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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN DAVIS, Defendant and Appellant.	A120428 (San Francisco County Super. Ct. No. 190226)

I. INTRODUCTION

A jury found John Davis guilty of murder (Pen. Code, § 187[1]) and also found true special circumstance allegations that the murder was committed in the course of rape and burglary (§§ 190.2, subd. (a)(17)(C) &(G)). Davis was sentenced to life in prison without parole.

On appeal, Davis contends the judgment must be reversed and a new trial ordered because: (1) the jury conducted an unauthorized experiment; (2) the trial court excluded scientific material relevant to the prosecution's DNA evidence; (3) the jury was told that Davis exercised his *Miranda*[2] rights during a police interview; (4) the prosecutor misled the jury during closing argument; (5) Davis was denied his constitutional right to confront witnesses against him.

[1] Statutory references are to the Penal Code unless otherwise indicated.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

We find that juror misconduct and multiple violations of Davis's constitutional right to confrontation require us to reverse the judgment and remand this case for a new trial.

II. STATEMENT OF FACTS

A. *The December 1985 Murder*

On December 4, 1985, at approximately 8:30 p.m., Bobby Adams went to meet his girlfriend, Barbara Martz, at her home at 1510 25th Street in the Potrero Hill district of San Francisco. Adams found the front door to the house open and Martz lying dead on the floor inside. Martz was nude and had been stabbed and cut several times. The police found a blood stained knife that had been taken from Martz's kitchen on a walkway between her house and the street.

An autopsy was performed by a Dr. Duazo whose report stated that Martz died from loss of blood due to multiple stab wounds. According to the autopsy report, sperm were found in smears taken from Martz's vagina and perineal area. Bruising on the victim's arms and legs was consistent with a struggle. Swabs with blood and sperm recovered from Martz's body were placed in a sealed envelope and stored in a freezer at the San Francisco Medical Examiner laboratory.

In July 1986, a teenager went into the basement of a public housing project located at 1626 25th Street in San Francisco, in search of his younger relatives. In this underground play area, which neighborhood kids referred to as the "shack," the boy found credit cards that belonged to Martz. He turned them into the police and then showed the officers the shack, where they recovered Martz's purse and wallet.

B. *The 2002 Investigation*

In 2002, the Martz homicide file was assigned to San Francisco Police Investigator James Spillane who re-opened the case to determine if there was evidence that could be submitted for DNA analysis. Shortly thereafter, Spillane took possession of the envelope of evidence collected during Martz's autopsy from the San Francisco Medical Examiner's office.

1. *The 2002 DNA Testing*

In March 2002, Dr. Cydne Holt, supervisor of the DNA section of the Forensic Division of the San Francisco Police Department, received a lab request from Spillane to analyze the Martz autopsy evidence. From the vaginal swabs that were collected during the autopsy, Holt generated a DNA profile of the contributor of the sperm sample (the DNA donor profile).

Using a process called differential extraction, Holt isolated a "clean" single-source sperm cell fraction from the swabs. She then used a procedure called polymerase chain reaction (PCR) to generate the DNA donor profile by focusing on specific DNA locations on the cell sample. Loci is a scientific term for a specific location on a chromosome which contains short tandem repeat (STR) strands of DNA that have been identified as useful for DNA profiling. In this case, Holt used the PCR method to (1) locate STR strands at nine specific loci, (2) amplify just those areas, and (3) assign a type to those areas by means of a computer program which then generated a string of numbers that comprised the DNA profile.

In June 2002, the DNA donor profile was loaded into the California State Combined DNA Index System (CODIS) database and, a few months later, the computer reported a match with a DNA sample from Davis that had been loaded into the database as an administrative consequence of a prior robbery and burglary conviction. (See § 295, et seq.) Police investigators used the database match to obtain a warrant pursuant to which they collected a DNA sample from Davis on October 10, 2002.

Bonnie Cheng, a criminalist at the Forensic Division of the San Francisco Police Department, used the PCR process to analyze Davis's DNA and develop his DNA profile. Cheng concluded that Davis's DNA profile matched the DNA donor profile that Holt had generated from the autopsy sperm sample at all nine loci.

2. *The December 2002 Interview*

In December 2002, Officer Spillane interviewed Davis who was in prison at the time. Spillane told Davis that he was looking into an old case and wanted to "rule people in or rule people out as the suspects." Davis agreed to talk with Spillane and was read

and waived his *Miranda* rights. In response to questioning, Davis said that he grew up in the Potrero Hill area of San Francisco, that his address was 1710 25th Street and that he had family who still lived there.

Using Polaroid photographs for orientation, Spillane explained to Davis that the police had found some property under the foundation of a building near the building where Davis grew up. He then showed Davis pictures of Martz's purse and wallet and asked if he had seen them before. Davis responded that he had not. Spillane said the items were found a long time ago and asked if there was any chance Davis might have seen them. Davis responded that "It's possible" and said that the wallet looked "kinda familiar." Davis confirmed that, when he lived in that area, he and his friends used to go into the underground areas of those buildings, that they would make forts out there, and that they found all kinds of things under there, like syringes, beer cans, knives, a gun, and that they once found a machete. Spillane asked if there was any chance that Davis may have touched the purse or wallet that were depicted in the photographs. At first, Davis said he did not think so. But, then Davis admitted that if he had found the wallet when he was a kid, he probably would have opened it and that it was possible that happened.

Spillane then showed Davis several pictures of Martz's building, both inside and out. Davis said he recognized the building but then repeatedly denied that he ever burglarized that house. Then Spillane showed Davis several pictures of Martz and asked whether he had ever seen that woman before. Davis said he had not. When Spillane said that she had lived in the house depicted in the other photographs, Davis seemed surprised that a white woman lived in that neighborhood. Davis repeatedly stated that he did not recognize the woman at all. Spillane asked if Davis had had a conversation with the woman 17 years prior, in 1985, would he remember it. Davis said he did not know, but that she did not look familiar to him.

Spillane then asked Davis several questions about his sexual partners in 1985. At one point, Davis said "What is this all about?" to which Spillane responded: "This woman lived in this house in 1985 and on December the 4th of that year, she was raped and murdered in her home." Spillane also said that the "problem" was that the semen

from the rapist had been "DNA tested" and that it matched Davis. Davis responded "Oh hell no."

Spillane shared his hypothesis that Davis went into Martz's house that day with the intent to do a burglary, that he was surprised and scared when the woman came home, which was understandable, and that he took the knife from her kitchen just to scare her so he could get out. Spillane said he had to go to the District Attorney, but that he wanted to first give Davis a chance to tell his side of the story. Davis said he did not have a side of the story because it wasn't him and that was all he could say. Davis repeatedly stated that he did not rape anyone. Spillane suggested that Davis had been carrying a "kind of a poison" around with him, that he thought Davis was remorseful and felt badly and that the woman's family needed closure. Davis responded: "I ain't got no more to say to you 'til I can get an attorney, you know. This is fucked up."

C. *The Case Against Davis*

An August 12, 2003, a three-count indictment charged Davis with murder with special circumstances, rape and burglary. Shortly thereafter, the rape and burglary charges were dismissed on the ground that the statute of limitations had expired.

