *supra*, 532 F.3d at p. 1263.) Finally, the court acknowledged that *Melendez-Diaz* was pending before the United States Supreme Court but found it unnecessary to await that decision because "the nature of the evidence in *Melendez-Diaz* is so different" from the instrument-generated evidence in the case before it. (*Id.* at p. 1264, fn. 25.)

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[9] Rule 801 of the Federal Rules of Evidence provides in part: "(a) Statement. A "statement" is (1) an oral or written assertion or [¶] (2) nonverbal conduct of a person, if it is intended by the person as an assertion. [¶] (b) Declarant. A "declarant" is a person who makes a statement."

Similarly, in *United States v. Moon*, *supra*, 512 F.3d at p. 362, a Drug Enforcement Agency chemist testified, based on the readouts of two instruments (an infrared spectrometer and a gas chromatograph), that the substance seized from the defendant was cocaine. The Seventh Circuit held that the readings from the instruments did not constitute a "statement" and were therefore not testimonial hearsay barred by the Confrontation Clause. (*Ibid.*) The court explained:

> A physician may order a blood test for a patient and infer from the levels of sugar and insulin that the patient has diabetes. The physician's diagnosis is testimonial, but the lab's raw results are not, because data are not "statements" in any useful sense. Nor is a machine a "witness against" anyone. If the readings are "statements" by a "witness against" the defendants, then the machine must be the declarant. Yet how could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one's interests. . . . The vital questions – was the lab work done properly? what do the readings mean? – can be put to the expert on the stand.

(*United States v. Moon*, *supra*, at p. 362.)

Two out-of-state cases decided since *Melendez-Diaz* are also instructive: *People v. Brown* (2009) 13 N.Y.3d 332 [918 N.E.2d 927]; and *State v. Appleby* (2009) 289 Kan. 1017 [221 P.3d 525]. In *Brown*, New York's highest court held that a DNA report, introduced through a non-testing forensic biologist, was not "testimonial" as that term is used in *Crawford*, *Davis*, and *Melendez-Diaz*. The court stated that the report "consisted of merely machine-generated graphs, charts and numerical data" that on its own contained no subjective analysis. (*People v. Brown*, *supra*, at p. 931.) The technicians themselves would merely have explained how they performed certain procedures. (*Id.* at p. 932.) But, "[a]s the Court made clear in *Melendez-Diaz*, not everyone 'whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must be called in the prosecution's case.'"

(*Ibid.*, quoting *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1.) Instead, a witness qualified to interpret the results had to – and did – testify at trial. (*People v. Brown*, *supra*, at p. 932.)

Similarly, in *Appleby*, two individuals employed by a forensic laboratory testified that, by using computer software, they determined that the chance of blood on one evidence item being from someone other than the defendant was one in 14.44 billion and that, on the other item, the chance was one in 2 quadrillion. (*State v. Appleby*, *supra*, 221 P.3d at p. 549.) The trial court denied the defendant's motion to exclude the testimony on the grounds that, because the testifying witnesses did not place the samples in the instrument and did not know how the data bases were compiled, admission of the data violated his Sixth Amendment rights. Applying *Melendez-Diaz*, the Kansas Supreme Court held that the evidence at issue was not testimonial, noting that DNA itself was physical evidence and non-testimonial. The comparisons were generated by placing it in a data base with other physical evidence. Further, the act of writing the computer programs to make the comparisons was a non-testimonial action. "[N]either the database nor the statistical program are functionally identical to live, in-court testimony, doing what a witness does on direct examination." (*Id.* at p. 551.) The only "testimonial" evidence, concluded the court, was elicited from the experts, who were on the stand and subject to cross-examination. (*Id.* at p. 552.)

Like its federal counterpart, Federal Rules of Evidence 801, the California Evidence Code defines a "statement" as oral, written, or non-verbal conduct by a "person." (Evid. Code, § 225.)[10] Here, the nylon strips

[10] Evidence Code section 225 provides: "'Statement' means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.

produced by the DQ Alpha testing (see 7RT 2767-2768) were not "statements" by a witness and, therefore, they did not qualify as "hearsay." Moreover, the nylon strips were not "testimonial." Their admission did not violate the Sixth Amendment. The decision in *Crawford* precludes admission of testimonial *hearsay*.

