I. SIXTH AMENDMENT

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

The history of the Sixth Amendment supports two inferences about the meaning of the Sixth Amendment.

1) It was directed to prevent the use of ex parte examinations as evidence against the accused, and
2) Testimonial statements of a witness who did not appear at trial are not admissible unless the witness was unavailable to testify, and the defendant had a prior opportunity for cross-examination.


The Confrontation Clause’s goal is to ensure the reliability of evidence and is a procedural rather than a substantive guarantee. “It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” (Id. at p. 61.) “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.” (Id. at p.62.)

II. HISTORICAL PERSPECTIVE (cases leading up to Melendez-Diaz)


In Crawford v. Washington, supra, the High Court held that the Confrontation Clause guarantees a defendant’s right to confront those “who bear testimony” against him. (Id. at p. 51.) The Court set forth various formulations of testimonial statements, including “pretrial statements that declarants would reasonably expect to be used prosecutorially” and “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.” (Id. at pp. 51-52.)
Whether the out-of-court statement violates the Confrontation Clause depends on whether it is testimonial or not. The Court did not define what constitutes “testimonial statement” but gave examples. (Id. at pp. 51-52.) It left for another day any effort to provide a comprehensive definition of “testimonial.” (Id. at p. 68.)

FACTS: The defendant assaulted a man that supposedly tried to rape his wife. At trial, the defendant claimed self-defense. The defendant’s wife was present during the offense and made a statement to the police (she didn’t see anything in the victim’s hand). The defendant asserted the marital privilege, barring his wife from testifying. The wife’s statement to police came in under a hearsay exception. The defendant claimed he was denied his Sixth Amendment right to cross-examine his wife. (Id. at pp. 38-40.)

HOLDING: Admission of wife’s out-of-court testimonial statement against her husband, despite the fact that he had no opportunity to cross-examine her, violated the Sixth Amendment. (Id. at pp. 68-69.)


In *Davis v. Washington*, supra, the Court said statements are testimonial “when the circumstances objectively indicate . . . that the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution.” (Id. at p. 822.)

*Davis* stems from two underlying cases:

1) FACTS: In *Davis*, the victim, Ms. McCottry, called 911 immediately after being assaulted, and identified her former boyfriend, Davis, as the perpetrator. McCottry did not testify at trial, but the 911 call was admitted into evidence. Davis claimed that he was denied his Sixth Amendment right to confront witnesses against him.

HOLDING: McCottry’s statements were *not* testimonial because under the circumstances the statements were made for the primary purpose of assisting the police in responding to an ongoing emergency. Furthermore, McCottry made the statements as the events were occurring (contemporaneous or near contemporaneous) rather than describing past events. (Id. at pp. 827-828.)

2) FACTS: In the underlying case, *Hammon v. Indiana*, police responded to a domestic disturbance. While at the house they questioned the wife and victim, Amy Hammon, while her husband, the defendant, was in the other room. Hammon made a statement that her husband hit her and threw her on the ground. She filled out and signed a “battery affidavit”. Hammon did not appear at trial, but the affidavit was admitted (hearsay exception, present sense impression) and the investigating officer testified. (Id. at pp. 819-821.)
HOLDING: Hammon’s statements were testimonial because the primary purpose of the police interrogation was to investigate a possible crime. There was no evidence of an ongoing emergency. The interrogation was formal in nature as Hammon was separated from the defendant and questioned about past events. (Id. at pp. 829-834.)

FACTS: In Geier, supra, a DNA laboratory supervisor (Cotton) was allowed to testify regarding the laboratory notes and conclusions of a testing analyst (Yates). The lower court found that the DNA results were admissible under the business record exception and also said that even if Yates’ analysis was hearsay, Cotton could rely on it for purposes of formulating her opinion as a DNA expert. (Id. at p.596.)

COURT’S REASONING:
Based on the court’s interpretation of Crawford and Davis, it found that such scientific evidence is not testimonial. Based on the distinctions made in Davis, [McCottry’s 911 call-ongoing emergency vs Hammons’ statement to police regarding past events] the court found “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.” (Id. at p.607.)

The court concluded that for a DNA report to be testimonial it must meet all three of the following criteria: “(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.” (Id. at p.605.)

The court found that the DNA report met criteria (1) and (3), but not (2) because Yates’ DNA report “constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events.” (Id. at p.605.)

HOLDING: The DNA report was not testimonial. (Id. at p. 607.) And even if Cotton’s reliance on Yates’ report violated defendant’s Sixth Amendment rights as construed by Crawford, any error was harmless. (Id. at p. 608.)

FACTS: In *Melendez-Diaz, supra,* three certified affidavits prepared by the persons who performed the chemical analysis on the seized substance were introduced. The certificates reported the weight of the seized bags and stated the substance in the bags was cocaine. The certificates were sworn to before a notary public.

The issue to be decided was whether the “affidavits” were testimonial, requiring the persons who prepared the affidavits to be produced in court, and subject to defendant’s right of confrontation. (*Id.* at p. 2531.)

HOLDING: The analysts’ certificates of analysis were affidavits within the core class of testimonial statements covered by the Confrontation Clause. Absent a showing that the analysts were unavailable to testify at trial and that the defendant had an opportunity to cross-examine them, the defendant was entitled to be confronted with the analysts at trial. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532.)

In *dicta,* the court responded to the respondent’s and dissent’s analytical arguments.

* analysts were not removed from coverage of Confrontation Clause based on theory that they were not “accusatory” or “conventional” witnesses (*Id.* at pp.2533-2535);

* analysts were not removed based on testimony was “neutral, scientific testing” (*Id.* at pp. 2536-2538);

* certificates of analysis were not removed from Confrontation Clause based on theory that they were akin to official and business records (*Id.* at pp. 2538-2540),

* defendant’s ability to subpoena analysts did not obviate state’s obligation to produce analysts for cross-examination (*Id.* at p. 2540).

The Court did not reach the question whether a person who checks the accuracy of the testing device must appear in person as part of the prosecution’s case. Nor did the Court reach the question whether documents prepared in the regular course of equipment maintenance qualify as testimonial records. (*Id.* at p. 2532, fn. 1.) However, the Court noted that “what testimony *is* introduced must (if the defendant objects) be introduced live.” (*Ibid.*)
IV. IS GEIER STILL GOOD LAW AFTER MELENDEZ-DIAZ?

In Melendez-Diaz, supra, the United States Supreme Court appears to have overruled the holding in Geier, but maybe not. Four days after deciding Melendez-Diaz, the United States Supreme Court denied certiorari in Geier. (Geier, supra, 41 Cal.4th 555, cert. den. Jun. 29, 2009, No. 07-7770, sub nom. Geier v. California (2009)_U.S._ [129 S.Ct. 2856, 174 L.Ed.2d 600].)

Melendez-Diaz rejected the principle that “near-contemporaneity” statements fell outside the scope of the Confrontation Clause, which is what Geier had held. As the Melendez-Diaz majority noted:

In any case, the purported distinctions respondent and the dissent identify between this case and Sir Walter Raleigh’s “conventional” accusers do not survive scrutiny. The dissent first contends that a “conventional witness recalls events observed in the past, while an analyst’s report contains near-contemporaneous observations of the test.” . . . [T]he dissent misunderstands the role that “near-contemporaneity” has played in our case law. . . . Though the witness’s statements in Davis were “near-contemporaneous” to the events she reported, we nevertheless held that they could not be admitted absent an opportunity to confront the witness.

(Melendez-Diaz, supra, 129 S.Ct. at p. 2535.)

V. COURT OF APPEAL CASES GRANTED REVIEW

Whether Geier survives after Melendez-Diaz is currently before the California Supreme Court in several cases “which present issues concerning the right of confrontation under the Sixth Amendment when the results of forensic tests performed by a criminalist who does not testify at trial are admitted into evidence and how the decision of the United States Supreme Court in Melendez-Diaz v. Massachusetts (2009) 557 U.S.___, [129 S.Ct. 2527, 174 L.Ed.2d 314] affects this court’s decision in People v. Geier (2007) 41 Cal.4th 555.”. (http://appellatecases.courtinfo.ca.gov)

(Previously published at 177 Cal.App.4th 202; 98 Cal.Rptr.3d 825.)
(Fourth District, Div ONE) - (McDonald, McConnell, Nares)

FACTS: Pena tested the alcohol content of defendant’s blood and reported a level of 0.09 percent blood alcohol content at time of the blood draw. Pena did not testify at trial, but
the report was admitted into evidence. Willey, the criminalist supervisor and custodian of the lab reports, testified at trial and explained the evidence processing procedures. (Id. at p. 205.)

HOLDING: Appears that Geier has been disapproved by the United States Supreme Court’s interpretation of the Confrontation Clause in Melendez-Diaz. (Lopez, supra, at p.206.) The report was the same as the certificates described in Melendez-Diaz, and was therefore testimonial hearsay evidence. Error was not harmless. (Id. at p. 208.)

(Previously published at 176 Cal.App.4th 1388, 98 Cal.Rptr.3d 702.)

(Third District) - (Blease, Sims, Nicholson)

FACTS: Dr. Bolduc, who had been fired for producing untrustworthy reports, prepared the autopsy report. The report was not admitted into evidence, but Dr. Lawrence (supervisor), who was not present at the autopsy, testified based exclusively on the contents of Bolduc’s report as to the victim’s death. Dr. Lawrence opined that the victim was strangled for two minutes before she died, which was a critical fact. (Id. at p. 1392.)