In 2005, Bonnie Cheng re-analyzed both the sperm-cell sample from the Martz autopsy and Davis's October 2002 DNA sample. Again using the PCR method, Cheng examined four additional STR strands in the samples so that the results could be combined with the earlier test results to generate 13-locus DNA profiles. Cheng then determined that the 13-locus donor profile and the 13-locus Davis profile matched at all 13 locations.[3]

A jury trial commenced August 6, 2007. The Martz autopsy report was admitted into evidence as a business record, although Dr. Duazo did not appear at trial. Dr. Amy

[3] Holt testified at trial that Cheng performed this additional testing because of a "desire to develop more information." According to Holt, experts have identified 13 loci which are particularly useful for DNA typing. In this case, the PCR testing that was performed in 2002 was done with a Profiler Plus kit which isolates nine STR strands at nine loci on the DNA sample. Then, in 2005, Cheng used a Cofiler kit to look at the additional four STR strands at four other loci on the samples.

Hart, the San Francisco Medical Examiner at the time of trial, testified about the autopsy that Dr. Duazo performed, about the evidence that was recovered and preserved during that autopsy and about the victim's injuries and cause of death.

Officer Spillane testified about his December 2002 interview with Davis and an audiotape recording of that interview was played for the jury. Thereafter, the prosecutor asked Spillane several questions about the interview and his investigation of this case. During that questioning, Spillane stated that, at some point "apart from the interview" that was played for the jury, Davis reported that he lived at 1710 25th Street during the time period in late 1985 to early January 1986.[4]

Spillane testified that 1620-1638 25th Street, the complex where Martz's purse and credit card were found, is located in between Davis's former residence at 1710 25th Street and Martz's former residence at 1510 25th Street. Spillane testified that he walked from the former Davis residence to the buildings where the property was recovered in approximately 70 seconds and from there to the former Martz residence in 35-40 seconds, completing the entire trip at a normal walking pace in "about just under two minutes."

Spillane also testified that he obtained information about Davis's brothers as part of his investigation, but that he did not speak with them or any of Davis's family.

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[4] On appeal, Davis contends that there was no evidence regarding his place of residence at the time of the murder. However, he overlooks the following colloquy from Spillane's testimony:

"Q. Did Mr. Davis report to you his address at that time period in late 1985 to early January 1986?

"A. Yes.

"Q. What was the address?

"A. 1710 25th Street.

"Q. That was apart from the interview that we heard?

"A. Yes."

Spillane confirmed that Davis has four brothers, two older and two younger than him, and that they all used their mother's maiden name as their last name, which was not Davis.[5]

During the trial in this case, the court permitted the jury to ask questions of the witnesses. At the conclusion of Spillane's testimony, a juror inquired whether Spillane had obtained a DNA reference sample from anyone other than Davis. Spillane responded that he had not.

The prosecution introduced its DNA evidence through the testimony of Dr. Holt who, by that time, was the Director of the San Francisco Police Department's Forensic Services Division. Holt testified about the DNA testing she performed in 2002 and also about the tests that Bonnie Cheng conducted in 2002 and 2005. Cheng did not testify at trial. Holt told the jury that the 13-locus DNA donor profile and the 13-locus Davis profile matched.

Holt also testified that Bonnie Cheng had performed a statistical analysis which established that the probability that a "random unrelated person" would by chance possess the same male DNA profile detected on the sperm fractions recovered during the autopsy was "one in seven quintillion for U.S. Caucasians, one in 25 quadrillion for African-Americans, one in 52 quintillion for California Hispanics, and one in 99 quintillion for the general Asian population."

The trial judge asked Holt the following question, which had been asked by a member of the jury: "If Dr. Holt were able to test Mr. Davis' brother's DNA, would she expect to see matches, and if so how, approximately how many markers or loci?" Holt gave the following response: "I can't say absolute numbers for that. I can say that the amount of similarity between siblings is expected to be closer than between unrelated people. I can say that the amount of similarity between full sibling, meaning both biological parents are the same, would be higher than between siblings where only one parent is shared. [¶] And I don't know particulars here necessarily, so I can't say the

[5] Contrary to the People's assumption/contention, this testimony by Spillane does not establish that Davis's brothers were half-brothers. We have not located any evidence to warrant that assumption.

number that is likely. I mean those could be estimated, but I haven't done that type of statistical analysis in this case."

The jury began deliberations on August 17, 2007, and returned a verdict on August 27, finding Davis guilty of murder and that both special circumstance allegations were true. The trial court denied a motion for new trial and sentenced Davis to life in prison without parole.

III. DISCUSSION

A. *Jury Misconduct*

1. *Issue presented and standard of review*

In his motion for a new trial, Davis argued, among other things, that the jury committed misconduct during deliberations by using evidence from outside the record and the expertise of one particular juror to calculate the likelihood that one of Davis's brothers matched the 13-locus DNA donor profile. In this court, Davis contends that the lower court erred by denying him a new trial on this ground.

"The trial court is vested with broad discretion to act upon a motion for new trial. [Citation.] When the motion is based upon juror misconduct, the reviewing court should accept the trial court's factual findings and credibility determinations if they are supported by substantial evidence, but must exercise its independent judgment to determine whether any misconduct was prejudicial." (*People v. Dykes* (2009) 46 Cal.4th 731, 809.)

In the present case, it appears that the trial court did not make any factual findings or credibility determinations. Indeed, we have been unable to confirm that the court conducted a hearing regarding the alleged misconduct before it denied the motion for new trial. We do have before us, however, pleadings and declarations relating to the juror misconduct motion, all of which were filed under seal in the lower court and subsequently unsealed by order of this court. We assume, absent evidence or any

contention to the contrary, that the trial court considered these declarations in reaching its conclusion that no prejudicial misconduct occurred.[6]

2. *The juror declarations*

Davis's evidence that an improper experiment was performed consisted of the declaration of a juror we refer to herein as C.D.[7]

C.D. stated that "[a] number of jurors mentioned that they were troubled that no calculation of the likelihood of a brother of John Davis being the source of the sperm was made," and that several jurors attempted to calculate that likelihood, some of whom used their calculators. According to C.D., one juror shared his opinion, which was based on his "own personal medical experience," that whatever the odds were that a brother was a match, "it was a very large number." This juror gave the others "a lot of information about genetics that had not been discussed in trial." The jury used this information and their own personal experience to discuss "statistical experiments" that could be done to address the concern of several jurors that there was no independent evidence regarding the likelihood of a match with a brother.

C.D. also stated that one juror calculated the odds of a brother being a match as one in eight million and told the others that this was a conservative estimate. According to C.D., "[i]n the end, we chose the one-in-eight million calculation as the "best estimate we could come up with for use in our deliberations."

In its opposition to the new trial motion, the prosecution argued that "[a]lthough jurors did estimations of the likelihood of a brother having the same DNA profile as Defendant, these actions do not rise to the level of misconduct recognized by the courts." It reasoned that the jury calculations were proper because they did not utilize extrinsic

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[6] Portions of the juror declarations that pertained to statements made or conduct that occurred in the jury room were admissible under Evidence Code section 1150, subdivision (a). Those statements "are evidence of objectively ascertainable overt acts that are open to sight, hearing, and the other senses and are therefore subject to corroboration." (*People v. Steele* (2002) 27 Cal.4th 1230, 1259-1267 (*Steele*).)

[7] For privacy sake, we will refer to jurors by their initials rather than their names.

evidence but based their estimates on evidence presented at trial. The prosecution attempted to support this claim with declarations from several jurors.

All of the jurors who submitted declarations in this case confirmed that the jury spent time discussing the likelihood that one of Davis's brothers might share his DNA profile, although many downplayed the significance of this issue and insisted that the calculations were based on the evidence presented at trial.

