IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	**AUTOMATIC APPEAL**
	)	
	)	**No. S058157**
Plaintiff/Respondent,	)	
	)	
v.	)	**(Contra Costa Superior Court**
	)	
MICHAEL NEVAIL PEARSON,	)	**No. 951701-2)**
	)	
Defendant/Appellant.	)	
	)	

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

On Appeal From A Sentence Of Death
From The Superior Court Of California, Contra Costa County
The Honorable RICHARD S. FLIER, Judge Presiding

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DEATH PENALTY

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Introduction

Appellant Michael Pearson hereby presents this supplemental opening brief raising a new claim of error based upon the decisions of the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, 129 S.Ct. 2527 and *Briscoe, et al., v. Virginia* (2010) 559 U.S. ____, affirming the former, on January 25, 2010. This claim is based upon the trial court's refusal to preclude the prosecutor from submitting an autopsy report and testimony repeating the report without calling the autopsy physician to the stand.

This claim was not made in appellant's opening brief, which was filed April 26, 2007, because the United States Supreme Court had not yet

held that a Confrontation Clause violation exists on our facts, nor issued any decision compelling reconsideration of the contrary views expressed by this court in *People v. Geier* (2007) 41 Cal.4th 555, 605.

Appellant's case has not yet been set for oral argument. This brief is therefore timely pursuant to rule 8.520(d) of the California Rules of Court.

STATEMENT OF THE FACTS

In the guilt phase of appellant's trial, the prosecutor called pathologist Brian Peterson M.D., to testify about the "cause of death and condition of the bodies" of homicide victims Lorraine Tally and Barbara Garcia, based on the autopsy report prepared by one Aaron Lipton, M.D.. The prosecutor reported that Dr. Lipton was "no longer employed by the county" and his present whereabouts were not known to the prosecutor. (15RT 2986.)

Defense counsel made a hearsay objection to testimony reiterating the autopsy report absent testimony from the report's author. The court rejected the objection, declaring that "experts testify from other experts' comments and reports. It's part of the expert opinion." [1] (15RT 2986-

1. As noted in appellant's opening brief, the trial court did not apply the same reasoning when the prosecutor objected to expert testimony recapitulating the reports of defense mental health experts. (AOB 285.) Respondent countered that the autopsy report was admissible under the business record exception to the hearsay rule, that the author of the report was "unavailable," and that the trial court's acceptance of testimony from another expert recapitulating the report was supported by *People v. Beeler* (1995) 9 Cal.4th 953, 979-980. (RB 172-173.)

2987.) No one inquired into the present availability of Dr. Lipton. His testimony was not offered at the preliminary hearing or at any other proceeding in which appellant could cross-examine him.

Dr. Peterson testified that he was employed by a corporation with a current contract to perform autopsies for Contra Costa County and was the custodian of the records of past autopsies, including those that Dr. Lipton performed on the victims in this case. He said Dr. Lipton was presently in Washington state. (15RT 2988-92.) He said the autopsy reports (People's Exhibit 23A and 25A) were prepared at or near the time of the autopsies. (15RT 2991-92.) This testimony was presumably based on his belief that contemporaneous reporting of an autopsy is customary and proper; he did not say that he was present or even under contract with the county at the time of the reported events. (15RT 2991.) The reports were offered and accepted into evidence. (15RT 2991-92.)

Dr. Peterson then described the condition of each victim's body and the trajectory of the bullets, as reported by Dr. Lipton, excepting only a point on which the Lipton report was internally inconsistent. (15RT 2993-3000.)[2] He told the jury that Lorraine Talley suffered one perforating gunshot wound to the head that entered from an area just above and behind her left ear and exited her neck, and one perforating gunshot wound to the

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2. Dr. Peterson opined that the wound just behind Lorraine Talley's left ear was the entrance wound of the quickly-fatal head shot, rather than an exit wound as reported in one portion of the report.

abdomen that entered near the small of her back. (15RT 2994-95.) When the prosecutor prodded him for further details, he added that "Dr. Lipton described a rectangular abrasion" on Talley's right upper shoulder. He said that Lipton "mentioned . . . two small tears in the blouse that he felt were in the same location as the abrasion" and that Lipton opined the tears "were caused by the exiting bullet as it exited the right side of the neck." He said the way Lipton described the abrasion "would fit" and "would line everything up" with the prosecutor's hypothesis of how Talley's head was turned when she was shot in the head. (15RT 2997.)

When the prosecutor asked if Dr. Lipton had noted any blood in Talley's abdominal cavity, Dr. Peterson said Lipton "described a quantity of blood within the abdominal cavity that would be approximately a cup to a cup and a half or so." (15RT 2997) Based on that reported finding, Dr. Peterson opined that the abdominal injury preceded the head shot. Dr. Peterson also repeated the report's descriptions of the damage to all the organs that Lipton said were torn and perforated by the shots. (15RT 2998-3000.) He told the jury that Dr. Lipton connected the wounds from the gunshot to Talley's head, measured the trajectory, and "stated" that the trajectory was at a 45-degree downward angle. (15RT 3005.)