Although the nylon strips required a qualified expert familiar with the scientific process to interpret them, the testimony of such a witness at trial satisfied appellant's confrontation rights. (See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532, fn. 1 ["We do not hold that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case . . . but what testimony is introduced must . . . be introduced live]."") Here, Swienton satisfied that role.

In *Melendez-Diaz*, the prosecution affidavits in which the witnesses attested that a substance was examined and was found to contain cocaine rather than the raw data of the testing performed. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2531, 2537.) The Supreme Court noted that the affidavits did not indicate what tests were performed, whether those tests were routine, and whether the results were subject to interpretation. (*Id.* at p. 2537.) It was therefore impossible to determine whether the analysis was done according to proper scientific protocol or whether there was human error in the testing process. (*Id.* at pp. 2537-2538.) Here, by contrast, Swienton was available to testify concerning the procedures used by Cellmark to ensure integrity and accuracy of the instrument and the test results had defense counsel concluded questioning in these areas was helpful to his case.

None of the reasons advanced in *Melendez-Diaz* suggests that the Confrontation Clause applies to the raw data, as opposed to the interpretation of that data. Specifically, the Court stated that the certificates

were "quite plainly affidavits," i.e., statements of fact sworn by a declarant before an officer qualified to administer oaths. Thus, they were the functional equivalent of live testimony. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.) But the nylon strips produced by the DQ polymarker testing in this case were neither sworn nor certified and had no ability to "testify" in court.

Also important in *Melendez-Diaz* was the fact that the analysts' "sole purpose" in preparing the affidavits was for their use in court as evidence against the accused. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.) The nylon strips were raw data that required an expert to interpret and explain. To the extent Swienton revealed the DNA test results through her testimony, the results were offered as an adjunct to that testimony, rather than "in lieu" of the testimony, as was the case in *Melendez-Diaz*. (See *Pendergrass v. State*, *supra*, 913 N.Ed.2d at p. 709 [*Melendez-Diaz* did not preclude admission of sources, including DNA test results, relied upon by analyst's supervisor in forming opinion].) Likewise, 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 testing, not to offer testimony against appellant.

Accordingly, appellant's "protection against the admission of unreliable evidence lies in the normal state evidence rules requiring an adequate foundation for the admission of the [data]." (*State v. Van Sickle*, *supra*, 813 P.2d at p. 914.) Admission of the instrument data into evidence through live testimony did not constitute a "'core class of testimonial statements' governed by the Confrontation Clause." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).) The nylon strips and photographs documenting the DQ Alpha test results were not contained in "formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions." (*Ibid.*) Accordingly, the evidence about the DQ

Alpha test results admitted here does not fall within the *Melendez-Diaz* majority holding, and testimony regarding these results did not violate the Confrontation Clause.

3. Any Error in Admitting the Challenged DNA Evidence Was Harmless

The erroneous admission of a hearsay statement in violation of the Confrontation Clause requires reversal unless the error is harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 680-681; *see Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1225.)

Here, the alleged error, if any, in questioning Swienton about Dr. Grossweiler's findings on the DQ Alpha testing was harmless beyond a reasonable doubt. Ms. Swienton did not merely regurgitate the opinion Grossweiler formed as a result of the DQ Alpha testing. Rather, Ms. Swienton independently reviewed the data produced by the scientific tests performed by Grossweiler and reached an independent conclusion. Consequently, even if the DNA test results obtained by Ms. Grossweiler were inadmissible without Grossweiler's testimony, Ms. Swienton's independent expert conclusions were admissible, thus rendering harmless any error in admitting the test results. (Cal. Evid. Code § 801; *People v. Geier*, 41 Cal. 4th at p. 608, fn. 13; *cf. United States v. Henry* (D.C. Cir. 2007) 472 F.3d 910, 914 [while "the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703" and "did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under [that rule]."].)

Moreover, 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. Appellant's involvement in the J.S./E.G. robbery was circumstantially established by virtue of the stolen answering machine he gave Gladys Santos, which she in turn gave to police. (5RT 2309-2310; 6RT 2521-2522; 8RT 3151-3152.) His connection to Santos' apartment was corroborated, in turn, by his arrest at that location. (5RT 2247-2255, 2443-2444.) At trial, J.S. identified this answering machine as having been taken during the robbery on December 15, 1995. (8RT 2971-2972, 3020.) A dark gray laptop computer with a liquid crystal display was also taken during the robbery. The screen was soft, flexed when touched, and changed color when touched. (7RT 2963-2964.) Ms. Santos testified that appellant brought this telephone answering machine to Santos's apartment in December 1995. Someone also left a dark gray Spectra laptop computer with a screen like the one stolen during the J.S./E.G. crimes on top of the refrigerator in Santos's apartment. Appellant asked Santos about the laptop during a telephone conversation, and Santos went to the refrigerator and opened the box. Later, Drebert took the computer from Santos's apartment. (6RT 2520-2554, 2562-2564.)