Juror P.F. disclosed in his declaration that he proposed a formula to the jury for calculating the likelihood that a brother might have the same DNA profile as Davis. P.F.'s juror questionnaire, which is part of the appellate record, reflects that he is a psychology professor with a medical degree.

In his declaration, P.F. stated that he used the "fact that we inherit one allele from our mother and one allele from our father at each of the 13 locations" to formulate the expression of "1/4 to the 13th power." P.F. stated that he then "did simple multiplication by hand in the jury deliberation room in front of my fellow jurors (1/4 times 1/4 times 1/4 times 1/4 . . .)." P.F. recalled that he described his estimate to other jurors as conservative, although he never referred to it as the best estimate.

P.F also explained that he proposed this formula after he failed to dissuade a particular juror from speculating that if defendant had a brother, that brother might have the same DNA profile. P.F. stated that he "addressed this juror's speculation using high school level biology and high school level math to estimate for this juror the likelihood of a hypothetical brother with the same mother and father as the defendant having the same 13 loci profile as John Davis."

Other jurors from whom the prosecution obtained declarations made statements to the effect that the jury accepted P.F.'s formula as valid and that they used it to calculate the likelihood of brothers with matching DNA. For example, juror J.A. stated that "we did a numerical calculation based on the evidence at trial to estimate the chances of a brother having the same DNA," and that "several of us" did the calculation by hand "after we realized that the calculators on our phones would not work for this calculation."

Another juror, N.L., stated: "Since no statistical information was giving [sic] on the chances of two brothers matching at all 13 locations, we used the trial testimony that a person inherits one of their mother's two alleles and one of their father's two alleles at each location. This gives a 1 in 4 chance that the brothers would have a match at any one location. We then multiplied that number to the 13th power since there were 13 locations tested. I remember the result of the calculation being around either 1 in 8 million or 1 in 16 million. I do not recall any juror using a calculator."

Some jurors also acknowledged that one or two of the jurors shared specialized knowledge during deliberations. Juror P.S. stated that there was a doctor and a nurse on the jury, "but they did not bring their independent knowledge to bear on the deliberations – other than clarification of the evidence." Juror J.S. stated that "[t]here were jurors with specialized knowledge in various fields that applied to the case. While they did use their expertise to analyze certain evidence presented at trial, at no time did any of the jurors express an opinion based on specialized information obtained from outside sources alone."

3 *Analysis*

"It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct. [Citations.]" (*In re Malone* (1996) 12 Cal.4th 935, 963 (*Malone*).)

In *Malone*, the court found that a juror in a murder trial committed misconduct by expressing to her fellow jurors "negative opinions on the reliability of petitioner's polygraph evidence, based on her own professional study of psychology." (*Malone, supra*, 12 Cal.4th at p. 963.) The court acknowledged that statements by this juror which merely reflected the evidence and argument presented at trial were "less egregious," but

nevertheless found that the juror's assertion that her views were "drawn from her own professional knowledge . . . was an improper injection of extrajudicial specialized information into the deliberations." (*Id.* at p 963, fn. 16.)

In contrast to *Malone*, there was no improper injection of extrajudicial specialized information into the jury deliberations in *Steele, supra,* 27 Cal.4th at pp. 1259, 1265-1267. *Steele* was a death penalty case in which appellant contended that four jurors with experience in the military and in Vietnam committed misconduct by offering their expertise to the other jurors. The *Steele* court disagreed, finding that the views that were allegedly shared by the jurors in question "were not contrary to, but came within the range of, permissible interpretations" of the evidence presented at trial regarding appellant's military training and experience in Vietnam and its potential effect on his crimes. (*Id.* at p. 1266.)

The *Steele* court reasoned that there was extensive trial evidence pertaining to these issues, much of which was "susceptible to various interpretations." (*Steele, supra,* 27 Cal.4th at p. 1266.) The court found that "[a]ll the jurors, including those with relevant personal backgrounds, were entitled to consider this evidence and express opinions regarding it." (*Ibid.*) As the *Steele* court explained, "it would be an impossibly high standard to permit these jurors to express an opinion on this evidence without relying on, or mentioning, their personal experience and background." (*Id.* at p. 1267.) The court also acknowledged, however, that "[a] fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting 'an opinion explicitly based on specialized information obtained from outside sources,'" which constitutes misconduct under *Malone, supra,* 12 Cal.4th at page 963. (*Steele, supra,* 27 Cal.4th at p. 1266.)

Applying these principles to the present case, we conclude misconduct occurred. There is no dispute that the jury performed a calculation in order to estimate the likelihood of a DNA match among brothers. Furthermore, the evidence clearly shows that the jurors used a formula to conduct this calculation that was not part of the evidence presented at trial. That formula was supplied to the jury by one of its members, juror

P.F., who had specialized knowledge and expressly identified himself as a specialist to his fellow jurors. Indeed, P.F. admitted that he shared his formula with the other members of the jury for the express purpose of dissuading them from "speculating" as to whether a brother might have perpetrated these crimes. This was not simply an interpretation of ambiguous evidence, as occurred in *Steele*, but an injection of extrinsic evidence by a specialist.

The People contend that there was no misconduct because the jury relied solely on the trial evidence and their own general knowledge to estimate the possibility that one of Davis's four brothers shared his DNA profile. This contention is simply not supported by the record before us. Several jurors, including, P.F., stated that the jury used the trial evidence that a person inherits one of their mother's two alleles and one of their father's two alleles at each loci. However, this particular piece of evidence was not the formula that the jury used to calculate the likelihood that brothers' DNA would match at the 13-loci that were tested in this case. That formula was supplied to the jury by one of its members, not by a trial witness.

In other words, in contrast to the situation in *Steele*, juror P.F. did not simply use his specialized knowledge to interpret the trial evidence. Rather, he used it to construct a formula that had no support in the trial record. His formula filled an evidentiary void that was expressly acknowledged by the prosecution's expert witness, Dr. Holt. As reflected in our foregoing factual summary, Dr. Holt testified that it was possible to estimate the likelihood of a matching DNA profile among brothers, but that she *did not* perform that analysis in this case.

4. *Prejudice*

"A juror's misconduct raises a presumption of prejudice, which may be rebutted by proof no prejudice actually resulted. [Citations.] 'A judgment adverse to a defendant in a criminal case must be reversed or vacated "whenever . . . the court finds a *substantial likelihood* that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury." [Citations.] . . . [¶] "The ultimate issue of

influence on the juror is resolved by reference to the substantial likelihood test, an objective standard. In effect, the court must examine the extrajudicial material and then judge whether it is inherently likely to have influenced the juror." ' [Citation.] (*Malone, supra,* 12 Cal.4th at pp. 963-964.)

" 'Such "prejudice analysis" is different from, and indeed less tolerant than, "harmless-error analysis" for ordinary error at trial. The reason is as follows: Any deficiency that undermines the integrity of a trial–which requires a proceeding at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury–introduces the taint of fundamental unfairness and calls for reversal without consideration of actual prejudice. [Citation.] Such a deficiency is threatened by jury misconduct. When the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial. By contrast, when the misconduct does not support such a finding, we must hold it nonprejudicial.' [Citations.]" (*Malone, supra,* 12 Cal.4th at p. 964.)