HOLDING: The autopsy report was testimonial, as it was the type of report prepared in anticipation of a criminal prosecution. (Id. at pp. 1399-1400.) While the case differs from Melendez-Diaz, because the report was not admitted into evidence, Dr. Lawrence’s opinion was entirely dependent upon the accuracy and substantive content of the report. (Id. at p. 1403.)

(Previously published at 177 Cal.App.4th 654, 99 Cal.Rptr.3d 369.)

(Second District) - (Rothschild, Mallano, Chaney)

This case involves both DNA and sexual assault reports

FACTS:

Sexual assault report: A nurse practitioner conducted a sexual assault examination on the victim and prepared a report of her findings and conclusions. Julie Lister, the lead nurse practitioner testified in place of the nurse who prepared the report. Lister testified that based on an independent review of the report, she would have reached the same conclusion. (Id. at p. 657.)

DNA report: A criminalist tested the victim’s T-shirt for biological material and sent portions of the shirt to Orchid Cellmark for DNA analysis along with DNA references samples from the victim and defendant. (Id. at p. 657.) The forensic supervisor (Hynds) did not personally perform any tests, but reviewed the analyst’s case file and
independently analyzed the raw data. She made her own comparisons to the reference samples and agreed with the analyst’s conclusions. (Id. at p. 658.) She testified in court and was available for cross-examination. (Ibid.) Although court’s holding regarding the DNA evidence was not published (Id. at p. 665), under Geier, this evidence would not have violated defendant’s right of confrontation.

COURT’S REASONING:

Geier is still controlling law, notwithstanding decision in Melendez-Diaz because:
1. In Geier, the supervisor of the analyst who prepared the reports testified at trial. In contrast, there was no live testimony in Melendez-Diaz.
2. Melendez-Diaz involved only “near-contemporaneous” affidavits prepared almost one week after the tests were performed, whereas Geier involved “contemporaneous” reports prepared at the time the tests were conducted.

(Gutierrez, supra, at pp. 663-664, fn. 3.)

HOLDING:

Sexual assault report: The contemporaneous notations in the report regarding the tests performed and observations made during the visual examination of the victim’s body, were not testimonial. (Id. at pp. 664-665.)

“Those parts of the narrative portion of the report that constituted a recordation of past events ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, [citation omitted]’ are testimonial.” (Id. at p. 665, emphasis added.) However, admission of the narrative portion of the report was not prejudicial. (Ibid.)

(Previously published at 176 Cal.App.4th 1047, 98 Cal.Rptr.3d 390.)

(Second District) - (Kriegler, Armstrong, Mosk)

FACTS: Joseph Muto, the chief laboratory director of the coroner’s office, testified at trial to the presence of alcohol and prescription drugs in the victim’s blood. The analysis and report was prepared by another laboratory criminalist. The report was not admitted into evidence. (Id. at p. 1070.)

COURT’S REASONING:

* There is no federal Supreme Court or California authority that precludes a scientific expert from testifying as to an opinion in reliance upon another scientist’s report. (Id. at p. 1073.) Melendez-Diaz did not overrule or render obsolete Geier’s holding. (Id. at p. 1074.)
Contrary to Melendez-Diaz, the toxicological findings were not proved by means of an affidavit. Muto testified as an expert. (Id. at p. 1075.)

"Melendez-Diaz decision did not reach the question of whether such expert testimony runs afoul of Crawford." (Id. at p. 1075.)

HOLDING: There was no Confrontation Clause violation because the written reports contained test results that were not introduced, and the expert who reviewed the reports and was qualified to interpret them, offered live testimony subject to cross-examination. (Id. at p. 1075) Even assuming defendant’s Sixth Amendment rights were violated, the constitutional error was harmless. (Id. at pp. 1076-1077.)

People v. Benitez, review granted May 12, 2010, S181137 (Grant and Hold). (Previously published at 182 Cal.App.4th 194; 106 Cal.Rptr.3d 39) (Fourth Dist., Div THREE) - (Rylaarsdam, Sills, O’Leary)

FACTS: Drug lab report stating the substance was methamphetamine was admitted into evidence. Supervisor Vaughn testified based on the notes prepared by analyst Jermain. Analyst Jermain, who prepared the lab report and certified the report under penalty of perjury, did not testify. (Id. at p. 42.) Vaughn testified that analyst Jermain complied with the proper procedures, but he did not physically observe the test. (Ibid.)

COURT’S REASONING:
The analyst knew the report would be used at trial. The sole purpose of the report was for use in a criminal prosecution. The report furnished an essential element (type and amount of drug) of the offense for which the defendant was charged, therefore the report was accusatory and testimonial in nature. (Id. at p. 44.)

The fact that the analyst’s notes were made in the regular course of business, pursuant to standardized scientific procedures, does not eliminate their testimonial nature. (Id. at p. 44.)

The fact that the report was made contemporaneously does not eliminate its testimonial nature. (Id. at p. 45.)

There is no substitute for cross-examination of the creator of the report. There were no effective means to challenge whether the analyst correctly performed tests reflected in the written report. (Id. at p. 45.)

8
The Court rejected the contention that evidence of scientific testing is inherently reliable, noting that "forensic evidence is not uniquely immune from the risk of manipulation." Many forensic labs are arms of law enforcement, creating the risk of manipulation. (Id. at p. 45.)

The court distinguished Geier. (Id. at pp 45-46.)

HOLDING: Drug lab report prepared by analyst Jermain who certified the test results under penalty of perjury and supervisor Vaughn’s use of the report as a basis for his expert opinion did not satisfy the Confrontation Clause, nor was the violation harmless beyond a reasonable doubt. (Id. at pp.44-45.)

*People v. Bowman*, review granted June 10, 2010, S182172 (Grant and Hold). (Previously published at 182 Cal.App.4th 1616; 107 Cal.Rptr.3d 156) (Fifth District) - (Vartabedian, Levy, Gomes)

FACTS: The drug analyst (Snow) who performed the test was not available to testify at trial. Spencer (supervisor), who trained Snow, testified as to the procedures for testing, and reporting results. Spencer testified that she regularly reviewed “contemporaneous” notes and had reviewed Snow’s notes. Spencer stated the report appeared to be in the standard format, and was reliable and trustworthy. Spencer testified the material tested contained methamphetamine. Spencer did not personally perform any weighing or testing of the substance. (Id. at pp. 1619-1620.) The lab report was not admitted into evidence. (Id. at p. 1620.)

COURT’S REASONING:
Distinguishes *Melendez-Diaz*, and follows *Geier*. Concludes that *Geier* was not impliedly overruled by *Melendez-Diaz*. (Id. at p. 1622.)

“In Geier, an in-court witness, subject to cross-examination, was allowed to rely on laboratory notes and reports to support an expert opinion that she was qualified by training and experience to give. In *Melendez-Diaz*, similar reasoning was held not to support the admissibility of a written document that was, of course, not subject to cross-examination and whose author was not subject to cross-examination concerning either expert qualifications or analytical conclusions.” (Id. at p. 1624.)

HOLDING: Based on the distinction between *Melendez-Diaz* (only affidavit admitted into evidence, no live witness) and *Geier* (expert gave opinion, subject to cross examination), the court followed *Geier* and held defendant was not deprived of his right to confront and cross-examine the witnesses against him. (Id. at p. 1624.)
VI. COURT OF APPEAL CASES - REVIEW STILL PENDING


FACTS: Officer Rowe performed the accuracy checks on the breathalyzer machine used by Officer Nunley to test defendant’s blood alcohol content. Rowe did not testify at trial and the accuracy records were not admitted at trial. Nunley testified at trial regarding the accuracy records produced by Rowe and opined the machine was working properly when he used it on defendant. Ms. Sterling, a forensic alcohol analyst also testified regarding the procedure for testing the accuracy of the machine and she believed the machine was working accurately when used on defendant. (Id. at pp. 465-466.)

ISSUE: Did defendant have the right to confront Officer Rowe, the person who tested the accuracy of the machine used by Officer Nunley?

COURT’S REASONING:

* This case differs from Melendez-Diaz because defendant was able to confront the person (Officer Nunley) who obtained the test results that incriminated him. (Id. at p. 467.) And, was able to cross-examine the state’s witnesses about the records and testing procedures that were utilized on the subject machine. (Id. at p. 468.)

* Based on Melendez-Diaz, not everyone involved in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in court as part of the prosecution’s case. (Id. at p. 467, citing Melendez-Diaz, supra, 129 S.Ct. at p. 2532, fn. 1.)

* The records Rowe produced were neutral in that they were not produced for use against a specific defendant and were produced contemporaneously with Rowe’s testing of the machine. (Id. at p. 468.)

HOLDING: The statements contained in Rowe’s accuracy records were nontestimonial in nature. Therefore, the trial court did not err in allowing Nunley and Sterling to rely on them in forming their opinions. This procedure did not violate appellant’s rights under the Sixth Amendment. (Id. at p. 469.)

*********** THREE SAMPLE ARGUMENTS ATTACHED ***********
SAMPLE ARGUMENTS
ARGUMENT

I.

