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Supreme Court No. _____
Court of Appeals No. 61804-1-I

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STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SIONE P. LUI,

Petitioner.

PETITION FOR REVIEW

By:

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A. IDENTITY OF PETITIONER

Sione Lui, through his attorney David Zuckerman, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

On November 23, 2009, Division One of the Court of Appeals filed a published opinion affirming Lui's conviction and sentence. App.

A.

C. ISSUE PRESENTED FOR REVIEW

Is the Sixth Amendment Confrontation Clause violated when an expert witness's testimony is based on the work of others who do not testify, and that work was done for the purpose of the criminal prosecution?

D. STATEMENT OF THE CASE

1. EVIDENCE PRESENTED AT TRIAL

(a) Background

On February 9, 2001, Elaina Boussiacos was found dead in the trunk of her car, which was parked in the lot of the Woodinville Athletic Club (WAC). Her fiancé at the time was Sione Lui. The evidence against Lui was entirely circumstantial. There was no eyewitness to the crime, no confession, and no history of domestic violence between Lui and Boussiacos. The State concedes that the crime was "unsolved" until 2007. Brief of Respondent (BOR) at 13. The only additional evidence acquired

at that time, however, was a new interview of Lui, in which he continued to deny the crime, and some new DNA testing, which is discussed below.

Lui and Boussiacos met in 1999. V RP 425. By the end of 2000 they were living together at an apartment in Woodinville. V RP 414. Their relationship was somewhat volatile and both were jealous. V RP 403-04. But at times they were very happy with each other and spoke of getting married. VI RP 695-96 (testimony of Boussiacos's mother). The status of their engagement frequently changed. Boussiacos would alternately wear or remove her engagement ring, depending on how she was feeling about Lui at the moment. IV RP 371.

In late January, 2001, Boussiacos learned that Lui had been talking with a woman named Sina Packer. Packer and Lui had a sexual relationship in the past but were now just friends. V RP 504-05, 508-11; VI RP 641; VI RP 1424. Nevertheless, Boussiacos was mad at Lui, in particular because he lied about how often he was in touch with Packer. V RP 500-01. Boussiacos told Packer that the engagement was off. V RP 502.

On January 28, 2001, Boussiacos bought a ticket to California. VI RP 623. She planned to visit her mother, Maria Phillips. VI RP 697-98. Phillips testified that Boussiacos spoke of ending the engagement, but Phillips advised her not to do anything rash. VI RP 698-99. On Friday, February 2 at 9:30 p.m., Boussiacos dropped off her son from a previous marriage with his father, Anthony Negron. VI RP 651, 660. Boussiacos's

flight was scheduled to leave at 8:30 a.m. on Saturday, February 3, 2001, but she was not on the flight. VI RP 623.

On Monday, February 5, Phillips informed Lui that her daughter never arrived. VI RP 703. Lui and his friends then made various efforts to search for Boussiacos, including putting up missing person flyers around Woodinville. VI RP 725, 733; XVI RP 1742. Sam Taumoefolau testified, in particular, that he and Lui were in the mall next to the WAC copying and putting up flyers on Tuesday, February 6 and Wednesday, February 7. XVI RP 1739-42. They did not see Boussiacos's car in the club's lot. XVI RP 1775-76. Taumoefolau recalled asking someone at the WAC to put up a flyer. XVI RP 1772. Katherine Wozow, the owner of the WAC, believed that Boussiacos's car had been sitting in her lot since the morning of February 3. VI RP 742-45. She was not aware of anyone requesting to put up missing person flyers at her club. VI RP 747.

On Friday, February 9, WAC staff contacted the police about the car, and the police confirmed that it belonged to the missing person. VI RP 745. Detectives arrived at the club that evening. VII RP 837; VIII RP 948-49. They found Boussiacos's body in the trunk of her car. VII RP 951. She was wearing sweatpants and a long-sleeved t-shirt. VII RP 865-66. She had some injuries including bruising in the area of her neck. VII RP 865. Her bra was stuffed up inside of her shirt. VII RP 866-67. It appeared that she had been dressed by someone else. IV RP 344; XVI RP 1726-28; XVI RP 1832. There was a suitcase, gym bag and "travel bag" in the car. VII RP 886, 895. She wore little makeup.

Several witnesses testified that Boussiacos was in the habit of dressing nicely and putting on makeup whenever she went out. When Sina Packer met with Boussiacos at a restaurant on January 31, 2001 (RP 494-96), however, her hair was pulled back in a pony tail and she had hardly any makeup on. V RP 503.

Nine identifiable fingerprints were found on the car. None of them belonged to Lui. XII RP 1578, 1581.