The *Malone* court found that the prosecution rebutted a presumption of prejudice resulting from the fact that a juror injected specialized knowledge regarding polygraph evidence into the deliberations by "showing the externally derived information was substantially the same as evidence and argument presented to the jury in court." (12 Cal.4th at p. 964.) As the court explained, "Because [the juror's] assertions were substantially the same as evidence and argument presented at trial, her error was much less egregious than similar misconduct we have found warranted reversal. [Citations]. Viewed in context of the evidence at trial, the misconduct here does not support a finding that at least one juror was improperly influenced to petitioner's detriment. (*Id. at p.* 965.)

In the present case, the formula proposed by juror P.F. and adopted by the jury during deliberations was not substantially the same as evidence presented at trial. Rather, as discussed above, the formula was proposed and adopted in order to fill an evidentiary void with respect to an issue that the jurors expressly identified as relevant to their

deliberations. Furthermore, the juror declarations compel the conclusion that at least one juror, and likely many more than that, were improperly influenced by the misconduct to Davis's detriment.

The People argue the misconduct that occurred in this case should be overlooked for two reasons. First, they contend that the entire matter was simply irrelevant. The People reason that, since there was absolutely no evidence that a brother was responsible for these crimes, the jury's experiment could not have prejudiced Davis. However, the evidence regarding Davis's brothers, though brief, was not irrelevant and it unquestionably had an impact on this jury. As reflected above, one juror asked Officer Spillane whether other DNA profiles had been tested. There was also a question from a juror as to whether the prosecution's DNA expert had calculated the likelihood of a DNA match among brothers. The prosecution's tactical decision not to explore or more fully address these issues at trial certainly cannot be used to render them irrelevant.

Alternatively, the People argue that Davis was not prejudiced because the jury over-estimated the likelihood of a DNA match between brothers and, thus, the unauthorized experiments inured to Davis's benefit. Not surprisingly, Davis's appellate counsel argues the opposite is true, i.e., that the jury under-estimated the likelihood that brothers could having matching DNA.

As we have already established, the trial record does not contain any evidence regarding the likelihood that one of Davis's brothers matched his DNA. Nevertheless, both parties spend significant time proposing and defending formulas for making that calculation. At least Davis's appellate counsel attempts to ground his proposed formula in the record of pre-trial proceedings pertaining to the DNA evidence, which is before us on appeal. The People, by contrast, base their analysis on scientific reports and theories that were never presented to the lower court and that are not a part of the appellate record. For this reason, Davis has moved to strike the People's analysis from their appellate brief. The People attempt to justify their decision to provide this court with what they characterize as "the correct formulae, and variables to insert into those formulae" by

pointing out that they provided citations to the formulae and data "which are readily accessible as public, published materials."

We would be inclined to grant the motion to strike if not for the fact that the competing formulas and analyses proposed by these parties on appeal reinforce our conclusion that Davis was prejudiced by the unauthorized jury experiment. The parties' lengthy and complex discussions undermine the People's efforts to characterize the jury's unauthorized experiment as nothing more than a high school level math problem. Like appellate counsel on both sides of this case, the jury went outside the trial record for an answer they believed was relevant to the question of guilt. The resulting prejudice to Davis requires a reversal of this judgment.

B. *Evidence Pertaining to the Arizona Database*

Davis contends the trial court erred by excluding evidence of a report titled "Arizona Nine Plus Locus Match Summary Report" (the Arizona Report).

1. *Background*

a. *The Arizona Report*

In or around July 2005, Bicka Barlow, a deputy public defender in the San Francisco Public Defender's officer, filed a declaration in this case, seeking issuance of an out-of-state subpoena. In her declaration, Barlow explained that she had become aware that an employee of the Convicted Offender Section of the Arizona Department of Public Safety had discovered multiple instances in which a pair of individuals whose DNA samples were included in the Arizona Database matched each other at nine of thirteen loci. Barlow stated that she had contacted that employee and requested that she "memorialize her findings" in a letter. That request was declined. After consulting experts, Barlow had concluded that the Arizona data was relevant to this case because, among other things, it would "demonstrate the fallibility of the statistical calculations" that were done by the San Francisco Crime laboratory.

On August 24, 2005, the Honorable Mary Morgan, judge of the San Francisco Superior Court, issued a certificate for the production of out-of-state documents (see § 1334) requesting that a judge of the superior court for the State of Arizona, Maricopa

County, issue an order directing the custodian of records of the Arizona Department of Public Safety, DNA Data Base Unit, to produce documents in this case including "[r]ecords of any matches within the Arizona state convicted offender database between two individuals of nine (9) or more loci within the thirteen (13) loci tested using Profiler Plus and Cofiler kits or the fifteen (15) locus Identifier kit." On September 22, the Honorable James H. Keppel of the Maricopa County Superior Court acted upon Judge Morgan's Certificate by issuing an order to show cause to the custodian of records of the Arizona Department of Public Safety, Product Documents/DNA Database Unit.

The custodian of records in Arizona produced the Arizona Report to the defense in this case. Although characterized as a report, the five-page document is a spread sheet of data unaccompanied by substantive analysis or any written explanation. The following statement appears at the bottom of each page of this report: "Prepared as a special report by court order. This report is not generated for or used by the Arizona Department of Public Safety Crime Laboratory for any statistical analyses. This report is property of the Arizona Department of Public Safety. Use of this document beyond the limitation of the court order by Judge Keppel is not authorized."

b. *The Discovery Motion*

The defense used the Arizona Report as support for a pre-trial motion to discover the California database that first identified Davis as a match to the DNA donor profile. Bicka Barlow testified on behalf of the defense at the discovery hearing. Barlow, who has a background in genetics, identified herself as an attorney-consultant to the defense in this case. Barlow testified that the Arizona Report showed that a study of the Arizona database of 65,000 people, produced 122 pairs of people who had DNA that matched at nine loci, 20 pairs of people who matched at 10 loci, one pair of people who matched at 11 loci, and one pair, who turned out to be siblings, who matched at 12 loci. Barlow testified that many experts in the field believed that the Arizona Study cast doubt on the validity of the random match probability methodology that was used in this case. She further testified that many experts believed they would find a 13-loci match among unrelated individuals in the California Database if they had access to it. At the

conclusion of the lengthy discovery proceeding, Judge Morgan denied the defense motion to discover the California Database. That ruling is not at issue in this appeal.

c. *Dr. Holt's Trial Testimony*

Before the prosecutor called Dr. Holt to testify, she moved to prohibit the defense from questioning Holt about the Arizona Report. She argued the report was irrelevant and unduly prejudicial under Evidence Code section 352. The defense maintained that the report was relevant because it undermined or at least called into question the reliability of the so-called "product rule," which was used to calculate the statistical likelihood of a random match between Davis and the DNA donor profile. The trial court, took the matter under submission and proceeded with the trial. Thereafter, the court interrupted Dr. Holt's trial testimony in order to conduct an Evidence Code section 402 hearing.

During the section 402 hearing, defense counsel cross-examined Holt about the Arizona Report outside the presence of the jury. Counsel stated that he had sent Holt a copy of the report and asked whether she had looked at it. Holt responded that she had not. Holt testified that she had heard of the Arizona Report, but that she had not seen or read it and that she could not authenticate the document that defense counsel showed her. During questioning by the prosecutor, Holt testified that she was not aware of any study that concluded the Arizona Report cast any doubt on the reliability of the "product rule" methodology that was used to calculate the random match probability statistics in this case. The defense stipulated that the product rule was generally accepted in the scientific community.

Defense counsel then asked Holt to review the Arizona Report "between now and Monday morning." The prosecutor objected and the trial court responded it would not "allow" that. The court explained: "As I indicated off the record, I think that what you really need to do is to bring in your own expert. This witness has not reviewed, relied upon, considered the information that you had asked her to. She did not, she is not basing her opinion on it in any way. And in order to get this testimony in, I believe that you're gonna need to bring in your own expert."