Although neither J.S. nor E.G. positively identified appellant as the perpetrator of the various crimes committed against them, J.S. positively identified Pritchard and Vera as two of the four robbers who invaded her home and terrorized her and her husband. She also positively identified Pritchard as the perpetrator of one forcible oral copulation count. Her descriptions of the height and build of the four robbers circumstantially implicated appellant as the rapist and the leader of the group. Moreover, appellant's status as the lead robber was consistent with his ongoing role as leader of this group of young men who called him, "Dad." (7RT 2910-2921, 2943-2948.) The STR testing personally conducted by Swienton was consistent with appellant being the donor of the genetic material targeted by the test. (7RT 2768-2780; Peo. Exh. 33 [chart of results].)

Although the DQ Alpha testing performed by Ms. Grossweiler served as additional circumstantial evidence suggesting appellant was the perpetrator of the sexual offenses against J.S. and one of the four men who robbed J.S. and E.G., other properly admitted evidence abundantly and sufficiently established his culpability. Any error was, therefore, harmless.

E. The Admission of Dr. Carpenter's Testimony, the Autopsy Report, and People's Exhibits 34 and 35 Did Not Violate Appellant's Sixth Amendment Right to Confront Witnesses

Appellant challenges "Dr. Carpenter's testimony regarding the autopsy report of Koen Witters" because that testimony was based upon his review of the autopsy report and photographs prepared by others. (Supp. AOB 24-28.) Appellant also claims the admission of the autopsy report (see IV Supp 2CT 368-381 [Peo. Exh. 36]) "was error under *Crawford*." (Supp. AOB 28-31.) These claims lack merit for the reasons discussed below.

1. Autopsy Reports Are Not Testimonial Evidence

Autopsy reports are medical records, a type of business or official record within the meaning of Evidence Code sections 1271[11] and 1280

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[11] Evidence Code section 1271 provides as follows:
Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or even 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; (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.

admissible absent confrontation. (See *People v. Beeler* (1995) 9 Cal.4th 953, 978-981 [autopsy report qualified as business record within the meaning of Evidence Code section 1271, such that witness coroner who did not prepare it could testify concerning its contents]; *People v. Clark* (1992) 3 Cal.4th 41, 159 [autopsy report qualified as official record within the meaning of Evidence Code section 1280, such that witness coroner who did not prepare it could testify concerning its contents].) Having qualified as a proper custodian of records, Dr. Carpenter could relate the contents of the report during the testimony to the jury. Additionally, autopsy reports are not testimonial evidence within the meaning of *Crawford*, and *Melendez-Diaz* did not change this conclusion.[12]

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

a. The Medical Records Distinction in *Melendez-Diaz*

The Confrontation Clause does not apply at all to nontestimonial statements. (See *Davis v. Washington, supra*, 547 U.S. at p. 824 [holding that the limitation with respect to testimonial hearsay is "so clearly

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

reflected in the text" of the confrontation clause that it "must . . . mark out not merely its 'core,' but its perimeter"].) *Melendez-Diaz* highlighted this boundary when it emphasized that the drug certificates at issue were "testimonial" in part because Massachusetts law expressly contemplated their preparation for use as evidence at trial. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) The underlying reason a document is prepared is a key criterion in determining its testimonial (or nontestimonial) status. (See also *id.* at pp. 2539-2540 ["Business and public records are generally admissible absent confrontation . . . because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial"].) This is a point on which the United States Supreme Court and this Court agree. (*People v. Geier*, supra, 41 Cal.4th at p. 607 [in determining whether a statement is testimonial, "the critical inquiry is not whether it might be reasonably anticipated that a statement will be used at trial but the circumstances under which the statement was made"].)