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BECAUSE THE TRIAL COURT ADMITTED TESTIMONIAL HEARSAY CONCERNING FINDINGS MADE DURING AN AUTOPSY EXAMINATION OF THE ALLEGED MURDER VICTIM'S BRAIN

Appellant contends that he was denied his constitutional right to confront and cross-examine the witnesses against him (U.S. Const., Amend. VI made applicable to the states by the due process clause of Amend. XIV) because the trial court admitted testimonial hearsay concerning findings made during an examination performed on the brain of the alleged victim, Anthony Scott, conducted as part of the autopsy. The pathologist who examined the brain did not testify. The pathologist who performed the remainder of the autopsy and who did testify relied partly on the hearsay report to reach the conclusion that Scott’s injury was likely caused by blunt force trauma and not likely the result of a fall from a standing position. The issue is properly before this Court on appeal, but if deemed forfeited, appellant was denied effective assistance of trial counsel.
A. The evidence at issue

Doctor Aaron Gleckman, a forensic pathologist and neuropathologist employed by the Riverside County Sheriff Coroner's Office (5 RT 879-880, 902), performed an autopsy on the body of Anthony Scott (5 RT 882), the victim named as “Anthony S.” in the charged murder (2 CT 270). There was already an incision on the scalp and damage as a result of the craniotomy performed by a neurosurgeon when Scott was hospitalized. (5 RT 885, 889.) Doctor Gleckman opined that the trauma to Scott's body was from multiple impacts. (5 RT 889-890.)

Scott's brain was removed during the autopsy and later examined by neuropathologist Doctor Stephanie Erlich. (5 RT 893.) Doctor Erlich did not testify. According to Doctor Gleckman, Doctor Erlich is board-certified as a neuropathologist and forensic pathologist. (5 RT 902.) Doctor Gleckman reviewed her report and used the content of that report when forming his opinion concerning the cause of Scott's death. (5 RT 903.)

Doctor Gleckman told the jury about Doctor Erlich's findings. (5 RT 903-904.) According to Doctor Gleckman, these
findings included “acute cerebral cortical contusions or bruises on the brain itself.” The contusions were “on both sides of the frontal lobe of the brain, and bilateral temporal that were on the temporal lobes of the brain.” Both pathologists found significant brain swelling and multiple brain herniations. Doctor Gleckman testified that Doctor Erlich found “herniation of the brain from right to left, which is called midline shift.” She also found “tonsillar herniation, which is part of the brain getting compressed due to pressure.” A portion of the back of the brain was “pushed down and compressed.” (5 RT 904.)

Doctor Gleckman testified that the swelling and herniations were a secondary effect of blunt-force trauma to the head. (5 RT 905.) He based his opinion both on his own observations and on the observations and findings of Doctor Erlich. (5 RT 905, 907.)

Doctor Gleckman opined that death was caused by blunt-force head trauma. When the prosecutor asked him what evidence he relied on in forming that opinion, he testified: “Well, everything that I reviewed: The deputy coroner’s report of the investigation, all of my autopsy findings, and also Dr. Erlich’s neuropathology report.” (5
B. The Crawford/Melendez-Diaz Rule

In Crawford v. Washington (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court held that the Sixth Amendment right of confrontation prohibits the admission of "testimonial" hearsay against a defendant in a criminal trial if the declarant is unavailable to testify and the defendant had no previous opportunity for cross-examination of the declarant. (Id., at pp. 50-56.) With the possible exception of dying declarations (Id., at p. 56, fn. 6) the Confrontation Clause bars admission, notwithstanding the fact that the statement falls within a state-law exception to the hearsay rule and notwithstanding the fact that that statement bears indicia of reliability (Id., at pp. 60-69, overruling Ohio v. Roberts (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597]). The Supreme Court in Crawford did not

7 The report from a deputy coroner was a summary of the circumstances of the death at the hospital. (5 RT 918.) The events at the hospital are not at issue because the attending physician did testify. (4 RT 695, et seq.)

8 The Sixth Amendment right of confrontation is made applicable to the states by the due process clause of the Fourteenth Amendment. (Pointer v. Texas (1965) 380 U.S. 400, 403-408 [85 S.Ct. 1065, 1067-
define the term "testimonial" and left unsettled whether hearsay statements could be considered testimonial if made in less than formal settings. But in Davis v. Washington (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224] (a consolidated opinion with Hammon v. Indiana), the United States Supreme Court formulated a "primary purpose" test. The Court clarified that statements are not testimonial if made to police to meet an ongoing emergency, but are testimonial if made in response to questions whose primary purpose is to gain information potentially relevant in a future criminal prosecution. (Id., at p. 822 [126 S.Ct., at pp. 2273-2274].) As the Court observed in Crawford, "[i]nvolve of government officers in the production of testimony with an eye toward trial presents unique potential for prosecution abuse." (Crawford v. Washington, supra, at p. 56, fn. 7 [124 S.Ct., at p. 1367, fn. 7]; see People v. Jefferson (2007) 158 Cal.App.4th 830, 844, rehng. den. 1-23-08, rev. den. 4-16-08.

In Melendez-Diaz v. Massachusetts (2009) 557 U.S. [129 S.Ct. 2527, 174 L.Ed.2d 314], the United States Supreme Court held that the Confrontation Clause applies to reports admitted as proof

1070, 13 L.Ed.2d 923.)
of an element of the offense. (129 S.Ct., at pp. 2531-2542.) The defendant in Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine. (129 S.Ct., at p. 2530.) As proof that material found by police was cocaine, the prosecution “submitted three ‘certificates of analysis’ showing the results of the forensic analysis performed on the seized substances.” (129 S.Ct., at p. 2530-2531.) The material was found to contain cocaine. (129 S.Ct., at p. 2531.) The Court held that proof of an element of the offense using a sworn certificate instead of live testimony or a prior opportunity for cross-examination violated the Confrontation Clause as interpreted in Crawford. (Melendez-Diaz v. Massachusetts, supra, 129 S.Ct., at pp. 2531-2532.) The certificates at issue in Melendez-Diaz “were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law.” (129 S.Ct., at p. 2531.) The Court found that the certificates “fall within the ‘core class of testimonial statements’” described in Crawford. (Melendez-Diaz v. Massachusetts, supra, 129 S.Ct., at p. 2532.) They embodied “the precise testimony the analysts would be expected to provide if called at trial. The ‘certificates’ are
functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (Ibid, quoting Davis v. Washington, supra, at p. 830 [126 S.Ct. at p. 2278].) The Court observed that the purpose of the affidavits was to provide evidence. Therefore, the affidavits are testimonial statements for purposes of the Sixth Amendment right to confront witnesses. (Melendez-Diaz v. Massachusetts, supra, 129 S.Ct., at p. 2532.)

In People v. Geier (2007) 41 Cal.4th 555, the California Supreme Court held that laboratory reports of the results of DNA testing that were prepared by a non-testifying declarant are not testimonial. The Court held that testimony about the reports by an expert who did not perform the test was admissible without violating the Confrontation Clause as interpreted in Crawford. (People v. Geier, supra, at pp. 596-607.)

Appellant contends that Melendez-Diaz has eclipsed Geier and is now controlling authority. The California Supreme Court explained in Geier that the report was a "contemporaneous recordation of observable events rather than the documentation of past events." (People v. Geier, supra, at p. 605.) Melendez-Diaz makes it clear that
is not the standard for determining if evidence is testimonial. Like the DNA report in Geier, the reports of forensic analysis at issue in Melendez-Diaz and in appellant’s case amounted to a contemporaneous recordation of what the analysts observed. (Melendez-Diaz v. Massachusetts, supra, 129 S.Ct., at p. 2531.)

The impact of Melendez-Diaz on Geier is pending before the California Supreme Court. One of those cases involves the testimony of a forensic pathologist who relied on a report prepared by a different pathologist, and thus the case is similar to appellant’s case. In People v. Dungo, review granted December 2, 2009, S176886, the Court granted review to decide whether the defendant was denied his right of confrontation when a forensic pathologist testified as to the manner and cause of death in a murder based on an autopsy report prepared by another pathologist. Other cases pending before the California Supreme Court include People v. Rutterschmidt, review granted December 2, 2009, S176213, where the Court granted review to decide whether the defendant was denied her right of confrontation when a supervising criminalist testified about the results of drug tests and a report prepared by another criminalist, People v. Guiterrez,
review granted December 2, 2009, S176620, where the Court granted review to decide whether the defendant was denied his right of confrontation when a nurse testified about the results of a sexual assault examination and the report prepared by another nurse, and a supervising criminalist testified as to the result of DNA tests and the report prepared by another criminalist, and People v. Lopez, review granted December 2, 2009, S177046, where the Court granted review to decide whether the defendant was denied his right of confrontation when the trial court admitted the results of a blood-alcohol level test and report prepared by a criminalist who did not testify and granted review to decide if the defendant was prejudiced in light of the testimony of a supervising criminalist about the laboratory procedures.

In each of these cases, the grant of review includes the issue of the impact of Melendez-Diaz on Geier.

C. The evidence at issue is testimonial hearsay

Doctor Erlich's report is testimonial hearsay. Doctor Gleckman explained his function as a forensic pathologist is to determine the cause of death, including death in cases of homicide. (5 RT 880-881.) He explained that Doctor Erlich provides separate
consultation “in cases like this, where it’s a homicide or there’s specific things you want to look at in the brain that might not be so easy to look at right away . . .” (5 RT 903.) Therefore, Doctor Erlich’s report summarized an examination conducted specifically to determine the cause of death in a homicide. The intent of the examination was to provide evidence for the forensic pathologist to use when testifying in court.