Thereafter, the defense called its "investigator" in this case, Bicka Barlow, to testify as an expert on the "intersection of the legal field and DNA evidence in the courtroom . . . ." Barlow has a masters degree in genetics and developmental biology and a law degree, and has previously been employed as a consultant expert in numerous criminal cases. She does not purport to be nor has she ever been qualified as an expert in the field of population genetics as it relates to human forensic identification.

Barlow testified that the Arizona Report consists of a "set of data" that can be and has been analyzed by experts who conduct statistical interpretation of DNA data. She also testified that experts had concluded that the Arizona Report undermines the established scientific procedures used to calculate population frequency statistics for human forensic DNA profiles. Barlow admitted, however, that she was not an expert in that area.

As the trial day drew to a close, the court indicated that it was "not impressed" by Barlow's testimony thus far. Defense counsel responded that his other expert was in Southern California and that it would be impossible to have him in court by the following Monday morning. Defense counsel suggested that he could ask Barlow to communicate with the other expert and obtain a detailed declaration from him. The court responded that there would need to be an opportunity to cross-examine the expert and the problem was that the defense had failed to lay a proper foundation for the Report. Thereafter, the defense elicited additional testimony from Barlow about the content of the Arizona Report, but it did not produce another expert.

After the matter was submitted, the trial court ruled that "the study is not relevant in this particular case and any discussion or testimony through Ms. Holt, particularly would only . . serve to confuse the jury, would constitute an undue consumption of time and under [Evidence Code section] 352, it will . . . not be referred to or provide the basis of any questioning to Ms. Holt." The court reiterated that Dr. Holt had not referred to, considered or relied on the Arizona Report in formulating her opinions and that the report had not otherwise been established as a reliable publication. On its face, the court found, the document appeared unreliable because it was prepared during the course of some

other litigation. Furthermore, the court found it was inappropriate for Barlow to act as co-counsel, investigator and also an expert witness in the same proceeding and that it would not give her testimony much weight.

When defense counsel argued that it should have wide attitude to cross-examine Holt, the court responded that the defense was attempting to "boot strap" by getting an irrelevant summary before the jury. The court clarified that it would not prevent the defense from presenting its own expert, but that it could not get the summary into evidence through its examination of Dr. Holt.

d. *The Mueller Declaration*

The day after Dr. Holt completed her trial testimony, the defense sought clarification of the court's ruling regarding the admissibility of the Arizona Report. Outside the jury's presence, defense counsel stated that it was his understanding from an off-the-record discussion with the court that the finding that the report was irrelevant would "preclude the defense from bringing its own witness to affirmatively testify regarding those matters," and asked if that was a "fair statement." The court responded: "I found based on what you put before me at this time that it is irrelevant, that that particular study is irrelevant." The court also reiterated that it was "not excluding you from presenting an expert witness." It explained again that, based on the defense presentation, the court concluded that the report was not relevant. It also reiterated that if defense counsel believed it could change the court's mind, it was free to try, outside the presence of the jury.

The following day, the defense filed a "Declaration of Dr. Laurence Mueller." Mueller, a professor of Ecology and Evolutionary Biology at the University of California, Irvine, stated that he was familiar with the Arizona Report. Mueller further stated that he had reviewed documentation which led him to conclude that the Arizona Department of Public Safety searched for DNA matches in its database by using the same 13 loci that were used to test the evidence in the present case. Furthermore, Mueller stated he had no reason to question the authenticity of the Arizona Report and that the report 'is the type of material that experts in this field generally rely upon."

Mueller opined that the results of that study "are scientifically relevant to every case in which DNA evidence is presented in conjunction with the standard Random Match Probability (RMP) statistical analysis. " He also stated that the study undermined an essential underlying assumption of the RMP methodology and assessment. Mueller further stated that he had spoken with several "experts" who agreed with him that the Arizona Report was relevant and useable for purposes of statistical analysis.

During a break in the trial proceedings, the trial court inquired whether defense counsel wished to discuss the Mueller declaration which had been filed that morning. Counsel stated: "I simply want to indicate as the Court knows this witness is down in the Los Angeles area. So I, given the Court's rulings and my previous statements, I wanted to make sure there was a complete record as to what the basis for our requesting to bring this evidence in."

The prosecutor objected to the declaration and requested that it not be admitted into evidence on the ground that she had not had the opportunity to cross-examine Mueller. Defense counsel responded that he thought the proffer was "perfectly acceptable" under the circumstances, explaining that "if Dr. Mueller were in San Francisco we would have him come in. But given the Court's ruling, it seemed unlikely since the Court had indicated that the evidence was not relevant – if the Court believes that this makes it relevant, then I will, we can proceed from there."

The matter was submitted and the trial court issued the following ruling: "The Court cannot accept this declaration for the truth of matter asserted. It is hearsay. There is no cross-examination of the declarant. [¶] The Court did review the document and has allowed the defense to file it to preserve any issues if there is an appeal. And the Court's ruling does not change."

2. *Analysis*

In their appellate briefs, the parties spend significant time debating whether the Arizona Report can properly be used to attack the validity of the statistical methodology that was used in this case, a methodology which indisputably has been generally accepted in the scientific community. We will not resolve this debate because questions of

relevance and admissibility simply cannot be answered in a vacuum. The question before us is not whether the Arizona Report *could be relevant*, but rather whether relevance and admissibility were established in this particular case. To answer this question, we consider the evidence that was before the trial court. We will not analyze or address evidence that was presented *only* to Judge Morgan or that the parties have culled from sources outside this record.

In this particular case, *the only method* by which the defense attempted to present evidence of the Arizona Report to this jury was through its cross-examination of Dr. Holt. Evidence Code section 721, subdivision (b) (section 721(b)) states: "If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal or similar publication unless any of the following occurs: [¶] (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion. [¶] (2) The publication has been admitted in evidence. [¶] (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. . . ."

By its plain language, section 721(b) precludes cross-examination of an expert about a report unless one of the exceptions set forth in that statute apply. In the present case, our review of the record confirms that no exception authorized the defense to cross-examine Holt about the Arizona Report.

The section 721(b)(1) exception did not apply because, as the trial court found, Holt's testimony during the section 402 hearing established that she did not refer to, consider or rely on the Arizona Report in arriving at her opinion. As reflected above, Holt testified that she had heard of the report but that she did not read it.

Davis contends that section 721(b)(1) was satisfied notwithstanding the fact that Holt did not rely on the Arizona Report. He cites Jefferson's California Evidence Benchbook (Cont.Ed.Bar, 3d ed. 1982) § 29.72, pp. 644-645) for the proposition that an expert may be cross-examined about a report of a nonwitness expert if "the expert witness testifies that he or she considered or referred to, but did not rely, on" the report.

But the record establishes that Holt did not consider or refer to the Arizona Report. Indeed, she did not even look at it.

Davis argues that Holt "can be deemed to have 'considered' the Arizona Report" because she testified that she was familiar with some aspects of it. This argument is unsupported by reason or relevant authority. Davis also argues that, even if "the witness must actually have read the publication, rather than merely have heard about it, in order to be cross-examined on it, then the trial court erred when it ordered Dr. Holt not to read the Arizona report." That is not what happened. Rather, the court precluded the defense from ordering Holt to read a report that had not been properly authenticated and that she had not previously considered in reaching her expert opinion in this case.

