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**Name:** People v. Dungo  
**Type:** Panel Victories  
**Categories:** Areas Constitutional Law > Confront/Cross-exam  
Evidence > Examination of Witness  
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Evidence > Scientific Evidence

**Opinion Date:** 8/24/2009  
**Court:** CA Court of Appeal  
**District:** 3 DCA  
**Division:**  
**Case #:** C055923  
**Attorney Name:** Ann Hopkins

### Summary



Appellant admitted choking his girlfriend to death, but said he did so only after she physically and verbally provoked him to the point where he lost control, in testimony that had some corroboration. The autopsy report helped the prosecution, but it was not offered as evidence, and the pathologist who did the autopsy did not testify because the county district attorney refused to use him as a witness in homicide cases, due to serious questions about the accuracy of his work in other counties. Instead, his supervisor gave opinions based on the autopsy he did not perform and the report he did not prepare, over Confrontation Clause objections. The Court of Appeal reversed appellant's second-degree murder conviction, because admission of the supervisor's testimony violated the Confrontation Clause. In light of *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. \_\_\_ [129 S.Ct. 2527, 174 L.Ed.2d 314], the autopsy report was "testimonial" under *Crawford v. Washington* (2004) 541 U.S. 36, because a California autopsy is an official inquiry into a death that could be criminally related, and is part of a law enforcement investigation. It did not matter that unlike *Melendez-Diaz*, the autopsy report here was not introduced into evidence; the report was formally prepared in anticipation of a prosecution, and "this is the sort of evidence - cloaked in the authority of a medical examiner and inherently designed to aid criminal prosecution - that the United States Supreme Court has warned against exempting from Sixth Amendment protections." Nor did it matter that the supervisor could be cross-examined, because the defense was still unable to explore the possibility that the pathologist lacked proper training or had poor judgment, and to test his honesty, proficiency and methodology; "notably, that was the prosecution's intent." The error was prejudicial, because much of the prosecution's case that appellant was guilty of murder rather than voluntary manslaughter was based on the autopsy report's conclusion as to how long the girlfriend was strangled before she died.

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