There is no functional difference between Doctor Gleckman’s testimony based on Doctor Erlich’s report and the reports admitted in Melendez-Diaz. In appellant’s case, instead of the actual report being admitted in evidence, a witness who was not the author of the report both relied on the report and related the contents of the report to the jury. The defense could not confront and cross-examine the report’s author.

D. The hearsay prejudiced the defense

Because the right involved is the federal constitutional right of an accused to confront witnesses and right of due process, the standard of prejudice is the federal standard. Reversal is required unless the reviewing court properly determines the error to be harmless
beyond a reasonable doubt. *(Chapman v. California (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705]; People v. Geier, supra, at p. 608.)* The California Supreme Court applied that standard in *Geier* to find that, even if the laboratory report was testimonial hearsay admitted in violation of the Sixth Amendment, the error was harmless in light of the other unique evidence in that case. *(Id., at p. 608.)*

The testimonial hearsay prejudiced appellant under the *Chapman* standard. Testifying in his own defense, appellant acknowledged fighting with Scott. Appellant thought he was defending himself when he swung and hit Scott. Scott then fell to the ground and appellant did not see him move. *(6 RT 1143-1144, 1208.)* Appellant denied stomping on Scott’s head or kicking Scott in the head. *(6 RT 1208.)*

Doctor Silvio Hoshek was one of the attending physicians at Riverside County Regional Medical Center when Scott was admitted to the hospital. *(4 RT 696.)* Doctor Hoshek testified that the trauma to Scott’s face and head was consistent with force being applied to one side of the head and the other side hitting a hard object. He acknowledged that someone could have struck Scott on the front of the
face and then the rear portion of the head struck the ground. (4 RT 716.)

Doctor Gleckman, who relied partly on the hearsay report of Doctor Erlich in reaching his conclusions about the cause of death, testified that it is not likely the injury Scott suffered happened from a fall. Doctor Gleckman testified that he did not think all of the injuries could be explained by a fall. He testified that it is unlikely Scott fell unconscious from a standing position and struck his head on a hard surface. (5 RT 912-913.)

To evaluate the prosecution's theory of implied malice, the jury had to determine whether appellant intentionally committed an act whose natural consequences were dangerous to human life and whether he deliberately acted with conscious disregard for human life. (See People v. Dellinger (1989) 49 Cal.3d 1212, 1215, rehg. den. 2-15-90; CALCRIM 520; 2 CT 362; 6 RT 1268-1269.) Hitting Scott and causing him to fall could not reasonably be considered an act whose natural consequences are dangerous to human life or an act showing conscious disregard for human life. Relying on witnesses who said appellant kicked and stomped Scott, the prosecutor argued that fact is
critical. (6 RT 1290.) Therefore, Doctor Gleckman's testimony that it not likely Scott's injuries were caused by falling from a standing position was a key part of the evaluation of appellant's defense and his credibility against the credibility of testimony that he kicked Scott.

Doctor Gleckman's testimony was critical to the finding of malice that resulted in the verdict of murder. As explained above, his opinion was based partly on testimonial hearsay. To the extent he also relied on his own examination of Scott, Doctor Gleckman used the testimonial hearsay to corroborate himself. The error is prejudicial and requires that the judgment be reversed.

E. Appellant's claim is properly before this Court, but if deemed forfeited, appellant was denied effective assistance of counsel

*Melendez-Diaz* was decided on June 25, 2009, after the testimony at issue in appellant's case and more than a month after the jury returned its verdict in appellant's case. (2 CT 383; 6 RT 1372.) Appellant was sentenced on June 26, 2009. (2 CT 391-392; 7 RT 1377-1408.)

At the time of the testimony at issue, *People v. Geier*, *supra*, would have been considered controlling authority permitting
hearsay testimony based on the content of a laboratory report. Therefore, if trial counsel had objected to the testimony, that objection would have been futile under California law as it existed at the time.

Trial counsel should not have been expected to anticipate Melendez-Diaz. Although the general rule is evidentiary challenges are waived unless timely raised at trial, "this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change." (People v. Turner (1990) 50 Cal.3d 668, 703, rehng. den. 6-21-90; see also People v. Sandoval (2007) 41 Cal.4th 825, 837, fn. 4.) Appellant submits that Melendez-Diaz is such an unforeseeable interpretation of Crawford. Even the California Supreme Court did not anticipate this extension of Crawford when the Court decided Geier. Therefore, forfeiture principles should not apply.

As noted above, Melendez-Diaz was decided the day before appellant was sentenced. If this Court agrees that appellant's claim has merit but deems it forfeited because trial counsel did not move for a new trial based on the Melendez-Diaz decision, it follows that appellant was denied effective assistance of counsel.
A defendant is denied his constitutional right (U.S. Const., Amends. VI & XIV; Cal. Cons. art. I, § 15) to effective assistance of counsel when counsel's acts or omissions fall below an objective standard of reasonableness under prevailing professional norms (Strickland v. Washington (1984) 466 U.S. 668, 687-688 [104 S.Ct. 2052, 2064, 80 L.Ed.2d 674]; People v. Ledesma (1987) 43 Cal.3d 171, 215-218), or withdraw a meritorious defense (People v. Pope (1979) 23 Cal.3d 412, 424-425, rehng. den. 3-28-79). Even where counsel makes a tactical decision, the decision must be made only after adequate investigation and consideration of applicable law. (People v. Hernandez (1988) 47 Cal.3d 315, 369, rehng. den. 1-26-89; People v. Ledesma, supra, at pp. 215.)

Prejudice in the context of ineffective assistance of counsel means a reasonable probability that the defendant would have obtained a more favorable result but for counsel's omission. This is a "probability sufficient to undermine confidence in the outcome." (Strickland v. Washington, supra, at p. 694 [104 S.Ct., at p. 2068].) For the reasons discussed under Subheading "D," admission of the testimonial hearsay is prejudicial. This evidence was critical to
whether appellant kicked the victim while he was down, a finding essential to the theory of second degree murder. For the foregoing reasons, this Court should address the claim on the merits and find the hearsay testimonial and prejudicial.
ARGUMENT

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BECAUSE THE TRIAL COURT ADMITTED TESTIMONIAL HEARSAY CONCERNING FINDINGS MADE DURING AN AUTOPSY EXAMINATION OF THE ALLEGED MURDER VICTIM'S BRAIN

The trial court admitted testimonial hearsay concerning autopsy findings made during an examination performed on the brain of Anthony Scott. Dr. Stephanie Erlich, a pathologist who examined the brain, did not testify. (5 RT 893.) Dr. Gleckman, the pathologist who also performed the autopsy and who did testify, relied partly on Erlich's hearsay report to opine about the cause of death and also related Erlich's findings to the jury. (5 RT 903-905, 907.) In the opening brief appellant contends that admission of this evidence denied him his constitutional right to confront and cross-examine the witnesses against him. (AOB 23-38; U.S. Const., Amend. VI made applicable to the states by the due process clause of Amend. XIV)

Respondent contends that appellant's confrontation clause rights were satisfied. (RB 9-23.) Respondent disagrees with appellant's argument that the rule of Crawford v. Washington (2004)
541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], as expanded in Melendez-Diaz v. Massachusetts (2009) 557 U.S. ____ [129 S.Ct. 2527, 174 L.Ed.2d 314], mandates exclusion of testimony about the hearsay report. Respondent claims that Melendez-Diaz must be read narrowly as applying only to formalized testimonial materials because that is the reason Justice Thomas joined the majority opinion. (RB 12-13.) Respondent argues that the pathologist who testified in appellant’s case could properly rely on the hearsay in forming his expert opinion and that, on this principle, Melendez-Diaz is consistent with the California Supreme Court’s decision in People v. Geier (2007) 41 Cal.4th 555. (RB 13-16.) Respondent argues that the report was not testimonial evidence under Geier, which remains good law. (RB 18-20.) Respondent argues that appellant was not denied effective assistance of counsel because his trial counsel failed to object to the evidence because Geier was then controlling authority and remains controlling authority. (RB 20-22.) Finally, respondent argues that any violation of the confrontation clause was harmless error. (RB 22-23.)
A. *Melendez-Diaz* mandates exclusion of testimony about findings made by the non-testifying pathologist

Respondent would limit the scope of *Melendez-Diaz* to hearsay in the form of formal documents such as the sworn certificate at issue in that case. Respondent relies on the concurring opinion of Justice Thomas suggesting that Confrontation Clause protections should apply only to formalized documents such as affidavits, depositions, prior testimony or confessions. (RB 12-13; see *Melendez-Diaz* v. *Massachusetts*, *supra*, 129 S.Ct., at p. 2543, conc. opn. of Thomas, J.)

If Justice Thomas' interpretation of the Confrontation Clause was the holding of the majority, the concurring opinion would have been unnecessary. The proper inquiry is whether the hearsay is functionally identical to live, in-court testimony. (*Melendez-Diaz* v. *Massachusetts*, *supra*, 129 S.Ct., at p. 2532.) Limiting *Melendez-Diaz* to sworn affidavits is contrary to the fundamental right of confrontation the case is intended to protect. It would mean that less-reliable unsworn testimonial hearsay may be admitted against a defendant, but if the same hearsay was formalized in a sworn affidavit, it could not be
admitted. It is well-settled, and has been asserted by the Attorney General in another case, that "statements not made under oath are likely to be less reliable than those made under oath because false statements under oath are subject to prosecution for perjury." (People v. Jacobs (2000) 78 Cal.App.4th 1444, 1451, italics in original.) Applying respondent's interpretation of Melendez-Diaz would mean that if Dr. Erlich's report had been in the form of a sworn affidavit, the report would fall within the mandate of the case. But whether or not it is made under oath, the hearsay content of the report is evidence appellant did not have the opportunity to cross-examine. The right of confrontation should control the result whether the hearsay is offered as a sworn document or as testimony of someone who is not the source of the hearsay.