Turning to section 721(b)(2), which authorizes cross-examination of an expert regarding a report that has been admitted into evidence, this exception did not apply because the Arizona Report was not admitted into evidence at trial. On appeal, Davis contends the Report should have been admitted because it was relevant. However, as best we can determine, Davis's trial counsel never actually offered the Arizona Report into evidence.

In any event, Davis fails to convince us that he made a sufficient showing that the Arizona Report was relevant in this case. Preliminarily, we reiterate that this showing cannot now be made with evidence that was presented only to Judge Morgan at the pre-trial proceeding. Beyond that, Davis contends that Mueller's declaration establishes that the Arizona Report was relevant and argues that the only reason he did not call Mueller to San Francisco to testify was that the court refused to change its prior ruling that the Report was not relevant. First, the trial court ruled that the Mueller declaration was inadmissible hearsay, a ruling Davis does not dispute on appeal. Second, the court did not preclude Davis from calling Mueller or any other expert to testify about the Arizona Report; indeed it urged the defense to do just that.

Finally, section 721(b)(3), which authorizes cross-examination of an expert about a report if it has been established as reliable by the testimony or admission of any expert or by judicial notice, did not apply in this case. As the trial court noted, the document

appeared unreliable on its face because it was not published and was accompanied by the disclaimer that it had been prepared for litigation and produced pursuant to a court order for a very limited purpose. Furthermore, Barlow's testimony was insufficient to establish reliability because she was attempting to act as both defense counsel and an expert in the same case. Furthermore, Barlow did not even purport to be an expert at calculating random match statistics. Nor could the defense properly use Barlow to introduce hearsay opinions of actual experts on that subject. Finally, as noted above, the court properly excluded the Mueller declaration because he was not present and available for cross-examination.[8] Therefore, there simply was no expert testimony before this trial court establishing the reliability of the Arizona Report.

To summarize, the appellate record establishes that Dr. Holt did not consider, refer to or rely on the Arizona Report, that report was not admitted or even offered into evidence at trial, and the reliability of the report was not otherwise established. Therefore, Evidence Code section 721 precluded the defense from cross-examining Holt about the Arizona Report. Furthermore, as a purely factual matter, the defense was not precluded from presenting its own expert to testify about the content and import of the Arizona Report.

C. *The Prosecutor's Comment*

During her closing argument to the jury, the prosecutor made the following comment: "The defendant did suggest during the trial that there was some issue with the statistics. There is no evidence however that there was any issue with the statistics. None. [¶] Every crime lab in the United States of America, every single one, uses the same method to calculate these statistics."

Davis argues, as he did in the trial court, that this comment was misconduct because "the sole reason" that contrary statistical evidence was not introduced at trial

[8] The parties spend significant time debating the merits of Mueller's expertise and opinions regarding perceived flaws in the random match probability methodology that was used in this case. We decline to address these issues in light of the fact that Mueller did not appear as an expert in this case.

"was because the prosecutor succeeded in excluding it." According to Davis, the prosecutor's comment was an improper half-truth because she blamed the defendant for failing to produce evidence when she was the one who prevented him from doing so. To support his conclusion that the comment was misconduct, Davis directs our attention to *People v. Frohner* (1976) 65 Cal.App.3d 94, 103 (*Frohner*).

The *Frohner* court reversed appellant's drug conviction because it found his case was severely prejudiced by (1) the prosecutor's failure to make a reasonable effort to locate the state's informant and (2) the trial court's refusal to re-open the case after jury deliberations commenced once the information was located. (*Frohner, supra*, 65 Cal.App.3d at p. 110.) The court also noted that other trial errors had occurred including that the prosecutor committed misconduct during closing argument by telling the jury that, if the defense had wanted the jury to see the People's informant, he could have used a subpoena to bring him in. (*Id*. at p. 108.) This comment was inexcusable, the court found, because the prosecutor knew that a subpoena could not be served on the informant and "[t]he only apparent reason for the comment" was to improperly "suggest to the jury that defendant had purposely failed to call [the informant] as a witness." (*Id*. at p. 109.)

Davis contends that the prosecutor in this case made the same type of comment that the *Frohner* court characterized as misconduct. We disagree. The *Frohner* prosecutor's comment was improper because he *erroneously* blamed the defendant for failing to produce a witness who was unavailable because the prosecutor had failed his duty to make a reasonable effort to locate that witness. In this case, by contrast, the prosecutor did not violate any duty by objecting to defense efforts to admit the Arizona Report via its cross-examination of the prosecution's expert witness. Thus, there was nothing erroneous or misleading about the prosecutor's observation to the jury that the defense challenged the prosecutor's statistics but failed to produce contrary statistical evidence.

Davis insists that the prosecutor's comment was erroneous because she "urged a conclusion–that there was no contrary statistical evidence–which was wrong, and which the prosecutor knew was wrong." This contention hinges on the premise that the Arizona

Report constituted competent contrary statistical evidence, a premise that the prosecutor rejected and that the defense failed to substantiate in the trial court. Our review of the record before us confirms that there was no contrary statistical evidence presented at trial and the prosecutor's remark to that effect was fair comment.

Davis intimates that a prosecutor commits misconduct by commenting on the absence of evidence to which he or she successfully objected even if that objection was sound. Case law holds otherwise. (*People v. Lawley* (2002) 27 Cal.4th 102, 152-156 (*Lawley*).) Misconduct means "the use of deception or reprehensible methods to persuade the jury. [Citation.]" (*Id.* at p. 156.) Thus, a prosecutor may commit misconduct by improperly capitalizing on erroneous evidentiary rulings during closing argument. However, when "the prosecutor's argument constituted fair comment on the evidence, following evidentiary rulings we have upheld, there was no misconduct." (*Ibid.*)

D. *Miranda/Doyle error*

As reflected in our factual summary above, the jury heard an audiotape recording of Spillane's December 2002 interview of Davis which concluded with the following statement by Davis: "I ain't got no more to say to you 'til I can get an attorney you know. This is fucked up." On appeal, Davis objects to the admission of this quoted statement, contending that the fact that he implicitly invoked his right to silence by requesting an attorney should not have been used against him. (Citing *Miranda*, *supra*, 384 U.S. at p. 468 and *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).)

Davis forfeited this claim of error by failing to raise it in the trial court. (*People v. Huggins* (2006) 38 Cal.4th 175, 198-199 (*Huggins*); *People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) Although Davis's trial counsel did move to exclude the entire December 22 interview on the ground that his *Miranda* rights were violated, the defense never objected that the specific comment quoted above was inadmissible. Nevertheless, we will address the merits of this argument because Davis contends that, if this issue was not properly preserved, he was denied the effective assistance of counsel.

In *Doyle, supra*, 426 U.S. at page 618, the United States Supreme Court held that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." As the court explained, "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." (*Ibid*.)[9]

The *Doyle* rule rests "on the fundamental unfairness presented by a breach of the implicit promise that the prosecution will not use at trial a defendant's silence: 'The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.' [Citations.]" (*People v. Quartermain* (1997) 16 Cal.4th 600, 619.) Our Supreme Court has acknowledged that the rationale of the *Doyle* rule applies with equal force to comments which penalize the exercise of the right to counsel. (*Huggins, supra*, 38 Cal.4th at pp. 198-199.)