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

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

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

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

b. The Nature and Purpose of an Autopsy Report

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

To claim that autopsy reports, although written by physicians and documenting physiological conditions, are nonetheless not "medical records" would be a legal fiction. To the contrary, California law

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

Like medical records in other contexts, autopsy reports are prepared according to standardized medical protocols that do not change based on the potential future use of those reports. State law mandates that coroners "inquire into and determine the circumstances, manner, and cause" of many categories of death, both related to criminal activity (e.g., "gunshot, stabbing") and unrelated to criminal activity (e.g., "exposure, starvation, acute alcoholism, drug addiction, . . . sudden infant death syndrome; . . . contagious disease"). (Govt. Code, § 27491[13]; see also Govt. Code, §

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[13] Government Code section 27491 specifies the types of deaths a coroner is obligated to investigate and provides, in pertinent part, as follows:

> It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; unattended deaths; deaths wherein the deceased has not been attended by a physician in the 20 days before death; deaths related to or following known or suspected self-induced or criminal abortion; known or suspected homicide, suicide, or accidental poisoning; deaths known or suspected as resulting in whole or in part from or related to accident or injury either old or recent; deaths due to drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration, or where the suspected cause of death is sudden infant death syndrome; death in whole or in part occasioned by criminal means; deaths associated with a known or alleged

(continued...)

27491.41, subd. (c) [mandating an autopsy in "any case where an infant has died suddenly and unexpectedly"]; Health & Saf. Code, § 102850 [listing six circumstances of death in which the coroner must be notified, only one of which expressly involves a criminal act].[14]) Significantly, these statutory mandates do not command, suggest, or imply that the purpose, method, or nature of the coroner's inquiry change depending upon whether the "circumstances, manner, and cause" of death were related to criminal activity. (See, e.g., Gov. Code, § 27491.41, subd. (d) [infant death autopsies must be conducted using a "standardized protocol"]; *People v.*

(...continued)

> rape or crime against nature; deaths in prison or while under sentence; deaths known or suspected as due to contagious disease and constituting a public hazard; deaths from occupational diseases or occupational hazards; deaths of patients in state mental hospitals serving the mentally disabled and operated by the State Department of Mental Health; deaths of patients in state hospitals serving the developmentally disabled and operated by the State Department of Developmental Services; deaths under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another; and any deaths reported by physicians or other persons having knowledge of death for inquiry by coroner. Inquiry pursuant to this section does not include those investigative functions usually performed by other law enforcement agencies.

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

> "(a) Without medical attendance.
> "(b) During the continued absence of the attending physician and surgeon.
> "(c) Where the attending physician and surgeon or the physician assistant is unable to state the cause of death.
> "(d) Where suicide is suspected.
> "(e) Following an injury or an accident.
> "(f) Under circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another."

Leach (Ill.App.Ct. 2009) 908 N.E.2d 120, 130 [where county code requires the medical examiner to determine the "manner and cause" of deaths falling within 15 categories – including criminal violence, suicide, accident, disease constituting a public health threat, and death during medical procedures – the medical examiner does not perform a law-enforcement function].)

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

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

The conclusion that a pathologist examines a body from a medical and not a law enforcement perspective is supported by additional statutory mandates that define a coroner's role independently of any law enforcement

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

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

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

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

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

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

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

920, 926 ["the mere fact a person creating a business record (or other similar record) knows the record might be used for criminal prosecution does not by itself make the record testimonial"].)

This Court has stated that, in determining whether a statement is testimonial,

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

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

Examination of the autopsy report prepared in this case illustrates that the *primary purpose* of the report is to document the pathologist's contemporaneous observations of the body as presented during the autopsy itself rather than at an earlier point in time. (IV Supp 2CT 368-381; 7RT 2827.) Utilizing the data compiled at the time of the autopsy, perhaps in combination with observations at the crime scene or information gathered from other sources, a qualified forensic pathologist can often extrapolate to a past event – the death event – and opine about the time, circumstances and cause of death. However, the ability to use the data compiled from the autopsy for this additional purpose does not convert the contemporaneous medical records into testimonial statements.

In sum, nothing in the record in this case indicates that the autopsy report was anything other than a nontestimonial medical record.[16] Here, Dr. Carpenter laid a sufficient foundation for the omission of the report as a business record. (7RT 2826-2832.) Accordingly, introduction of the autopsy results did not violate the Confrontation Clause.