B. The prosecution may not circumvent Melendez-Diaz by claiming that testimonial hearsay is the basis of an expert's opinion

Respondent characterizes the report prepared by Dr. Erlich as merely something used by Dr. Gleckman as a basis for his own opinion. Relying on Evidence Code section 801, subdivision (b), and cases pre-dating Melendez-Diaz interpreting that section,
respondent argues that Dr. Gleckman could properly rely on the hearsay in forming his expert opinion. (RB 14.)

An expert's reliance on hearsay cannot trump the right of confrontation. As the Court of Appeal explained in People v. Campos (1995) 32 Cal.App.4th 304, rehng. den. 3-10-95, a case on which respondent relies (RB 14), an expert may use hearsay in forming their opinion, but an expert may not testify about the contents of reports or opinions expressed by other experts if the purpose of the testimony is to prove a disputed fact (People v. Campos, supra, at pp. 307-308). The reason for the rule is the defendant's right to confront witnesses. The contrary approach means the party against whom the testimony is offered would be denied the opportunity of cross-examining the source of the hearsay. (Id., at p. 308, and cases cited therein.)

Although Dr. Gleckman used the content of Dr. Erlich's report when forming an opinion about the cause of death (5 RT 903), Dr. Gleckman testified about Dr. Erlich's findings. Dr. Gleckman related the content of the hearsay report to the jury, telling the jury Dr. Erlich's specific findings concerning the injuries to Scott's brain. (5 RT 903-904.) If such testimony may be admitted under the scope of
Evidence Code section 801, the prosecution could circumvent the Crawford/Melendez-Diaz Rule in any case by simply having an expert review the hearsay and relate the contents of the hearsay document to the jury under the guise of “expert opinion.”

C. Melendez-Diaz has eclipsed Geier

In reaching its decision in Melendez-Diaz, the United States Supreme Court implicitly overruled Geier by rejecting much of the reasoning of the California Supreme Court. This includes rejection of the notion that contemporaneous recordation of observable events rather than the documentation of past events, eliminates any Sixth Amendment concerns. (Melendez-Diaz v. Massachusetts, supra, [129 S.Ct., at p. 2535]; see People v. Geier, supra, at p. 605.) The United States Supreme Court also advised that, even if there are other ways to challenge or verify forensic evidence, “the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable strategy is available.” (Melendez-Diaz v. Massachusetts, supra, at p. 2536.)

Respondent observes that the United States Supreme Court denied certiorari in Geier. (RB 16-17.) However, denial of a
writ of certiorari is not an expression of opinion on the merits. (*United States v. Carver* (1923) 260 U.S. 482, 490 [43 S.Ct. 181, 182, 67 L.Ed. 36].)

Both parties agree that the issue is pending before the California Supreme Court in several cases. (AOB 30-31; RB 10, fn. 7.) As noted in the opening brief, one of those cases is similar to appellant’s case. *People v. Dungo*, review granted December 2, 2009, S176886, involves testimony of a forensic pathologist who relied on a report prepared by a different pathologist. (See AOB 30.)

California courts are currently divided on this issue. In *People v. Benitez* (2010) 182 Cal.App.4th 194, ptn. for rev. filed 3-29-10 (S181137), this Court held that an analyst’s report stating the substance found on the defendant’s person was methamphetamine was subject to the right of confrontation and that right was not satisfied by the ability to cross-examine the analyst’s supervisor. The supervisor testified based on notes. Therefore, the hearsay evidence was not offered in the form of a sworn document as was the hearsay in *Melendez-Diaz*. Respondent distinguishes *Benitez* as applying when a “witness acts as mere conduit . . .” (RB 17, fn. 8.) In appellant’s case,
Dr. Gleckman acted as a conduit for the findings made by Dr. Erlich in addition to using those findings as support for his own conclusions. (5 RT 904-905, 907.) Recently the Court of Appeal for the Fifth Appellate District held that Melendez-Diaz did not abrogate the California rule that a witness testifying in court may rely on laboratory notes and reports prepared by a different individual as support for the witness’s opinion. (People v. Bowman (Mar. 23, 2010, F058082) ___ Cal.App.4th ___ [2010 WL 1038819].) Until the California Supreme Court resolves the conflict, this Court should follow its own decision in Benitez.

D. Appellant’s claim is properly before this Court

In the opening brief appellant argued that his claim is properly before this Court because People v. Geier was controlling authority at the time of the testimony at issue. Therefore, any objection would have been futile. (AOB 35-36.) An objection is not required where it would be futile under controlling law. (People v. Sandoval (2007) 41 Cal.4th 825, 837, fn. 4; People v. Morton (2008) 159 Cal.App.4th 239, 249, rev. den. 4-9-08.) In the alternative, appellant argued he was denied effective assistance of counsel because his trial
counsel failed to move for a new trial based on the *Melendez-Diaz* decision. (AOB 36-38.)

It appears that respondent agrees that the issue is properly before this Court. Respondent mentions the forfeiture issue (RB 10, 20) but addresses both that issue and the claim of ineffective assistance of counsel by noting that *Geier* was (and according to respondent still is) controlling authority. Respondent also argues that any claim of ineffective assistance of counsel is defeated by the lack of prejudice caused by the hearsay evidence. (RB 20-23.) Therefore, this Court should decide both the merits of the confrontation claim and the question of prejudice.

**E. The hearsay prejudiced the defense**

Respondent agrees that the federal standard of prejudice applies. (RB 22.) Reversal is required unless the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705]; *People v. Geier*, supra, at p. 608.)

Respondent argues that Dr. Gleckman's testimony about the contents of Dr. Erlich's report is harmless beyond a reasonable
doubt. As support for that position respondent claims it was Dr. Gleckman's own observations that provided the crucial evidence concerning the cause of Scott's death. (RB 22.) In addition, respondent cites evidence supporting the conclusion that appellant repeatedly stomped or kicked Scott in the head, evidence that appellant left the scene after the flight, and evidence of appellant's involvement in fights with other people. (RB 23.)

Appellant did not dispute the fact that he and Scott were involved in a fight. His defense was that he acted in self-defense. He did not stomp on Scott's head or kick him in the head. Instead, Scott fell to the ground. (6 RT 1143-1144, 1208.)

Appellant submits that hearsay concerning the findings of Dr. Erlich necessarily contributed to the guilty verdict by supporting the prosecution's theory that appellant stomped on Scott's head or kicked him in the head. Dr. Erlich's report noted contusions on the frontal and temporal lobes (5 RT 904, 907), and other damage to the brain that produced swelling and caused the brain to press against the skull (5 RT 904-905). To the extent Dr. Gleckman made independent observations of the brain, the jurors would have viewed the hearsay as
corroborating Dr. Gleckman. For the foregoing reasons, appellant contends the error is prejudicial and requires that the judgment be reversed.
ARGUMENT

I. THE TRIAL COURT ERRED BY ADMITTING HEARSAY EVIDENCE AND VIOLATED APPELLANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WHEN IT PERMITTED A PATHOLOGIST TO TESTIFY TO THE AUTOPSY RESULTS WHEN HE HAD NOT PERFORMED THE AUTOPSY; THE ERROR WAS REPEATED WHEN TO COURT ADMITTED AN EXHIBIT WHICH SUMMARIZED THE RESULTS OF THE AUTOPSY.

A. Introduction.

Appellant’s conviction must be reversed because the trial court admitted expert testimony conveying a non-testifying forensic pathologist’s autopsy findings in violation of the Sixth Amendment’s Confrontation Clause. It also presented those findings via an exhibit which was admitted into evidence. Both the testimony and the exhibit were specifically objected to. The prosecution did not establish the nature of the victim’s injuries or cause of death by competent evidence.

B. Record Below.

Before trial the prosecution in an in limine motion put the court on notice that it wanted to use Dr. Joe Cohen, the chief forensic pathologist of Riverside County, to testify about the results of the autopsy instead of Dr. Aaron Gleckman, who was the forensic pathologist who did the actual autopsy. (3 CT 589.) Dr. Gleckman no longer was with the Sheriff’s...

Court and counsel discussed the matter in pretrial proceedings. Counsel for appellant reiterated his position that “calling a substitute coroner is going to be a violation of Mr. Mejia’s Sixth Amendment right to confrontation, and it just shouldn’t be done and it can’t be done.” (1 RT 136.) An investigator for the County testified that Dr. Gleckman after some effort had been located back East, but he was refusing to testify unless he was paid “top dollar” for his inconvenience. The investigator testified as follows:

A. Last week, I called [the residence in Vermont at which I had found Dr. Gleckman] later in the evening and got a hold of a female at the location. That female told me it was too late to call and hung up on me. And so later, about, it was 3:45 a.m. on Friday morning, I got a call on my cell phone, and a message was left from Dr. Gleckman, basically telling me that it was not his responsibility any longer to testify in this case. I called him back at 3:45, after I got the message, and I spoke with Dr. Gleckman.

