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No. 61804-1-I
King County Superior Court No. 07-1-04039-7 SEA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Plaintiff/Appellee,

v.

SIONE P. LUI,
Defendant/Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Trickey, Judge

APPELLANT'S REPLY BRIEF

David B. Zuckerman
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-1595

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I.
STATEMENT OF THE CASE

The State concedes that the 2001 murder of Elaina Boussiacos was "unsolved" until 2007. BOR at 13. The only new testimony the State points to after that time, however, involves an interview with Lui in March, 2007. BOR at 13-15. The detectives tricked Lui into speaking with them by falsely stating that they had gathered information on two suspects. BOR at 13-14. They then grilled him for several hours about events that were now six years old. XIII RP 1660-65. Lui never confessed to the crime. At most, he made some statements that were arguably inconsistent with information the police had gathered from others. BOR at 14-15. The worst of it appears to be that Lui denied knowing what had happened to Boussiacos' wedding ring although there was evidence he gave it to his new wife. BOR at 15.[1] That Lui might not wish to reveal such ungentlemanly conduct, however, hardly proves that he committed murder.

The State points out that Lui told the detectives that Boussiacos's ex-husband, James Negron used to be in a gang, and asserted that he "used

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people." BOR at 14. The State then suggests that James Negron "had established an alibi." BOR at 14 n.15, citing to X RP 1428. The apparent purpose of this is to imply that Lui was making outrageous accusations against Negron to deflect blame from himself. The State does not mention that it successfully excluded any other testimony pointing to Negron as an alternate suspect.

At a pretrial hearing on March 24, 2008, the State moved to exclude any evidence pointing to another suspect. I RP 50. See also CP 9. Specifically, the State was concerned that various witnesses told the police that Negron and Boussiacos used to be involved in gangs . I RP 52. The State also move to exclude evidence that Anthony Negron, the son of James Negron and Elaina Boussiacos, would return with bruises after visiting his father. I RP 53. All of these requests were granted. I RP 51-53.

Nevertheless, after redacting Lui's statement to Detective Peters (see I RP 46), the State chose to leave in Lui's comments about Negron's gang membership. Supp CP ___; Ex. 169 at 27-28. Among other things, Lui said that Boussiacos told him that Negron used to kill people and that she feared him. The State also asked Detective Bartlett to confirm that Negron had an alibi and she responded: "That is correct." XVI RP 1428.

Defense counsel failed to object that the question was leading and that the answer could only have been based on hearsay. There is nothing else in the trial record to reflect any meaningful alibi for Negron.

Thus, it is hardly fair to view Lui's comments about Negron as tending to prove *Lui*'s guilt. Lui was merely repeating what Boussiacos told him, and the State excluded all corroborating evidence pointing to Negron and had no proof that Negron had an "alibi."

II.
ARGUMENT

A. THE TESTIMONY OF DR. HARRUFF AND MS. PINEDA VIOLATED THE CONFRONTATION CLAUSE

1. The U.S. Supreme Court's Ruling in *Melendez-Diaz* Invalidates Much of the State's Argument

As Lui noted in his Corrected Appellant's Opening Brief (AOB), the U.S. Supreme Court's upcoming decision in *Melendez-Diaz v. Massachusetts* would shed light on the issues presented here. The decision issued on June 25, 2009. *Id.*, -- U.S. --, 129 S. Ct. 2527, -- L. Ed. 2d -- (2009). The Court held that the admission of a forensic analyst's written report in lieu of live testimony violated the Confrontation Clause. In its Brief of Respondent (BOR), the State contended that "[t]he Supreme Court's opinion in *Melendez-Diaz* is unlikely to resolve this appeal, since

it does not address a situation where a different expert appears for cross-examination." BOR at 18. While the State is correct that the facts of *Melendez-Diaz* can be distinguished in that way, the Supreme Court's analysis shows that the same principles apply in either case.

First, the majority rejected the dissent's argument that analysts are not "conventional witnesses" (and thus not subject to confrontation) because they "observe[d]" neither the crime nor any human action related to it." *Id.* at 2535. "The dissent's novel exception from coverage of the Confrontation Clause would exempt all expert witnesses – a hardly 'unconventional' class of witnesses." *Id.* Thus, it is clear that an "expert" witness is treated no differently from any other witness for purposes of the Confrontation Clause.