2. Even If the Autopsy Report Was Inadmissible, the Trial Court Properly Permitted Testimony by a Board Certified Forensic Pathologist Based in Part on the Autopsy Report

Regardless of the admissibility of the autopsy report itself, Dr. Carpenter could properly rely upon them in forming his opinion pursuant to Evidence Code section 801, subdivision (b). The presence of Dr. Carpenter on the stand for cross-examination satisfied Capistrano's confrontation rights.

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

a. The Pathologist, Testifying as an Expert, Properly Could Rely on Testimonial or Non-Testimonial Hearsay in Forming His Opinion

Capistrano's jury, of course, also received evidence of the cause of death in connection with the expert opinion testimony of Dr. Eugene Carpenter. *Melendez-Diaz* did not overrule statutes like Evidence Code section 801, subdivision (b), which provides for this type of evidence. (*United States v. Turner*, *supra*, 591 F.3d at p. 934 ["*Melendez-Diaz* did not do away with Federal Rule of Evidence 703"].)[17] An expert may base his opinion on any material, "whether or not admissible," reasonably relied upon by experts in the field in forming their opinions; and, if questioned, the expert may relate the basis on which he formed his opinion. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618; *People v. Montiel*, *supra*, 5 Cal.4th at pp. 918-919; Evid. Code, § 801.) Such expert-opinion testimony is permissible because the expert is present and available for cross-examination. (*People v. Sisneros*, *supra*, 174 Cal.App.4th at p. 154; *People v. Thomas*, *supra*, 130 Cal.App.4th at p. 1210.) "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*People v. Sisneros, supra*, 174 Cal.App.4th at pp.

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

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

153-154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; accord., e.g. *State v. Bethea*, supra, 173 N.C. App. at pp. 54-58.)

This Court and others have upheld the opinion testimony of a pathologist based upon another pathologist's observations and conclusions. (*People v. Beeler, supra*, 9 Cal.4th at pp. 980-981 [autopsy report qualified as business record within the meaning of Evidence Code section 1271, such that witness coroner who did not prepare it could testify concerning its contents]; *People v. Clark, supra,* 3 Cal.4th at p. 159 [autopsy report qualified as official record within the meaning of Evidence Code section 1280, such that witness coroner who did not prepare it could testify concerning its contents]; *People v. Wardlow* (1981) 118 Cal.App.3d 375 [same]; *State v. Lui, supra*, 153 Wash.App. at pp. 318-325 [pathologist's testimony not rendered inadmissible by *Melendez-Diaz*]; *Commonwealth v. Nardi* (Mass. 2008) 893 N.E.2d 1221, 1230-1231 [Confrontation Clause not violated when testifying experienced pathologist based cause of death opinion on documentation and photographs in another pathologist's autopsy report].) This Court in *Beeler* emphasized that the reliability of an autopsy report flows from the direct observations of the medical examiner set forth in that report, as distinguished from more subjective conclusions based upon "'the consideration of many different factors.'" (*People v. Beeler, supra,* 9 Cal.4th at p. 981 [quoting *People v. Terrell* (1955) 138 Cal.App.2d 35, 58].)

As discussed previously, California courts have long held that experts may testify based on hearsay which may itself by testimonial in nature. (See Arg. XXIV.D.2.a, *ante*.) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. (Evid. Code, § 720, subd. (a).) Once found to be qualified, expert witnesses enjoy two major distinctions from a percipient witnesses. First,

expert witnesses are not required to possess personal knowledge of the matter upon which their testimony is based. (Evid. Code, § 702, subd. (a).) Second, expert witnesses may testify in the form of an opinion and state the basis for their opinion on direct examination. (Evid. Code, § 802.)

Dr. Carpenter testified regarding his qualifications as an expert witness. (7RT 2825-2826.) With over nine years of experience in forensic pathology, board certification and the performance of over 4,000 in addition to supervising thousands of additional autopsies, the trial court properly allowed Dr. Carpenter to testify as an expert witness regarding the autopsy and cause of death of the victim, Koen Witters. (See *People v. Farnam* (2002) 28 Cal.4th 107, 162 [find that error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness clearly lacks qualification as an expert.]) Thus, Dr. Carpenter was properly permitted to state his opinion, that the cause of death was asphyxia due to strangulation resulting from constriction of the throat and neck (7RT 2833) and the basis for his opinion, namely the findings of Dr. Frisby during the autopsy that were memorialized in the autopsy report and the findings documented in the photographs taken by Coroner's staff.