Q. And what did he say?

3Formerly 176 Cal.App.4th 1388. See footnote 7, post.
A. Basically, Dr. Gleckman told me that he was not going to testify; it was not his responsibility legally. I told him that we would still need him to testify, and I tried to explain maybe that, you know, the law's changed. And Dr. Gleckman told me that he didn't care. He wanted to, if he came out, get paid top expert testimony pay, and he wanted all the money up front to testify in this matter.

And he refused to give me any further contact information, other than [an] e-mail address. (2 RT 184.)

The prosecutor subsequently told the court that she felt that the People thus had shown due diligence in trying to get Dr. Gleckman, but a showing of due diligence was not required. In this case Dr. Cohen would as an expert be basing his own opinion on the work of Dr. Gleckman. (2 RT 190-191.) The prosecutor also indicated that her office would be attempting an out-of-state subpoena, but it was a complicated process. (2 RT 197-198.) In any event,

[MS. URBAN (Prosecutor)]: It is the District Attorney's office position that we do not pay percipient witnesses for their testimony. And Dr. Gleckman performed this autopsy in his capacity as a deputy coroner, and therefore we would not be able to pay him for his testimony in this case. We would be able to fly him here and pay for his lodging, but not be able to give him an expert witness fee. (2 RT 198.)

The court ruled, however, that Dr. Cohen would be permitted to testify in the stead of Dr. Gleckman unless it came upon information compelling a different disposition. (2 RT 198-199.) Appellant renewed his objection later at trial (6 RT 1027-1028) and just before Dr. Cohen testified.
The jury then received the testimony of Dr. Cohen. ⁴

C. The Admission of Dr. Cohen's Testimony Was Erroneous.

The outrageously unethical and unprofessional attitude exhibited by Dr. Gleckman resulted in an unconstitutional result in this case. ⁵

1. The Confrontation Clause principle.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him .....” (U.S. Const., Amend. VI.) This right renders testimonial statements by a nontestifying witness inadmissible unless the witness is unavailable and was previously subject to cross-examination by the defendant. (Crawford v. Washington, supra, 541 U.S. 36, 59 & fn. 9.) The results of the autopsy performed by Dr. Gleckman were testimonial in nature, and as such the admission of those results and their meaning through a pathologist other than the one who performed it violated appellant’s right to confrontation.

In People v. Geier (2007) 41 Cal.4th 555 the California Supreme

⁴See Statement of Facts, ante, pages 6-7.

⁵The prosecutor argued below that the instant situation is analogous to the case where the witness is unavailable: “It's analogous to the situation where if Dr. Gleckman were dead ....” (2 RT 190.) Appellant disagrees. The record is explicit that Dr. Gleckman arrogantly refused to be a witness unless he was paid to be such irrespective of his professional responsibilities. The instant situation is much more analogous to a witness being in contempt.
Court held that testimony about a DNA report, laboratory notes and results was admissible when conveyed through a testifying supervisor, rather than the laboratory analyst who performed the tests, because the report, notes and results were not “testimonial” within the meaning of Crawford. The court construed Crawford and the subsequent authority of Davis v. Washington (2006) 547 U.S. 813, 817 to require courts to focus their inquiry on how the evidence was created. Geier reasoned that the results were not testimonial because they were recorded contemporaneously as they were observed, even if they were prepared for use at trial. (People v. Geier, supra, 41 Cal.4th at pp. 606-607.)

Dr. Cohen's testimony arguably was analogous to the laboratory supervisor’s testimony that Geier found admissible, in that Cohen was chief pathologist and he conveyed what were apparently contemporaneously recorded observations made by Gleckman during his autopsy of Cruz. This was the argument made by the prosecutor in the instant case. However, analysis of the United States Supreme Court’s recent decision in Melendez-

6MS. URBAN [Prosecutor]: The autopsy protocol prepared by Dr. Gleckman has no opinions contained within the document. It's a typed-up document that reflects the notes that he prepared at the time of the autopsy, which would essentially amount to a business record. There's no opinions contained in Dr. Gleckman's report regarding self-defense, defensive wound, nothing of the sort. All he does was go through and, from a medical perspective, conduct the autopsy. There are no opinions in there that would cause any trouble .... (2 RT 192.)
Diaz v. Massachusetts shows that the autopsy findings indeed were testimonial under the Confrontation Clause.

In Melendez-Diaz, the court held that certificates of forensic drug analysis were testimonial because they were formally prepared for the purpose of proving a fact at trial, and thus 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." (Melendez-Diaz v. Massachusetts, supra, 129 S.Ct. at p. 2532, quoting Crawford, supra, 541 U.S. at p. 52.)

2. Melendez-Diaz displaces Geier.

The reasoning in Geier cannot be reconciled with the guidance set forth by the U.S. Supreme Court in Melendez-Diaz. Therefore, this court must follow Melendez-Diaz. Geier is based on at least three analytical principles that are undermined in Melendez-Diaz.

First, the Geier court maintained that the results of scientific tests are

not accusatory but rather are inherently neutral and reliable. A laboratory analyst who conducts scientific analysis does so "as part of her job, not in order to incriminate the defendant." (People v. Geier, supra, 41 Cal.4th at p. 607.) Therefore, the laboratory analyst is not a witness who bears testimony "against" a defendant. (Ibid.) But Melendez-Diaz found no support in the Sixth Amendment or case law for that idea, stating that the Confrontation Clause applies to all witnesses against the defendant, not simply to those who are accusatory. The certificates of forensic drug analysis in Melendez-Diaz "certainly provided testimony against petitioner, proving one fact necessary for his conviction – that the substance he possessed was cocaine." (Melendez-Diaz, supra, 129 S.Ct. at p. 2533.) Therefore, the laboratory analysts who prepared the certificates were witnesses "against" the defendant. (Id. at p. 2534.)

Melendez-Diaz also rejects the contention that evidence of scientific testing is inherently reliable, noting that "[f]orensic evidence is not uniquely immune from the risk of manipulation," particularly because in most forensic laboratories, the laboratory administrator reports to the head of a law enforcement agency.⁸ Melendez-Diaz emphasizes that cross-

⁸Appellant’s trial counsel pointed this out to the trial court: "[A]s Melendez-Diaz noted, forensic evidence is not immune from the risk of manipulation." (2 RT 194.)
examination is not only a useful means of assuring accurate forensic analysis, but also is the only means that is guaranteed under the Confrontation Clause. "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

(Melendez-Diaz, at p. 2536, quoting Crawford, supra, 541 U.S. at pp. 61-62.) The courts may not substitute a test for reliability based on trustworthiness for the right of confrontation.⁹

Second, Geier construed Crawford and Davis as holding that a statement was not testimonial if it represented the contemporaneous recordation of observable events. (People v. Geier, supra, 41 Cal.4th at pp. 606-607.) Focusing on how the statement was made, then, Geier concluded that where a laboratory analyst who performed scientific tests contemporaneously recorded the results, the statement of results was not testimonial. (Ibid.) Melendez-Diaz, on the other hand, minimized the weight to be given to contemporaneity in confrontation clause analysis. Melendez-

⁹Crawford abrogated the prior rule under Ohio v. Roberts (1980) 448 U.S. 56 under which a hearsay statement made by an unavailable witness could be admitted without violating the confrontation clause if the statement contained adequate guarantees of trustworthiness or indicia of reliability. The California Supreme Court has recognized the abrogation. (See People v. Cage (2007) 40 Cal.4th 965, 975-976.)
Diaz emphasized that courts must focus instead on whether the statements 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.'" (Melendez-Diaz, supra, 129 S.Ct. at p. 2532.)

Finally, Geier favorably reviewed decisions from other states holding that forensic test results are admissible as business records. (People v. Geier, supra, 41 Cal.4th at p. 606.) However, Melendez-Diaz observed that statements in official records produced for use at trial or records of a business whose "regularly conducted business activity is the production of evidence for use at trial" may only be admitted subject to the demands of the Confrontation Clause. (Melendez-Diaz, supra, 129 S.Ct. at p. 2538.) Under Melendez-Diaz, documents prepared for use at trial may not be admitted under the hearsay exceptions for business or public records without offending the defendant’s right to confrontation. The court specifically stated that, "Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment." (Melendez-Diaz, supra, 129 S.Ct. at p. 2540.)

The principles set forth in Melendez-Diaz control over the reasoning
employed in Geier.

3. The Cruz autopsy report and findings were testimonial.

Under Melendez-Díaz, this court asks whether the autopsy report and findings were prepared for the purpose of proving a fact "under circumstances which would lead an objective witness reasonably to believe that it would be available for use at a later trial." (Melendez-Díaz, supra, 129 S.Ct. at p. 2532.) Under California law, the purpose of an autopsy is to determine the circumstances, manner and cause of death, and must document in permanent form the detailed medical findings from the autopsy. (Dixon v. Superior Court (2009) 170 Cal.App.4th 1271, 1277; Gov. Code §§ 27491, 27491.4.) Official inquiry by the coroner into a criminally related death is "certainly part of law enforcement investigation." (Ibid.)

Here, Cruz’s autopsy was performed during the homicide investigation by Gleckman, who was a deputy coroner employed by the Riverside County Sheriff’s Department. A homicide detective investigating Cruz’ death, Detective Ken Patterson, was present at the autopsy. (See 6 RT 919.) As required under California law, Gleckman determined the circumstances, manner and cause of Cruz’ death, and documented his detailed medical findings in a report. Gleckman’s autopsy findings,
conveyed to the jury through Cohen's testimony at trial and later through an exhibit, described in detail the nature and scope of the injuries observed on Cruz' body, including the presence, depth and location of a stab wound to the heart. Cohen also recited the nature of the death as being a homicide. (7 RT 1187, 1192-1193.)