The prosecutor elicited very similar testimony respecting the autopsy of Barbara Garcia. (15RT 3009-3013.) Dr. Peterson agreed that the evidence supported all of the prosecutor's hypotheses of how the wounds were inflicted and the movements of the victims and the shooter in between the first and final shots. (15RT 2999, 3002-07, 3010, 3018-19.)

ARGUMENT

ALLOWING THE PROSECUTOR TO PRESENT AN AUTOPSY REPORT AND TESTIMONY REPEATING ITS ASSERTIONS WITHOUT PRODUCING THE AUTHOR OF THE REPORT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION AND COMPELS REVERSAL

A. Appellant had a right to cross-examine the author of the report

Both the United States and California constitutions guarantee a defendant in a criminal case the right to confront and cross-examine the witnesses against him. (U.S.Const., 6th Amend. ["In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."]; Cal.Const., Art. I, § 15 ["The defendant in a criminal cause has the right . . . to be confronted with the witnesses against the defendant."].)

This right is violated when the prosecutor is permitted to prove any part of its case through an out-of-court "testimonial" statement from a witness whom the defendant had no prior opportunity to cross examine, even if the witness is unavailable. (*Crawford v. Washington* (2004) 541 U.S. 36, 54.) The court in *Crawford* did not provide a comprehensive definition of "testimonial," but noted that, at a minimum, prior testimony or its functional equivalent and police interrogations would qualify. (Id. at 68, 124 S.Ct. at 1374, 158 L.Ed.2d at 203). The Court also described a "core class of testimonial statements" as including:

> . . . 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 which were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.* (*Id.* at 51-52, 124 S.Ct. at 1364, 158 L.Ed.2d at 193; emphasis added; internal quotation marks and citations omitted.)

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __, 129 S.Ct. 2527, 174 L.Ed.2d 314, the Court held that affidavits of state laboratory analysts stating the results of their analyses were testimonial statements subject to the requirements of the Confrontation Clause. The Court concluded that, as affidavits, they fell within the core class of testimonial statements described in *Crawford.* (*Id.* at __; 129 S.Ct. at 2532; 174 L.Ed.2d 314). The Court further reasoned that the affidavits' purpose was to provide the same testimony the analysts would give if called to testify in person, and they were therefore "functionally equivalent to live, in-court testimony." (*Ibid.*). The Court also noted that the sole purpose of the affidavits was to provide evidence of the composition, quality and weight of the substance analyzed, and the analysts were surely aware of the affidavits' evidentiary purpose. (*Ibid.*).

Dr. Lipton's autopsy report was similarly "testimonial" in nature. The decedents were obviously homicide victims. A police officer attended the autopsy and collected evidence taken from the victims' bodies. (15RT 2972-78.) Like the analysts in *Melendez-Diaz*, Dr. Lipton was surely aware of the evidentiary purpose of his report. And as *Melendez-Diaz*

makes clear, reports prepared in anticipation of litigation are "core class" testimonial statements, even if the report was made contemporaneously with the observation of the reported facts, and those facts are "scientific" as one might presume to be the case with an autopsy report. *(People v. Benitez* (Feb. 24, 2010, G041201) __Cal.App.4th __ [pp. 4-8].) Indeed, the *Melendez-Diaz* decision specifically mentions autopsies in discussing the need to honor the defendant's right to cross-examine forensic analysts. (129 S.Ct. at 2936, fn. 5.)

B. The claim of error was preserved

Defense counsel's failure to cite the Confrontation Clause of the Sixth Amendment in objecting to Dr. Peterson's testimony and the admission of the autopsy reports did not forfeit or waive the present claim. This case was tried in 1996, many years before the Supreme Court decided Melendez-Diaz. As submitted in Respondent's brief, the trial court's rejection of defense counsel's hearsay objection was supported by this court's decision in *People v. Beeler, supra*, 9 Cal.4th 953, 979-980. (RB 172-173.) Whether correct or not, the trial court's stated reason for rejecting the hearsay objection [the report is admissible as a part of the expert's opinion] manifests the futility of raising a hearsay objection to the autopsy reports themselves. Counsel cannot forfeit a claim by failing to make an objection that was futile at the time of trial. (*O'Connor v. Ohio* (1966) 385 U.S. 92, 93, 87 S.Ct. 252, 17 L.Ed.2d 189 ["failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court"]; *People v.*

Birks (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver where lower court was bound by decision of higher court on issue].)

C. The error was not harmless

Lipton's reported statements of the examinations he performed, the quantities of blood he reportedly found in particular parts of the bodies, and the locations of the perforating wounds he reportedly observed, provided the basis for the opinions the prosecutor asked Peterson to render. Accordingly, Dr. Peterson implicitly and explicitly asserted that Dr. Lipton had examined and explored the decedents bodies and observed the phenomena he reported. For example, he asserted that "when Dr. Lipton examined the body, he could actually see a little bit of the bruise and feel the bullets there." The bruise "confirmed" that the victim "continued to live after that first shot was fired." (15RT 3010.)