The detectives found a small blood stain by the stick shift. VII RP 883. It was collected into evidence. VIII RP 1031. The Washington State Patrol Crime Laboratory (WSPCL) obtained a DNA profile from the blood. IX RP 1194-95. It did not match Lui or Boussiacos. IX RP 1224-25.

A very small number of Lui's sperm cells were found on Boussiacos's underpants. IX RP 1220-21, 1271. The cells could have been there for a long time. IX RP 1269-71. Similarly, a very small amount of sperm was found in the vaginal swabs taken from Boussiacos. IX RP 1235-36. Again, the WSPCL scientist could not say how long they had been present. IX RP 1254.

The steering wheel contained Boussiacos's DNA with a trace of unidentified male DNA. IX RP 1218.

The crime scene team from WSPCL was not called out to examine Boussiacos's car for trace evidence. IX RP 1260. Nobody tested her clothing to see whether the perpetrator left skin cells on it when putting her in the trunk. IX RP 1274. Although it appeared that Boussiacos was

strangled, nobody swabbed her neck to see whether the perpetrator left skin cells there. IX RP 1279. *See also*, XVI RP 1727-28.

As discussed in detail below in section (c), the victim's shoelaces contained DNA belonging to either Lui or his son, DNA belonging to either James Negron or his son, and DNA belonging to an unidentified male. The DNA testimony also raised the possibility of a weak, unknown male profile in the vaginal wash. The record does not reflect any attempt to determine whether the unidentified profiles found on the stick shift, the shoelaces, the steering wheel, and the vaginal wash matched each other.

Lui's home was in the total control of the Sheriff's Office for several weeks, beginning on February 9, the day Boussiacos's body was found. XVI RP 1714-15. During that time the police were free to examine and seize any items they wished. XVI RP 1715-16. Lui had no advance notice that he would not be allowed back in the house after February 9. XVI RP 1716. The police found no signs of violence. VIII RP 943-48, 957-58, 1009-11.

On Wednesday, February 14, eleven days after Boussiacos went missing and five days after she was found dead, Detective Denny Gulla arranged for dog tracker Richard Schurman to meet him at the WAC parking lot. VIII RP 959-60. Detective Gulla brought with him an article of male clothing he had found in the Lui household. VIII RP 961. The dog sniffed the clothing and then pursued a track that led through the mall adjacent to the WAC, and ultimately to Lui's home. VIII RP 1072-77. The State's theory was that Lui killed Boussiacos, put her body in the

trunk of her car, drove it to the WAC parking lot, and then walked back to his apartment. XVI RP 1840-41. The defense suggested that the dog was following the more recent path Lui took when he walked through the area with Taumoefolau. VIII RP 1104-06. Schurman could not say when the scent trail was laid down. *Id.* Schurman acknowledged that scent deteriorates over time. VIII RP 1087-89. Bloodhounds are certified based on their ability to follow 24-hour-old trails. VIII RP 1089-90. Regarding an 11-day-old trail, Schurman stated: "I would start to be real cautious about watching my dog's behavior, because they tend to go off trail." VIII RP 1106. The oldest trail he had ever followed was 12 days old. VIII RP 1097.

(b) Testimony of Dr. Harruff

The State presented the testimony of medical examiner Dr. Richard Harruff although Dr. Kathy Raven performed the autopsy in this case. X RP 1337. Dr. Harruff "probably did not see the autopsy directly." X RP 1338. He reviewed Dr. Raven's report, however, and "signed off on it." X RP 1339.

Defense counsel objected that the testimony was based on hearsay. X RP 1341. The Court did not believe the objection was well-taken under the hearsay rules because an expert can rely on hearsay under ER 703. X RP 1345-46. The Court recognized, however, that a separate issue was presented under the Confrontation Clause of the Sixth Amendment. X RP 1346. The prosecutor maintained that the Confrontation Clause was not implicated because Dr. Raven's work was "not testimonial." Rather, [t]his

is a public health requirement.” *Id.* Defense counsel disagreed, noting that the very purpose of an autopsy report in a homicide case is to prepare testimony for trial. X RP 1346-47.

The Court agreed with the defense that “a large purpose of these reports is testimonial.” X RP 1347. Nevertheless, “since he signed off on the report at the time the confrontation requirement is satisfied by him being in court.” The Court therefore overruled the objection. *Id.*

The Court of Appeals mistakenly stated that “Dr. Raven was unavailable to testify at Lui’s trial because she had relocated to Nevada and was testifying in another case.” *State v. Lui* at *1. In fact, the trial prosecutor stated that it would be possible to present her testimony “on Monday” if the trial court found that necessary. X RP 1343.