Second, the Court explained that the result did not depend on whether the non-testifying analyst's materials might be considered business or official records under state law. *Id.* at 2539-40. "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." *Id.* at 2540.

Third, it is irrelevant whether the out-of-court statements are "prone to distortion or manipulation" or are "the resul[t] of neutral, scientific testing." Forensic lab reports would be testimonial even if "all analysts always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa." *Id.* at 2537 n.6.

Fourth, the defendant's ability to subpoena the missing witness is "no substitute for the right of confrontation." *Id.* at 2540. "[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Id.*

As the dissent recognized, the majority's decision clearly prohibited one expert witness from testifying about work done by another, even if the one who signs the report appears in court. *Id.* at 2545-46. "[T]he Court has already rejected this arrangement. The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second:

> [W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman [here, the laboratory employee who signs the certificate] recite the unsworn hearsay testimony of the declarant [here, the analyst who performs the actual test], instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it."

Id. at 2546, quoting *Davis v. Washington*, 547 U.S. 813, 826, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (bracketed comments added by dissent in *Melendez-Diaz)*. "Under this logic, the Court's holding cannot be cabined to the person who signs the certificates. *If the signatory is restating the testimonial statements of the true analysts – whoever they might be – then those analysts, too, must testify in person.*" *Id.* at 2546 (emphasis added).

The above portion of the *Melendez-Diaz* dissent accurately stated the implications of the majority opinion. Although the majority spent most of its opinion *rejecting* various criticisms of the dissent as exaggerations, *id.* at 2532-42, it did not dispute this point.

Further, the majority's resolution of the petition for a writ of certiorari in *Ohio v. Crager*, 116 Ohio St.3d 369, 879 N.E.2d 745 (2007), shows that it agrees with the dissent on this point. *Crager* is precisely on point with Lui's case. The trial court relied on *Crager* when admitting the expert testimony. *See* XII RP 1478-80. Similarly, the State relies heavily on *Crager* in the BOR at 45-48. It correctly characterizes *Crager* as a case "remarkably similar to this one." BOR at 46.

On June 29, 2009, four days after the opinion issued in *Melendez-Diaz*, the Supreme Court issued the following order in *Crager*:

> The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted.

> The judgment is vacated and the case is remanded to the Supreme Court of Ohio for further consideration in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. ___ (2009).

Crager v. Ohio, No. 07-10191, -- U.S. --, 2009 WL 1841607 (2009). The Supreme Court will issue such an order only when an intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S. Ct. 604, 133 L. Ed. 2d 545 (1996).[2]

In *Crager*, as here, the State introduced DNA evidence through an expert witness from its own crime laboratory. *Ohio v. Crager*, 116 Ohio St.3d. at 371. The analyst who actually performed the testing was not produced because she was on maternity leave. *Id.* The testifying analyst performed a "technical review" of the other's work, which "involved reviewing her notes, the DNA profiles she generated, her conclusions, and

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[2] On June 29, 2009, the Supreme Court denied without explanation petitions for writs of certiorari in some other cases that raised issues similar to those in *Melendez-Diaz.* The "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 361 (1923) (Holmes, J.). *Accord, Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366, n. 1, 93 S. Ct. 647, 650, n. 1, 34 L. Ed. 2d 577 (1973); *Brown v. Allen*, 344 U.S. 443, 489-497, 73 S. Ct. 397, 437-441, 97 L. Ed. 469 (1953). "The variety of considerations that underlie denials of the writ, counsels against according denials of

the final report." *Id.* at 373. He came to an independent opinion regarding the conclusions. *Id.*

The Ohio Supreme Court relied on its prior decision in *State v. Craig*, 110 Ohio St. 3d 306, 853 N.E.2d 621 (2006), *cert. denied*, 549 U.S. 1255, 127 S. Ct. 1374, 167 L. Ed. 2d 164 (2007), which held that a defendant's confrontation rights were not violated when a doctor who did not perform the autopsy testified about it in court. *See Crager*, 116 Ohio St.3d at 378-79. It recognized, as Lui maintains, that the same analysis applies in both situations. The Court found that the work of the original DNA analyst – like the work of the autopsy doctor – was not "testimonial" because it merely documented "objective findings." *Id.* Ultimately, the Court found that, because the testifying analyst had reached his own conclusions, he conveyed any "testimonial" aspects of the DNA examination. *Id.* at 384. There was no confrontation violation in the Court's view because the testifying analyst could be questioned about "the procedures that were performed, the test results, and his expert opinion about the conclusions to be drawn from the DNA reports." *Id.* (citations and internal quotations omitted).