As noted above, the autopsy report was received into evidence. However, it did not improperly function as the equivalent of live testimony as did the affidavits at issue in *Melendez-Diaz*. With the exception of the first and last pages, it noted the information observed by the examining pathologist, Dr. Frisby. Instead, the "statement" used at Capistrano's trial was forensic pathologist Dr. Carpenter's expert opinions concerning the cause of Witters's death. With respect to the cause of death, Dr. Carpenter rendered his own opinions independent of those of Dr. Frisby, based upon the coroner's investigation, the photographs, and the autopsy report.

This testimony was Dr. Carpenter's independent opinion as an expert. It was a far cry from the "bare bones" written affidavits, found inadmissible

in *Melendez-Diaz*, which merely set forth the ultimate conclusion, under oath, that the tested substance contained cocaine. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2531.)

b. The Requirements of the Confrontation Clause Were Satisfied By Allowing Capistrano to Cross-Examine the Testifying Forensic Pathologist

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

As respondent discussed in greater length when discussing the DNA expert testimony, nothing in *Melendez-Diaz* conflicts with this analysis. (See Arg. XXIV.D.2.a, *ante*.) *Melendez-Diaz* did not hold that a defendant's confrontation rights are satisfied only if every person who provides a link in the chain of information relied upon by a testifying expert is available for cross-examination. Nor does it require that the prosecution call every person who can offer information about scientific evidence. There is no logical reason why the Confrontation Clause is not satisfied in

this regard if the testifying witness possesses sufficient qualifications and knowledge about the autopsy process, the results of the examination, the methods were used, and the acceptance of those methods in the pertinent scientific community.

As previously noted, the purpose of the Confrontation Clause is "to ensure reliability of evidence" by exposing it to the "crucible of cross-examination." (*Crawford, supra*, 541 U.S. at p. 61.) The Confrontation Clause is satisfied if a defendant can adequately test the reliability of a scientific conclusion or result by engaging in cross-examination. The identity of the expert cross-examined is and should be beyond the purview of the Constitution. (See *United States v. Turner, supra*, 591 F.3d at p. 933 ["the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself"].)

Capistrano does not dispute Dr. Carpenter's qualifications as an expert and did not dispute them at his trial. Capistrano had ample opportunity to cross-examine Dr. Carpenter about the autopsy results, the general procedures for performing the autopsy, the documentation of those results, the preservation of samples, and any other autopsy issue he deemed appropriate. The trial court did not limit his examination in any manner. (7RT 2839-2842.) Dr. Carpenter was just as capable of addressing issues as the original pathologist would have been, especially because (1) the autopsy report made routine and descriptive observations of the physical body with little incentive to fabricate the results, and (2) any medical examiner would not likely have an independent recollection of performing a specific autopsy, and would have had to rely upon the report to the same extent Dr. Carpenter did. (*Geier, supra*, 4 Cal.4th at p. 602.) Nothing in

Melendez-Diaz precluded Dr. Carpenter from relying upon another pathologist's autopsy report in forming his opinion.[18]

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

3. Admission of Coroner's Photographs (Peo. Exhs. 34 and 35) Did Not Violate Capistrano's Sixth Amendment Confrontation Right

Capistrano further complains that Dr. Carpenter's testimony violated his Sixth Amendment rights because he relied upon photographs (Peo. Exhs. 34, 35) taken by other staff employed by the Coroner's office and

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

"[t]he defense could not cross examine on the accuracy of these pictures because the person who witnessed them was not present in court." (See Supp AOB 27-28.) His premise for this contention is mistaken. Capistrano received the full right to confrontation concerning the photographs when he cross-examined Mark Schuchardt, a criminalist employed by the Los Angeles County Coroner's Office, who created the autopsy photographs admitted as People's Exhibits 34 and 35. At trial Schuchardt testified that he was the assigned criminalist in the investigation of the death of Koen Witters, that he examined Mr. Witters's body after it arrived at the Coroner's Office on December 10, 1995, and that he photographed the body prior to the autopsy. (7RT 2813-2814.) Mr. Schuchardt testified in detail concerning the wounds and was cross-examined by Capistrano's counsel and codefendant's counsel. (7RT 2813-2823.) Because Capistrano had the opportunity to examine the person who photographed Witters's body – the same photographs used by Dr. Carpenter in forming his opinion of the cause of death – no Confrontation Clause challenge to the photographs can be sustained.