As Dr. Harruff continued to testify, defense counsel again objected, noting that Dr. Harruff was now relying on and relating information recorded by others besides Dr. Raven, such as the temperature of the victim’s body at the time she was found. X RP 1352-54. As the prosecutor recognized, Dr. Harruff could not give his opinion as to the time of death with relying on the body temperature. X RP 1370. The Court again overruled. X RP 1352-54, 1370-71.

Dr. Harruff ultimately testified that the death could have taken place on February 2 or 3, 2001. X RP 1356. He also testified that the victim had various injuries, that she was killed by strangulation, possibly with a ligature, and that she had no alcohol or drugs, including nicotine, in her blood. X RP 1357-98. (The lack of nicotine aided the State because

Lui told the police that Boussiacos might have been killed after sneaking out of the house to smoke. X RP 1430; XVI RP 1845.) This testimony was based not only on the autopsy report but also on photographs taken by others, and on a toxicology report performed by others. *See, e.g.*, X RP 1375-77 (discussing photographs) and X RP 1397-98 (discussing toxicology report).

The prosecutor relied on Dr. Harruff's testimony in arguing that that Lui intended to kill Boussiacos, a necessary element of murder in the second degree. XVI RP 1850. She focused on his description of various bruising, which the prosecutor argued was consistent with the victim trying to defend herself. *Id.* She then repeated Dr. Harruff's opinion regarding the level of force and the amount of time it would have to be applied to strangle Boussiacos to death.

It could have taken up to four minutes to die. I am not going to count that out. But we know that it was long enough, whatever it was, to burst those tiny blood vessels in her eyes and in her mouth and on her skin. To kill her with nothing other than an intent of, "I am going to kill you."

XVI RP 1850-51. She also relied on Dr. Harruff's testimony to argue that "there wasn't a lot of blood because it is that purging post death, sort of pinky colored." XVI RP 1850. That helped her explain why no bloodstains were found in Lui's home or on his clothing.

(c) Testimony of Gina Pineda

The State proposed to present a witness, Gina Pineda, to various DNA results obtained by a private laboratory, although she took no part in the testing. X RP 1415-19. Rather, Ms. Pineda merely reviewed the notes

and reports of the scientists who performed the tests. X RP 1419. The defense objected that Pineda's testimony would violate the Confrontation Clause. Defense counsel argued that the underlying documents were clearly testimonial because they were generated as part of the criminal litigation, yet the scientists who performed the work would not be available for cross-examination. X RP 1419-20. The Court agreed with the State. *See* CP 17-18. *See also*, XII RP 1477-80.

Ms. Pineda testified that she is the associate director of Orchid Cellmark, a private DNA company in Dallas, Texas. XII RP 1483. She previously worked for Reliagene Technologies, a DNA company located in New Orleans, Louisiana that was acquired by Orchid Cellmark. *Id.* For the last four years, Pineda had done little DNA testing herself. XII RP 1484. She did not view or participate in any of the testing done in this case. XII RP 1489, 1494-95.

Reliagene tested the shoelaces from the victim, the vaginal swab DNA extract, and three known samples from various individuals. Orchid Cellmark tested the vaginal wash from the victim. XII RP 1491. In regard to the testing at Reliagene, Pineda reviewed the documentation prepared by the analysts and signed off on the report. XII RP 1505-06. Ms. Pineda was aware of the chain of custody procedures at Reliagene and Orchid Cellmark, but could not say from her own observations that they were followed in this case. XII RP 1508-13.

The testing performed by Reliagene and Orchid Cellmark was restricted to the Y chromosome, which is unique to males. The testing

would therefore ignore any female DNA in the sample. XII RP 1496-97. This type of testing cannot distinguish between the members of the same paternal lineage (such as a father and his son). XII RP 1502. Neither Sione Lui nor his son, Enoch Lui, could be excluded as the "major" donors of DNA found on the victim's shoe laces. XII RP 1518. The profile detected occurs in about 0.2% to 0.3% of the male population. XII RP 1545. Anthony Negron, the ex-husband of Elaina Boussiacos, could not be excluded as a "minor" donor of DNA on the shoelaces. XII RP 1519. In addition, an unidentified man was a minor donor. XII RP 1552-53. The DNA found on the shoelaces could have come from any cellular materials, including skin cells, sweat, or saliva. XII RP 1553. Because the tests are very sensitive, a person could leave detectible DNA on a shoelace merely by touching it. XII RP 1554.

No result could be obtained from the vaginal swab extract because the quantity of male DNA was too low. XII RP 1534, 1559-60. The vaginal wash extract was tested by Orchid Cellmark. XII RP 1535-36. Sione Lui could not be excluded as a donor of male DNA. XII RP 1537, 1566. 0.2% of the male population could have the same profile. XII RP 1546. Ms. Pineda was neither the analyst nor the supervisor for this test. XII RP 1564-65. She did not sign off on it. X RP 1562.