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certiorari any precedential value." *Teague v. Lane*, 489 U.S. 288, 296, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (citations and internal quotations omitted).

The reasoning of the Ohio court is essentially the same as that of the trial court in this case. *See* XII RP 1476-82. By noting that its decision in *Melendez-Diaz* undermined the reasoning in *Crager*, the U.S. Supreme Court necessarily rejected the reasoning in this case as well.

Even before *Melendez-Diaz* issued many lower courts, relying on prior U.S. Supreme Court cases, rejected the sort of reasoning expressed in *Crager*. *See* AOB at 26-29. *See also, Maine v. Mangos*, 957 A.2d 89, 2008 ME 150 (2008) (confrontation violation where DNA lab supervisor testified based on work of analyst); *McMurrar v. Indiana*, 905 N.E.2d 527 (2009) (quality assurance manager of lab testified to drug test performed by analyst); *United States v. Mejia*, 545 F.3d 179, 198-99 (2d Cir. 2008) (gang expert violated confrontation clause by basing opinion on statements of others).

2. <u>The State's Arguments Regarding Dr. Haruff's Testimony are Flawed</u>

The State contends that the autopsy report of Dr. Raven was not "testimonial" because it was a "business record", prepared "pursuant to statutory authority in the regular course of business of the Medical Examiner's Office." BOR at 24. It maintains that Dr. Harruff could rely on "objective facts" documented in the report. BOR at 26. It cites

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) for the proposition that business records are not testimonial.

As discussed above, however, the *Melendez-Diaz* court rejected the notion that forensic records prepared in the investigation of a crime could be exempt from the Confrontation Clause, whether or not they might qualify as "business records" or "public records" under state law. In fact, the Court specifically noted that "coroner's reports" were not traditionally "accorded any special status in American practice." *Melendez-Diaz*, 129 S. Ct. at 2538. The Court clarified its comment in *Crawford* concerning business records: "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." *Id.* at 2539-40. In this case, Dr. Raven's report – like the forensic report in *Melendez-Diaz*, was clearly "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*, 129 S. Ct. at 2531, quoting *Crawford*, 541 U.S. at 52. When a dead body is found in the trunk of a car with signs of

violence, there can be no doubt that the medical examiner is involved in a homicide investigation.

As noted in the AOB at 9, Dr. Haruff also relied on and recited the toxicology analysis of Boussiacos's blood. Such chemical analysis, of course, falls within the precise holding of *Melendez-Diaz.*

The State next argues that, even if Dr. Raven's report is testimonial, "Dr. Harruff's testimony satisfied Lui's confrontation right." BOR at 29. It relies on the reasoning of the Ohio Supreme Court in *Ohio v. Craig, supra.* BOR at 30-31. As noted above, the Ohio Supreme Court followed the same reasoning in *Crager*, and was reversed by the U.S. Supreme Court in view of *Melendez-Diaz.*

Finally, the State maintains that any confrontation violation regarding Dr. Haruff's testimony was harmless beyond a reasonable doubt. BOR at 33-36. It contends, for example, that his conclusion that Boussiacos could have been killed on February 2 or February 3 was immaterial since the charging period was technically February 2 through February 9. BOR at 35. It was fundamental to the State's theory of the case at trial, however, that Lui killed Boussiacos sometime after she was last seen on the evening of February 2 and before her plane was scheduled to leave in the morning of February 3. In closing argument, the prosecutor

discussed at length how various bits of circumstantial evidence fit that scenario. XIV RP 1809-42. Among other things, she ridiculed the testimony of a defense witness who maintained that Boussiacos' car did not appear in the parking lot of the Woodinville Athletic club until several days after February 3. XIV RP 1840-42. In rebuttal argument, the second prosecutor likewise maintained that Boussiacos was killed no later than the early morning of February 3. XIV RP 1887.

As Lui has pointed out, Dr. Haruff's testimony was also used to prove intent to kill, to explain the lack of bloodstains in the Lui residence, and to contradict Lui's suggestion that Boussiacos was killed when she sneaked out of the house to smoke. AOB at 9-10. The State now belittles all of these points, BOR at 35-36, although they were urged to the jury as evidence of guilt.[3] As discussed further below in section 3, it is not clear what evidence the State now believes to strongly support guilt, if the extensive forensic testimony in this case was truly insignificant.