The Cruz autopsy findings were prepared as part of a homicide investigation for the purpose of proving a fact for criminal prosecution—namely, that this was a homicide and also that the victim was killed with malice. Therefore, like the certificates at issue in Melendez-Diaz, the findings in the autopsy report are "a solemn declaration or affirmation made for the purpose of establishing or proving some fact," and were "made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial." (Melendez-Diaz, supra, 129 S.Ct. at p. 2532.) There can be no doubt that the autopsy report and associated medical findings contained therein and derived therefrom were testimonial.

4. Appellant's right of confrontation was violated.

Where an expert witness for the prosecution discloses the testimonial autopsy findings of a nontestifying pathologist, and relies on the independent truth of those findings in rendering his own individual
opinions, the Confrontation Clause requires that the defendant have the opportunity to confront the pathologist or medical examiner who conducted the autopsy. Substituted cross-examination is not constitutionally adequate. *(Melendez-Díaz, supra, 129 S.Ct. at p. 2536 [while there may be “other ways - and in some cases better ways - to challenge or verify the results of a forensic test ..., the Constitution guarantees one way: confrontation”].)*

The court noted in *Melendez-Díaz* that where the results of forensic analysis are introduced in a criminal prosecution, the failure to call the performing analyst as a witness prevents the defense from exploring the possibility that the analyst (here, the pathologist performing the autopsy) lacked proper training or had poor judgment, or from testing the analyst’s “honesty, proficiency, and methodology.” *(Melendez-Díaz, supra, 129 S.Ct. at p. 2538.)*

Dr. Gleckman exhibited an outrageously unethical and unprofessional attitude in refusing to testify about an autopsy he himself performed unless he were paid a lot of money up front as an expert. It all the more begs the question as to whether his professional shortcomings manifested themselves in other ways with respect to this autopsy. Only cross examination could reveal them so their importance could be considered by the trier of fact.
Appellant’s right to confront Gleckman could not be satisfied by cross-examining Cohen.

D. The Court Exacerbated the Error By Admitting People’s Exhibit No. 32 Into Evidence.

Before the case was submitted to the jury, the prosecution urged the court to admit People’s Exhibit No. 82, which was a collection of medical records relating to Mr. Cruz, including autopsy findings. Appellant objected to their admission on general hearsay grounds, but also objected on the basis that as was the case in Melendez-Diaz with lab records, these particular records also had been prepared in anticipation of litigation. (Being an exhibit, this was certainly true.) Moreover, they were testimonial for purposes of the Sixth Amendment under Melendez-Diaz. The trial court ruled for admission, however. (8 RT 1464.)

This ruling by the trial court simply perpetuated its Confrontation Clause error. Appellant certainly had no chance to cross-examine the preparer of these records.

E. The Requirement of Reversal.

In determining whether a Confrontation Clause violation is

\[\text{10Before } \text{this } \text{case goes under submission, appellant will move for the transmission of this exhibit to this court in accordance with the provisions of rule 8.224 of the California Rules of Court.}\]
prejudicial, this court uses the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Page*, *supra*, 40 Cal.4th at pp. 991-992.) Under that standard, respondent must show the error to have been harmless beyond a reasonable doubt.

Dr. Cohen’s testimony was crucial to the prosecution’s case in establishing the victim’s death as a homicide and as a murder, that is, a homicide with malice aforethought. In her argument to the jury the prosecutor emphasized that, “We know about the intent to kill because of the size of that knife and the perforation to the heart of Mr. Cruz.” (8 RT 1561.) There was no other evidence of the victim’s injuries than those which the jury received from Cohen’s description of the autopsy as done by Gleckman.

Appellant’s conviction must be vacated for another reason which is outside of usual prejudice tests: The prosecution failed to prove an element of the offense, i.e., cause of death, by confident evidence. (*United States v. Arias* (9th Cir. 1978) 575 F.2d 253, 254.) Appellant’s conviction is invalid as a matter of law.

Appellant’s conviction must be reversed.
IV.

REVERSAL OF THE JUDGMENT IS REQUIRED BECAUSE THE ADMISSION IN EVIDENCE OF CERTIFIED PRIORS RECORDS DEPRIVED APPELLANT OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION AT THE PRIORS PHASE OF TRIAL.

The trial court committed reversible error violating appellant's Sixth Amendment right of confrontation and cross-examination by admitting in evidence, over defense objections, certified priors records, and finding the existence of alleged priors based on the hearsay information in those records, without the prosecution offering any live witness who could be confronted and cross-examined by the defense as to the purported foundation for and accuracy, reliability, and completeness of the priors records being offered for the prosecution’s prima facie case.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.” This right is applicable to the States through the Fourteenth Amendment. (Melendez-Diaz, supra, 557 U.S. __ [p. 3] [citing Pointer v. Texas (1965) 380 U.S. 400, 403 [85 S.Ct. 1065, 13 L.Ed.2d 923]].)

“Confrontation: (1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the “greatest legal engine ever invented for the discovery of truth”; (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.” (California v. Green 1970) 399 U.S. 149, 158 [90 S.Ct. 1930, 26 L.Ed.2d 33]
The Confrontation Clause guarantees a defendant’s right to confront those ‘who “bear testimony”’ against him.” (Melendez-Diaz, supra, 557 U.S. ___ [p. 3]; Crawford, supra, 541 U.S. at p. 51.) "‘Testimony’ . . . is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ " (Crawford, supra, 541 U.S. at p. 51, italics added.) The Supreme Court has included, within a “core class of ‘testimonial’ statements” that “share a common nucleus,” inter alia, “affidavits” and “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” (Crawford, 541 U.S. at pp. 51-52, italics added; Melendez-Diaz, supra, 557 U.S. ___ [p. 4]; People v. Geier (2007) 41 Cal.4th 555, 597-598.)

“A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” (Melendez-Diaz, supra, 557 U.S. ___ [p. 3]; Crawford, supra, 541 U.S. at 54, 59 & fn. 9, 68.)

In Melendez-Diaz, the nation’s highest court held that “certificates” showing seized and analyzed substances to contain cocaine are “quite plainly affidavits; ‘declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths’”; the certificates are “incontrovertibly a ‘solemn declaration or affirmation made for the purpose of establishing or proving some fact’”; and the certificates “fall within the ‘core class of testimonial statements’” that Crawford described as being covered by the Sixth Amendment Confrontation Clause. (Melendez-Diaz, supra, 557 U.S. ___ [p. 3].) The “fact in question” -
cocaine being the substance seized from the defendant's possession – was "the precise testimony the [laboratory] analysts would be expected to provide if called at trial." (Id., 557 U.S. ___[p. 4].) "The 'certificates' are functionally identical to live, in-court testimony 'doing precisely what a witness does on direct examination.'" (Id., 557 U.S. ___[p. 4].) The affidavits 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., 557 U.S. ___[p. 5].) Under state law, "the sole purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance." (Id., 557 U.S. ___[p. 5], original italics, underlining added.) The state analysts could be expected to be "aware of the affidavits' evidentiary purpose, since that purpose – as stated in the relevant state-law provision– was reprinted on the affidavits themselves." (Id., 557 U.S. ___[p. 5].) Because the analysts' affidavits were "testimonial statements" and the analysts were "witnesses" for Sixth Amendment purposes, the defendant was "entitled to 'be confronted with' the analysts at trial," "[a]bsent a showing that the analysts were unavailable to testify at trial and that [the defendant] had a prior opportunity to cross-examine them." (Id., 557 U.S. ___[p. 5], original italics.)

Section 969b provides in full;

*For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this State, has been convicted of an act punishable by imprisonment in a state prison, county jail or city jail of this State, and has served a term therefor in any penal institution, or has been convicted of an act in any other state, which would be punishable as a crime in this State, and has served a term therefor in any state penitentiary, reformatory, county jail or city jail, or has been convicted of*
an act declared to be a crime by any act or law of the United States, and has served a term therefor in any penal institution, the records or copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence.

(Pen. Code, § 969b, italics added.)

The section 969b prior packets from the California Department of Corrections ("CDCR") pertaining to appellant bore a signed and dated certification by the "Department of Corrections State of California" that the packet attached to the certification "is a true and correct copy of the original documents contained within our records." (AUG CT 10, 22, 24.) Other priors records pertaining to appellant that were maintained by the courts and by law enforcement were similarly certified. (AUG CT 26, 40, 62.)

Additionally, the CDCR’s packet included the following CDCR certification:

This is to certify that the Secretary of Corrections and Rehabilitation is the official legal custodian of the prisoners committed to California State prisons, and has authorized

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The codification of this delegation of authority by the CDCR Secretary is contained in CDCR’s Department Operations Manual ("DOM"). (DOM, Chapter 7 ("Adult Case Records Information"), Article I ("Uniform Case Records Information"), §§ 71010.1 through 71010.5 <http://www.cdcr.ca.gov/Regulations/Adult_Operations/DOM_TOC.html> [as of Apr. 24, 2010].) Case records for an inmate maintained by the CDCR include correctional facility information as well as "information received from the courts, probation officers, sheriffs, police departments, DAs, State DOJ, FBI, and any other interested agencies and persons." (DOM, § 71010.1.) The “Case Records” administrator and staff administer CDCR’s “Uniform Case Records System,” maintain inmate records, and,
the undersigned as Correctional Case Records Analyst of the Parole and Community Services Division (P&CSD) to certify on his behalf of [sic] the criminal records of person(s) who have served sentences in the California state prisons, including the certifications required under Section 969B of the California Penal Code. [¶] I further certify that the copies of the Abstract of Judgment(s), Fingerprint Card(s), Chronological Movement History, and Photograph attached are true and correct copies of those in my custody as required by law.