Those opinions – which rested exclusively on Lipton's report — provided objective, scientific support for the prosecutor's *coup de grace* theory of appellant's behavior and intent. Accordingly, the prosecutor emphasized his possession of that evidence repeatedly and forcefully in the presence of the jury at trial.

During voir dire, the prosecutor declared (in a rhetorical question to a juror, no less) that the evidence of how the victims died was strong proof of appellant's intent to kill. ["[I]f somebody got shot in the head and died of arterial damage, shot in the head, back of the head, execution style. It might tell you somebody's as [sic] state of mind at the time he pulls the trigger, right?" (9RT 1892.)]

In guilt phase closing argument, the prosecutor asked the jury to view the testimony of an eyewitness to the Talley shooting "in the context of the testimony of Dr. Peterson regarding what shot was fired last because that will – altogether ... It's like a jigsaw puzzle. Does it fit? If it doesn't fit you have to come up with some other theory. Okay." (26RT 4907.) The next time he mentioned Peterson's testimony he conjoined it with the autopsy photographs in asserting "very strong circumstantial evidence of something you have to look an absolute obligation to see. And it's the intent to kill." (26RT 4913)

Further on, the prosecutor reminded the jury that Peterson talked about "blood in the upper abdominal cavity in Lorraine Talley's case. In the lower abdominal, I believe in Barbara Garcia's case. They were bleeding after they were shot. That's part of the reason why – that is other reason also why you know that Barbara Garcia's shot last in the head. Why you know that Lorraine Talley was shot last in the head." (26RT 4914.) Further still, "when you look at her injuries, the injuries to her body as testified by Dr. Peterson in conjunction in the way – placement of the bullets, you know Lorraine Talley was shot somewhere in here. Probably ducking away, trying to turn away from this murderous assault that she's then suffering." (26RT 4916.)

A constitutional error may not be held harmless unless the beneficiary proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*Chapman v. California* (1967) 386 US 18, 24.) The test "is not whether, in a trial that occurred without the

error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) "Consistent with the jury-trial guarantee, the question ... the reviewing court [is] to consider ... is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." (Ibid.)

Accordingly, the proper analysis does not derail on to the likelihood that the prosecutor could have secured Dr. Lipton's testimony if the trial court had precluded the prosecutor from presenting the autopsy report in his absence, nor the probability that the defense could impeach Lipton if he were called. "The inquiry into harmless error focuses on the impact of the error in the trial that actually occurred, not on whether the same verdict would have been reached in a different trial in which the error was avoided. [Citations.]" (*Washington v. United States* (D.C. App. 2009) 965 A.2d 35, 45, fn. 30, citing *inter alia*, *Sullivan v. Louisiana, supra*, 508 U.S. 275, 279.)

Likewise, the proper analysis does not turn on whether a reasonable jury would have returned the same verdicts with no autopsy evidence at all. When evidence was admitted in violation of the federal constitution, the proper focus is on the role that the improper evidence actually played in the case as it was tried, not the viability of a case lacking that evidence. Thus, in *Arizona v. Fulminante*, the Court held that admission of an illegally obtained confession was not harmless after focusing primarily on two

factors: 1) the prosecutor had manifested his belief that the confession was important for conviction; and 2) the evidence was such that the jury could have relied in part on the confession to convict. (*Arizona v. Fulminante* (1991) 499 US 279, 297-300.)

These decisive factors are present to an even greater extent in respect of the autopsy evidence here. The prosecutor repeatedly manifested belief that the autopsy-based testimony was important for conviction, and the evidence was such that the jury could have relied on it in reaching its verdict. Indeed, after hearing the prosecutor's final argument, reasonable jurors could hardly be expected to do ignore the evidence at issue here.

An error is harmless only when it is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on another ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 73, fn. 4.) Here, the record reveals that prosecutor, who had an opportunity to judge the demeanor and other factors affecting the credibility of his witnesses, saw the autopsy evidence as very important to his case. "There is no reason why the reviewing court should treat this evidence as any less crucial than the prosecutor -- and so presumably the jury -- treated it." *(People v. Cruz* (1964) 61 Cal.2d 861, 868.) On this record, one cannot conclude with the requisite certainty that the inadmissible evidence did not contribute to the verdict obtained. Reversal is required.

CONCLUSION

The judgment of conviction must be reversed.

DATED: March 10, 2010

Respectfully submitted,

_____
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CERTIFICATE OF COUNSEL

The foregoing supplemental opening brief on appeal was produced in 13 point proportional Times Roman typeface. Exclusive of tables and this certificate, it contains 2785 words as counted by WordPerfect 12.

JEANNE KEEVAN-LYNCH

PROOF OF SERVICE BY MAIL

RE: People v. Michael Pearson, No. S058157

I, Jeanne Keevan-Lynch, declare under penalty of perjury as follows: I am over the age of 18 years, and I am not a party to the within action. My business address is P.O. Box 2433, Mendocino, California, 95460. On the date indicated below, I served a copy of the attached supplemental opening brief on the persons indicated below, by depositing same in the mail with postage thereon fully prepaid.

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Executed under penalty of perjury under the laws of the State of California and the United States of America on March 10, 2010.

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