In the present case, evidence of Davis's invocation of his right to counsel was admitted as part of the December 22 interview. However, it does not appear to us that the prosecutor ever made any reference to that invocation during the trial itself. Indeed, it appears the comment was included simply to signify when the interview ended. Nevertheless, Davis is adamant that introducing *any evidence* that he invoked his right to counsel or silence constituted automatic error. Evidence of the invocation all by itself, Davis reasons, could lead the jury to infer that the defendant has something to hide.

We reject this proposed automatic error rule for several reasons. First, Davis fails to cite authority which either articulates or applies such a per se rule. Second, Davis ignores authority holding that it is not always "error to permit evidence that a defendant

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[9] The *Doyle* rule was foreshadowed in *Miranda* itself, where the Court stated: "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute, or claimed his privilege in the face of accusation." (*Miranda, supra,* 384 U.S. at p. 468, fn. 37.)

exercised his right to counsel." (*Huggins*, *supra*, 38 Cal.4th at p. 198.) Indeed, claims of *Doyle* error have repeatedly been rejected when, as here, " 'the prosecutor did not invite the jury to draw any adverse inference from either the fact or the timing of defendant's exercise of his constitutional right." (*Id.* at p. 199; see also *People v. Crandell* (1988) 46 Cal.3d 833, 878*; People v. Hughes* (2002) 27 Cal.4th 287, 332, fn. 4.)

There may be a case in which the circumstances raise a legitimate concern that the jury may have drawn an improper inference from evidence that the defendant invoked his *Miranda* rights even though the prosecutor did not comment on that invocation. But Davis does not identify any such circumstance in the present case.

Under the circumstances presented here, where the invocation of the right to counsel was admitted as part of a recorded statement that was otherwise admissible, where there was no objection raised in the trial court, and where the prosecutor did not use the invocation to invite the jury to draw an adverse inference or, indeed, make any reference to the comment at all, we conclude there was no *Doyle* error.

E. *Confrontation Clause Rights*

1. *Issues presented*

Davis contends that the trial court violated his constitutional right to confront witnesses against him by (1) admitting the Martz autopsy report into evidence; (2) permitting Dr. Hart to testify about the contents of the Martz autopsy report which was prepared by Dr. Duazo; and (3) permitting Dr. Holt to testify regarding the results of DNA testing/analysis that was performed by Bonnie Cheng.

2. *Legal Principles*

The Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment, states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." In *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*), the United States Supreme Court held that a defendant's Sixth Amendment right of confrontation is violated by the admission of testimonial statements of a witness who was not subject to cross-

examination at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination.

Crawford overruled *Ohio v. Roberts* (1980) 448 U.S. 56, 57 which previously held that evidence with "particularized guarantees of trustworthiness" was admissible without confrontation. As the *Crawford* court explained, "[t]o 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. . . . [¶] Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (*Crawford, supra*, 541 U.S. at pp. 61-62.)

The *Crawford* court declined to "spell out a comprehensive definition of 'testimonial.'" The court anticipated (correctly) that its refusal to do so would cause interim uncertainty. (*Crawford, supra*, 541 U.S. at p. 68.)

In *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), our Supreme Court held that a DNA report that was relied on but not prepared by the People's expert was not a testimonial statement within the meaning of *Crawford, supra*, 541 U.S. at page 52. In that case, the analyst who compared DNA recovered from inside a rape victim with the defendant's DNA prepared a report of her findings but did not testify at trial. Instead, the substance of the DNA report was conveyed to the jury through the testimony of the People's expert.

The *Geier* court announced the following test for determining whether "scientific evidence" like the DNA report before it constituted a testimonial statement: "For our purposes in this case, involving the admission of a DNA report, . . . a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Geier, supra*, 41 Cal.4th at p. 605.) Applying this test, the *Geier* court found that the DNA report was not a testimonial statement because, although the first and third criteria

were satisfied, the second was not. The court found that the DNA report did not describe past facts relating to criminal activity because the analyst's observations constituted "a contemporaneous recordation of observable events rather than the documentation of past events. That is, she recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (*Id*. at pp. 605-606.) This fact was crucial, the court reasoned, because when the analyst made her observations she was not acting as a witness and, therefore, was not testifying. (*Ibid*.)

Recently, the United States Supreme Court revisited the question of what constitutes a testimonial statement. (*Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*).) The *Melendez-Diaz* defendant was convicted of distributing and trafficking cocaine based, in part, on "certificates of analysis" that were introduced into evidence at trial. These certificates, which were mandated by and prepared in accordance with state law, reported that the results of forensic analysis showed that material the police had seized from the defendant was cocaine. The *Melendez-Diaz* court held that the certificates were testimonial statements because they were declarations made for the purpose of establishing a fact made under circumstances which would lead the affiant to believe or in fact know that the statements would later be used at trial. (*Id*. at pp. 2531-2532.) Therefore, the analysts who made the statements were witnesses for purposes of the Sixth Amendment. (*Id*. at p. 2532.)

The *Melendez-Diaz* court made several important points regarding the nature of a testimonial statement, points which eliminate much of the uncertainty that the *Crawford* court predicted its decision might cause.

First, an individual who makes a statement need not be an "accusatory" witness for the Clause to apply; if the statement is being used against the defendant, it is adverse testimony even if the individual who prepared it is not a direct accuser. (*Melenzez-Diaz, supra,* 129 S.Ct at pp. 2533-2534.) In this regard, the court expressly rejected the notion that a witness could be "helpful to the prosecution, but somehow immune from confrontation." (*Ibid*.)

Second, the Confrontation Clause is not limited to statements made by "conventional" witnesses. Thus, statements are not exempt simply because they (a) recount "near contemporaneous" observations as opposed to recalling events observed in the past, (b) do not pertain to observations of the crime or any human action related to it, or (c) were not provided in response to interrogation. (*Melendez-Diaz, supra*, 129 S.Ct at pp. 2534-2535.)

Third, statements pertaining to allegedly "neutral" scientific tests are not excepted from the requirements of the Confrontation Clause. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2536.) *The Melendez-Diaz* court expressly rejected the contention that "there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is 'prone to distortion or manipulation,' and . . testimony . . . which is the 'resul[t] of neutral, scientific testing.' " (*Ibid*.) Carving out an exception for scientific testing would, the court explained, resurrect an overruled line of authority which previously held that evidence with " 'particularized guarantees of trustworthiness' " was admissible without confrontation. (*Ibid*.)

Fourth, "business records" are subject to the Confrontation Clause if they are testimonial statements, i.e., statements made for the purpose of establishing or proving some fact at trial. (*Melendez-Diaz, supra*, 129 S.Ct. at pp. 2538-2540.) In this regard, the court expressly declined to approve a purported common law rule that coroner's reports are admissible without confrontation. (*Id.* at p. 2538.)

The *Melendez-Diaz* court also clarified the relationship between the business records exception to the hearsay rule and the Confrontation Clause, as follows: "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because–having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial–they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here–prepared specifically for use at 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 pp. 2539-2540.)

Finally, the *Melendez-Diaz* court cautioned that the requirements of the Confrontation Clause cannot be relaxed to accommodate the " 'necessities of trial and the adversary process.' " (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2540.) As the court explained, notwithstanding the fact that it may make the prosecution of criminal trials more burdensome, the Confrontation Clause "is binding, and we may not disregard it at our convenience." (*Id*. at p. 2540.)