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[3] The State now suggests that the defense used to its advantage Dr. Harruff's testimony that strangulation would take significant time, because it argued that would be inconsistent with a murder committed in a "jealous rage." BOR at 36. The defense was forced to make that weak argument in view of Dr. Harruff's testimony, but the jury likely found it plausible that a jealous, angry man could kill by strangulation just as he could kill by other methods. Without Dr. Harruff's testimony, the defense would have had the stronger argument that the State had simply failed to prove the element of intent to kill.

3. The State's Arguments Regarding Ms. Pineda's Testimony are Flawed

The State's first argument is that the report of the DNA scientists who actually analyzed the samples are not "testimonial" because they are merely a "contemporaneous recording of observable events." BOR at 44. It relies on several state-court cases from various jurisdictions which "have reached the same conclusion, for essentially the same reasons." BOR at 45. One of those cases is *Ohio v. Crager* which, as discussed above, was overturned by *Melendez-Diaz*. In any event, the State's premise is incorrect; Pineda relied on the opinions of the analysts as well as their raw data. For example, although the data revealed a second, unknown, male profile in the vaginal wash, Pineda testified that the analysts told her they concluded this was likely only an artifact from the testing process. *See* AOB at 13.

The State next argues that, even if the work of the analysts was testimonial, the Confrontation Clause was satisfied by offering Ms. Pineda up for cross-examination. BOR at 46-50. In this regard, the State relies primarily on the discredited *Crager* case.

Finally, the State contends that any error was harmless. "Lui lived with Boussiacos. The fact that his DNA was on her shoelaces, along with the DNA of her son, was not in itself very damning. Nor was the fact that

he had recently had sex with her particularly incriminating: it was unclear why he chose to hide that." BOR at 50-51. That is not how the evidence was portrayed at trial. That the DNA on the shoelaces was consistent with Lui's was presented to support the State's argument that he dressed Boussiacos after killing her. That Lui's DNA was found in the vaginal wash, although Lui denied recent sex, was used in closing argument to suggest a sinister scenario. *See* AOB at 14. The trial prosecutor contended that Lui falsely denied sex with Boussiacos "because whatever happened in that regard that night was very bad." XIV RP 1828. She argued at length that Lui might have sexually assaulted Boussiacos, perhaps while strangling her. She also came up with an incriminating interpretation of the very small amount of semen detected: "It is entirely possible that there was no completed sex act and that would have been the final humiliation for him." XIV RP 1830.

The State undoubtedly spent a great deal of money to obtain the DNA testing from Orchid Cellmark and to fly Ms. Pineda to Seattle for the trial. Her testimony covers 81 transcript pages. XII RP 1482-62. It is ironic that the State would now contend that this evidence was inconsequential.

In any event, a constitutional error can be harmless only if "the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *State v. Watt*, 160 Wn.2d 626, 636, 160 P.3d 640 (2007). The State does not even attempt to argue that the untainted evidence was overwhelming. As noted above, it concedes that the crime was "unsolved" for six years. If the State does not have enough evidence to even file charges, it can hardly be characterized as "overwhelming." The only new evidence obtained after that was the new DNA testing from Orchid Cellmark, and a statement in which Lui made no confession. Without the testimony of Ms. Pineda, the 2007 statement is the only new evidence. But the mere fact that Lui may have made some misstatements during that interrogation (when suddenly pressed to remember events six years old) hardly amounts to "overwhelming" evidence.

As the State concedes: "no one piece of evidence was dispositive, but the picture as a whole convinced the jury beyond a reasonable doubt that Lui was guilty." BOR at 51. It is impossible to conclude beyond a reasonable doubt that the jury would have reached the same result if two major pieces of the puzzle were missing.

III.
CONCLUSION

For the foregoing reasons, the Court should conclude that the confrontation violations in this case require a new trial.

DATED this 31st day of July, 2009.

Respectfully submitted,

David B. Zuckerman, WSBA #18221
Attorney for Sione P. Lui

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on the following:

Ms. Deborah Dwyer, Senior DPA
King County Prosecutor's Office
516 Third Avenue, W554
Seattle, WA 98104

Mr. Sione Lui#319129
Washington Corrections Center
PO Box 900
Shelton, WA 98584

July 31, 2009
Date

Christina Alburas, Paralegal

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