(AUG CT 12, italics added.) In other words, this further certification served to provide prima facie evidence that the certifier was lawfully empowered to maintain the criminal records for the inmate (here, appellant) and to certify those records as being true and correct records; that the inmate’s original records were actually being maintained by the certifier and were those “required by law”; and that the copies of such records being supplied in the section 969b priors packet were true and correct copies of the inmate’s original records. In short, the certification is intended to provide prima facie evidence that the copies of the inmate’s records being supplied are authentic and complete copies of the original records, and that the original records themselves are accurate and complete and have been reliably maintained as required by law.

In the very same manner that the Melendez-Diaz state analysts could be expected to be “aware of the affidavits’ evidentiary purpose, since that purpose – as stated in the relevant state-law provision– was reprinted on the affidavits themselves,” a section 969b certifier could be expected to be aware of his or her certification’s evidentiary purpose as set forth in both

inter alia, “certify departmental records required by law,” including “[c]ertification of criminal records pursuant to PC 969(b) [(Pen. Code, § 969b)].” (DOM, §§ 71010.3.1, 71010.3.2, 71010.4, 71010.5.)
the text of the certification itself and the text of section 969b as well. (Melendez-Diaz, supra, 557 U.S. [p. 5].)

As with the certificates in Melendez-Diaz, the “sole purpose” of the certificates for section 969b priors packets (and of the certificates for the other priors records offered against appellant) is to provide “prima facie evidence.” (Melendez-Diaz, supra, 557 U.S. __ [p. 5].) That “prima facie evidence,” according to the express language of section 969b, is “the fact that a person being tried for a crime or public offense under the laws of this State, has been convicted of an act punishable by imprisonment in a state prison, county jail or city jail of this State, and has served a term therefor in any penal institution, or has been convicted of an act in any other state, which would be punishable as a crime in this State, and has served a term therefor in any state penitentiary, reformatory, county jail or city jail, or has been convicted of an act declared to be a crime by any act or law of the United States, and has served a term therefor in any penal institution.” (Pen. Code, § 969b.)

As with a certificate in Melendez-Diaz, the certificate for the CDCR section 969b priors packet (as well as the certificates for the other priors offered against appellant) is “incontrovertibly a “solemn declaration or affirmation made for the purpose of establishing or proving some fact”; and “fall[s] within the ‘core class of testimonial statements’” that Crawford described as covered by the Sixth Amendment Confrontation Clause. (Melendez-Diaz, supra, 557 U.S. __ [p. 3].) Section 969b certificates “are functionally identical to live, in-court testimony ‘doing precisely what a witness does on direct examination.’” (Id., 557 U.S. __ [p. 4].) The section 969b certificates are “‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be
available for use at a later trial."

The "fact[s] in question" here—again, that the inmate's records being supplied are authentic and complete copies of the original records, which themselves are accurate and complete in all particulars as to the inmate's penal circumstances and have been reliably maintained as required by law—are "the precise testimony [the certifying custodians of records] would be expected to provide if called at trial." (Id., 557 U.S. __ [p. 4].)

Defense counsel did all that he could, both orally and in writing, to raise Melendez-Diaz as a Confrontation Clause basis for the position that section 969b was void as unconstitutional, both facially and as applied to appellant's circumstances, and that the priors materials being offered at appellant's priors phase of trial were constitutionally inadmissible, because the prosecution was being permitted to prove up its priors case via certified copies of documentary evidence, while the defense was being precluded from confronting and cross-examining the "declarants" or the persons who prepared the documents included within the priors material. (2CT 305, 314-326; 2RT 450-454, 456.) Cases predating Melendez-Diaz like People v. Lizarraga (1974) 43 Cal.App.4th 815, 820, and People v. Taulton (2005) 129 Cal.App.4th 1218, 1225, which rejected Sixth Amendment Confrontation Clause challenges to the use, in the priors phase of trial, of certified copies of a prison record or court minute orders, or of an abstract of judgment, are no longer viable expositions of law in light of Crawford and Melendez-Diaz. (2CT 318-319; 2RT 451-453.) Section 969b materials "serve the dual purpose of recording an inmate's term of imprisonment from admission to release and proving the truth of prior convictions within a courtroom." (2CT 319; 2RT 451-453.)
counsel correctly pointed out that the *Taulton* decision overlooks the express mandate of section 969b that such records could be used as evidence in criminal trials. (2CT 319-320; 2RT 451-453.) Such records “are crafted in anticipation of being used in future court proceedings,” and it is “reasonably foreseeable” that they will be so used. (2CT 320, 322.) Information about an inmate’s priors that is included in section 969b materials “has clearly been recorded for the purpose of later use in subsequent litigation in the event an inmate reoffends upon reentry into society.” (2CT 321-322.) Thus, such records are “testimonial” under *Crawford* and *Melendez-Diaz*. (2CT 320; 2RT 453.) Section 969b itself is facially unconstitutional because it dispenses with the Sixth Amendment Confrontation Clause requirements of witness unavailability and defense opportunity for cross-examination of a declarant before the declarant’s testimonial statement regarding an inmate’s prison record, court minute orders, or abstract of judgment may become admissible. (2CT 324-325.) The priors materials as to appellant violate the Confrontation Clause because the prosecution was being allowed to use documentary evidence “to establish the prior offense, prior imprisonment, release from prison, and the identity of this offender” without intending or having to call any witness to prove these facts, or to afford the defense the opportunity to cross-examine “a single one of the declarants underlying the documents in the section 969b package.” (2CT 326.) Defense counsel requested that the trial court strike the sentence enhancements imposed upon appellant as a result of the prior convictions. (2CT 325.)

For the reasons stated above, the trial court incorrectly concluded that *Taulton* survives *Melendez-Diaz*, and that section 969b materials are not “prepared for any particular purpose,” and the court erroneously denied
the defense motion to suppress the materials. (2RT 454.) Denying the defense the opportunity to confront and cross-examine the declarants, whose certificates accompanied the priors documents (prison, court, and law enforcement records) admitted in evidence to prove appellant's priors, violated appellant's Sixth Amendment rights of confrontation and cross-examination. (AUG CT 10, 12, 22; 24, 26, 40, 62.)

The standard of prejudice for Confrontation Clause errors is whether they are harmless beyond a reasonable doubt. (Van Arsdall, supra, 475 U.S. at p. 684; Lilly v. Virginia (1999) 527 U.S. 116, 139-140 [119 S.Ct. 1887, 144 L.Ed.2d 117].) "The correct inquiry is whether, assuming that the damaging potential of the [precluded] cross-examination were fully realized, a reviewing court might nonetheless say the error was harmless beyond a reasonable doubt." (Van Arsdall, supra, 475 U.S. at p. 684.)

In deciding whether the federal constitutional error here is harmless beyond a reasonable doubt, this reviewing court should adopt the mind set of the state supreme court when it was considering whether violation of a Sixth Amendment jury trial right violation was harmless beyond a reasonable doubt in People v. Sandoval (2007) 41 Cal.4th 825. Facing a situation in which the pertinent procedures (for determining facts aggravating sentencing) had undergone a sea change (from judges finding such facts by a preponderance of the evidence to jurors finding such facts beyond a reasonable doubt) between trial and appellate review, the Court was careful to point out that "the reviewing court cannot necessarily assume that the record reflects all of the evidence that would have been presented"; "a reviewing court cannot always be confident that the factual record would have been the same"; and [c]ounsel's strategy might have been different; had the new constitutionally driven procedures been in
place in the trial court. (Sandoval, supra, 41 Cal.4th at pp. 839-840.) The same cautionary note must be sounded here. It would be utter speculation for this reviewing court to consider what the record might have been, had defense counsel been allowed to confront and cross-examine live prosecution witnesses on (1) whether or not the copies of priors documents pertaining to appellant that were being offered in evidence at the priors proceeding were in fact authentic and complete copies of original records; (2) and whether or not the original records themselves were accurate and complete and had been reliably maintained as required by law. There is no crystal ball to foretell what a live prosecution witness might have admitted on cross-examination, or as to the strategy that defense counsel (had he been allowed to do so) might have pursued in such cross-examination or the nature or extent of such cross-examination. Vigorous cross-examination might well have revealed glaring holes or discrepancies in pertinent institutional record-generation or record-keeping practices or in specific records pertaining to appellant, that would have cast substantial and reasonable doubt upon the accuracy, reliability, or completeness of the copies of records being offered to establish the prosecution’s prima facie case on the priors allegations.

In short, it cannot be said that the Confrontation Clause error here is harmless beyond a reasonable doubt. Accordingly, this reviewing court should do each of the following: (1) declare section 969b unconstitutional both facially and as applied to appellant; (2) and reverse the trial court’s true findings on the alleged priors, reverse the sentence, and remand for retrial on the alleged priors with appellant being afforded the opportunity to confront and cross-examine prosecution custodial witnesses regarding offered priors documentation, and for resentencing.

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