While the principles set forth in *Melendez-Diaz* clarify the test for identifying testimonial statements requiring confrontation, this case has also raised questions about the continuing validity of post-*Crawford* tests that were formulated without the benefit of these principles. For example, the issue of whether *Melendez-Diaz* undermines the *Geier* test is currently pending before our Supreme Court. (See, e.g., *People v. Dungo* (2009) 176 Cal.App.4th 1388, rev. granted Dec. 2, 2009, S176866; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, rev. granted Dec. 2, 2009, S176620; *People v. Rutterschmidt* (2009) 176 Cal.App.1047, rev. granted Dec. 2, 2009, S176213; *People v. Lopez* (2009) 177 Cal.App.4th 202, rev. granted Dec. 2, 2009, S177046.)

3. *Analysis*

1. *The autopsy report*

Applying the principles summarized above, we conclude that the trial court erred by admitted the Martz autopsy report into evidence at trial. The report was a testimonial statement because it was prepared in anticipation of and for the purpose of use at a criminal trial, and was used at that trial to establish numerous facts necessary to convict Davis, including that Martz was raped and stabbed to death during a struggle, and that DNA essential to the prosecution case was extracted from her body. The autopsy report should not have been admitted at trial because its author, Dr. Duazo, did not testify and no showing was made that he was unavailable or had previously been subject to cross-examination.

The People contend that autopsy reports are admissible without confrontation pursuant to Evidence Code sections 1271 and 1280. Those statutes provide that business records are not made inadmissible by the hearsay rule, but they do not and, indeed, could

not except a testimonial statement from the requirements of the Confrontation Clause. (*Melendez-Diaz, supra*, 129 S.Ct. at pp. 2538-2540 [business records which constitute testimonial statements require confrontation].)

The People further contend that an autopsy report is admissible absent confrontation because it is created for administrative purposes and not for the purpose of establishing or proving a fact at trial. The *Melendez-Diaz* court acknowledged that many business records will be admissible absent confrontation because they were created for the administration of an entity's business affairs and not for the purpose of establishing or proving a fact at trial. (*Melendez-Diaz, supra*, 129 S.Ct at pp. 2539-2540.) However, the People fail to convince us that the autopsy report falls into this category. For example, they rely on the fact that autopsy reports are prepared pursuant to statutory mandates and in accordance with standardized medical protocol. But the same was true of the affidavits at issue in *Melendez-Diaz*. Furthermore, the People erroneously assume that because autopsy reports are prepared in the ordinary course of business they are not subject to confrontation. When the business of the individual is to generate statements that will be used to prove facts at a criminal trial, confrontation is required.

The People contend that an autopsy report is analogous to a medical record and then rely on authority from outside this jurisdiction which holds that medical records of hospital tests and procedures are not testimonial statements because they are prepared for the purpose of rendering treatment. (See *Baber v. State* (2000) 775 So.2d 258, 260-262; *State v. Garlick* (Md. 1988) 545 A.2d 27, 34-35.) However, an autopsy report is not analogous to a medical record generated for the purpose of facilitating medical treatment of a live person. The autopsy report documents the circumstances and cause of death and thus cannot be used for rendering treatment. In the present case, there can be no doubt that Dr. Duazo understood that he was performing an autopsy on the victim of a crime and that his report might well be used at a criminal trial for the purpose of establishing facts necessary to obtain a conviction.

The People make various other arguments to the effect that autopsy reports are particularly reliable, pointing out, for example, that they are prepared contemporaneously

with the performance of the autopsy itself. However, perceived guarantees of trustworthiness do not justify violating the Confrontation Clause. (*Crawford, supra*, 541 U.S. at pp. 61-62; *Melendez-Diaz, supra*, 129 S.Ct at p. 2536.)

2. *The Experts' testimony*

As reflected in our factual summary, the prosecution called two expert witnesses who testified at trial about reports they did not author which pertained to the evidence in this case. Dr. Hart testified about the Martz autopsy that was conducted by Dr. Duazo and about the content of the autopsy report. Furthermore, Dr. Holt testified about DNA tests that were performed by Bonnie Cheng and about the conclusions that Cheng recorded in her reports.

We have already concluded that the autopsy report is a testimonial statement. Consistent with our analysis above, we also hold that Cheng's notes and reports were testimonial statements within the meaning of *Melendez-Diaz*. There is no question that those notes and reports were made for the purpose of use at trial to establish facts necessary to convict Davis. Further, the record does not reflect that either Duazo or Cheng were unavailable at the time of trial or that either was subject to prior cross-examination by Davis. Therefore, we hold that Davis's confrontation rights were violated when both Hart and Holt were permitted to testify about the content of testimonial statements they did not prepare.

The People contend that these two experts properly testified about the reports they did not prepare pursuant to Evidence Code section 801, subdivision (b). That statute authorizes an expert to base her opinion on reliable hearsay unless the "expert is precluded by law from using such matter as a basis for his opinion." Thus, the People cannot use that provision to avoid a constitutional problem. In any event, under *Crawford*, otherwise admissible hearsay evidence is nevertheless subject to the restrictions of the Confrontation Clause. (*Crawford, supra*, 541 U.S. at p. 51.) "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." (*Ibid.*)

The People contend there was no confrontation problem because both Hart and Holt were subject to cross-examination at trial. However, the People ignore the fact that the prosecutor used both of these witnesses to admit evidence of this defendant's guilt in the form of testimonial statements prepared by individuals who were *not* subject to cross-examination.

Finally, the People contend that the confrontation issues relating to testimony by these experts are governed by *Geier, supra*, 41 Cal.4th 555, and not by *Melendez-Diaz*. They reason that *Melendez-Diaz* is inapposite because it did not involve the testimony of a qualified expert and that *Geier*, which is still the controlling authority in this state, holds that a qualified expert, who appears at trial and is subject to cross-examination, may properly rely on and tell the jury about another individual's testimonial statement.

First, *Geier* did not hold that an expert can properly testify about another individual's *testimonial* statement. Rather, the court held that the DNA report at issue in that case *was not* a testimonial statement under *Crawford*. (*Geier, supra*, 41 Cal.4th at pp. 605-606.) The court reasoned that the non-testifying analyst's report was a contemporaneous recordation of observable events rather than documentation of past events. The fact that the analyst generated her report as she was actually performing her tests led the *Geier* court to conclude that she was not acting as a witness when she made and recorded her observations. (*Ibid*.) In our view, this rationale is directly undermined by the principles announced in *Melendez-Diaz*. [10]

Second, the *Geier* court did not hold nor intimate in any way that a testimonial statement which would otherwise be subject to the restrictions of the Confrontation Clause could nevertheless be admitted into evidence through the testimony of an expert who did not make that statement herself. The People do not cite any authority supportive

[10] The People note that the United States Supreme Court declined the opportunity to review *Geier* just four days after deciding *Melendez-Diaz*. (See *Geier v. California* (2009) __ U.S. __ [129 S.Ct. 2856].) However, the *Geier* court expressly found that any confrontation error that may have occurred in that case was harmless beyond a reasonable doubt. (*Geier, supra*, 41 Cal.4th at pp. 606-607.) It occurs to us that subsequent review by the United States Supreme Court may have been deemed unnecessary for this reason.

of this proposition which, in any event, is unsound in light of *Melendez-Diaz*, *supra*, 129 S.Ct 2527.

3. *Prejudice*

Violations of the Confrontation Clause require reversal of the judgment unless they are harmless beyond a reasonable doubt. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *People v. Davis* (2009) 46 Cal.4th 539, 620.) In the present case, the evidence that was admitted in violation of Davis's confrontation rights was crucial to his conviction. Indeed, the People do not contend otherwise.

IV. DISPOSITION

The judgment is reversed and this case is remanded for further proceedings consistent with this decision.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.