Second, the photographs did not qualify as "hearsay" and, therefore, their admission did not violate the Sixth Amendment. The decision in *Crawford* precludes admission of testimonial *hearsay*. The photographs were not "statements" since they did not qualify as "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225.) In this case, the photographs of Witters's body did not qualify as "hearsay evidence."

Nor are photographs "testimonial" within the meaning of *Crawford* since they were not "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (*Davis v. Washington*, *supra*, 547 U.S. at p. 830.) Moreover, in this case the

photographer testified and, therefore, Capistrano was afforded the opportunity for cross-examination guaranteed by the Sixth Amendment.

4. Any Error in Admitting the Autopsy Report and/or Dr. Carpenter's Expert Testimony Was Harmless

In any event, admission of the autopsy report and Dr. Carpenter's testimony was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 680-81; *see Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Mitchell*, *supra*, 131 Cal.App.4th at p. 1225.)

The autopsy report was introduced into evidence. (See Peo. Exh. 36.) However, Dr. Carpenter used the photographs, rather than the report, to illustrate his expert opinion testimony and Dr. Frisby's conclusions were not expressly verbalized for the jury. To the extent the contents of the report was the same as the substance of Dr. Carpenter's testimony, the report was cumulative and therefore, its admission was harmless. Dr. Carpenter was available for cross-examination.

As for the admission of Dr. Carpenter's testimony, it was offered as an expert opinion and ultimately established Witters's death was not accidental or the result of natural causes. These points were abundantly obvious from other unchallenged evidence. Nothing in Dr. Carpenter's testimony directly inculpated appellant. The evidence and testimony that incriminated appellant was offered through other witnesses, including the detectives who investigated the crime scene and Gladys Santos. Appellant made a detailed and self-corroborating confession to the murder of Koen Witters which was corroborated by the evidence found at the crime scene. Indeed, appellant's confession provided details that could only have been known by the killer or someone present when the murder occurred. Particularly, appellant's confession revealed that he had observed the

victim shaving prior to entering the apartment to rob him (5RT 2442); investigating officers found shaving cream and stubble in Witters's bathroom sink. (5RT 2372.)

Capistrano admitted strangling and cutting the victim in his statements to Gladys Santos. (5RT 2439-2441, 2443.) Apart from the autopsy report or Dr. Carpenter's testimony, the investigating officers testified Witters was bound, gagged, strangled, and his wrists cut, and the small quantity of blood suggested Witters was dead or dying when the cuts were made. (5RT 2368, 2370, 2382, 2389-2390.) Witters's desktop Apple MacIntosh computer was stolen during the robbery. (5RT 2344-2345, 2351-2354, 2357-2358, 2373-2376, 2381.) After the murder, Capistrano asked Santos if she knew anyone who wanted a desktop Apple MacIntosh computer. (5RT 2447-2448, 2461.) Capistrano commented that his victim "liked to travel to Europe" (5RT 2447) and liked Asian women (5RT 2445, 2447); Witters was a Belgian citizen, his girlfriend was Taiwanese, and police found a photograph of an Asian woman on his ransacked bed. (5RT 2334-2337, 2346-2348, 2371-2372.)

Although Dr. Carpenter's testimony concerning the cuts on Witters's body and that strangulation was the cause of death (7RT 2830-2839) served as evidence corroborating Capistrano's confession to Santos, the observation of the luggage strap wrapped tightly around Witters's neck at the crime scene (5RT 2368, 2382; 7RT 2812-2820) 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. Thus, any erroneous admission of Dr. Carpenter's testimony or the autopsy report was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment be affirmed.

Dated: July 30, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 21,672 words.

Dated: July 30, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Capistrano**
No.: **S067394**

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 collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 30, 2010, I served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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, 2010, at Los Angeles, California.

Deisy A. Dvorak
Declarant

D. A. Dvorak
Signature

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOHN LEO CAPISTRANO,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S067394

Los Angeles County Superior Court Case No. KA034540
The Honorable Andrew C. Kauffman, Judge

SUPPLEMENTAL PROOF OF SERVICE – SUPPLEMENTAL RESPONDENT'S BRIEF

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DECLARATION OF SERVICE BY U.S. MAIL

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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 collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 5, 2010, I served the attached **SUPPLEMENTAL PROOF OF SERVICE - SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 5, 2010, at Los Angeles, California.

Deisy A. Dvorak
Declarant

Signature

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