The report prepared by Orchid Cellmark actually stated that Sione Lui could not be excluded as the "predominant" contributor of male DNA in the vaginal wash. XII RP 1566. Ms. Pineda acknowledged that other "peaks" were detected on some of the genetic markers that were

inconsistent with Lui's profile. *Id.* Over additional objection, she was permitted to testify that she discussed that matter with analysts at the Dallas lab and they concluded that these other peaks were "below threshold" and likely artifacts from the testing process rather than truly DNA from a second individual. XII RP 1567-68. She maintained that the word "predominant" went into the report "in order to be conservative." XII RP 1568.

In her closing argument, the prosecutor emphasized the Pineda's testimony was inconsistent with Lui's claim that he did not have sex with Boussiacos close to the time she disappeared.

That is the second thing that he will never admit and has never admitted to any one, probably himself included, that is the intercourse that night. He has adamantly denied throughout that they had sex.

He loved the idea of religious righteousness, but he can't even admit to himself, even in the face of semen in her vagina, because whatever happened in that regard that night was very bad.

XVI RP 1828. The prosecutor then suggested that Lui might have sexually assaulted Boussiacos. XVI RP 1829. "Maybe it happened at the same time she was being strangled, maybe not." XVI RP 1830. *See also*, XVI RP 1853. The prosecutor explained the small amount of semen detected as follows: "It is entirely possible that there was no completed sex act and that would have been the final humiliation for him." XVI RP 1830.

The prosecutor urged the jury to accept Pineda's claim that "predominant contributor" of male DNA really meant "sole contributor."

“We know that there is no other person’s semen in her.” XVI RP 1848.

The jury convicted Lui of murder in the second degree, as charged. CP 19. He was sentenced within the standard range to 200 months. CP 36-44.

2. THE COURT OF APPEALS DECISION

On November 23, 2009, the Court of Appeals affirmed. *State v. Lui*, -- Wn.2d --, -- P.3d --, 2009 WL 4160609 (2009). In the Court’s view, the very recent decision in *Melendez-Diaz v. Massachusetts*, -- U.S. --, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), “does not preclude a qualified expert from offering an opinion in reliance upon another expert’s work product.” *Id.* at *1. The Court relied for persuasive precedent on a decision of an intermediate appellate court in California and two decisions from Illinois courts. *Id.* at *8. It recognized that “some courts have reached contrary results.” *Id.* at *9, n.21.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS CASE PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES. RAP 13.4(B)(3).

The U.S. Supreme Court’s analysis of the Sixth Amendment Confrontation Clause changed significantly after its decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). It is no longer relevant whether an out-of-court statement falls within a “firmly rooted” hearsay exception or whether the court deems the statement to have sufficient “indicia of reliability.” Rather, the test is whether the statement would have been deemed “testimonial” by the founders of the

Constitution. Recently, the Court applied the *Crawford* analysis to statements prepared by expert, forensic witnesses in *Melendez-Diaz*. It found that the certificate of a laboratory analyst asserting that the tested substance was cocaine was a testimonial statement. *Id.*, 129 S. Ct. 2527, 2540. The majority rejected various arguments that the statements of scientific experts should be treated differently from the statements of other witnesses. *Id.* at 2532-42.

The parties in this case have disputed whether the reasoning of *Melendez-Diaz* applies when, as here, a live expert witness testifies at trial but it is not the same one who performed the forensic analysis. See Reply Brief of Appellant; State's Supplemental Brief; Supplemental Brief of Appellant. As the Court of Appeals noted, the Illinois courts and a California appellate court¹ have held that *Melendez-Diaz* does not apply. The Court acknowledged, however, "that some courts have reached contrary results."

In fact, many courts have held – both before and after the *Melendez-Diaz* ruling, that the sort of testimony presented in Lui's case

¹ In fact, the current state of the law in California is uncertain. *California v. Rutterschmidt*, 176 Cal.App.4th 1047, 98 Cal.Rptr.3d 390 (2009), relied on by the Lui Court, may no longer be cited as authority under California's rules because the California Supreme Court granted review in *California v. Rutterschmidt*, -- Cal.Rptr.3d --, 2009 WL 4795343 (Cal. Dec 02, 2009) (NO. S176213). "The issues to be briefed and argued are limited to the following: (1) Was defendant denied her right of confrontation under the Sixth Amendment when a supervising criminalist testified to the result of drug tests and the report prepared by another criminalist? (2) How does the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. --, 129 S.Ct. 2527, 174 L.Ed.2d 314, affect this court's decision in *People v. Geier* (2007) 41 Cal.4th 555, 61 Cal.Rptr.3d 580, 161 P.3d 104?" The State has relied heavily on *Geier* in its briefing in Lui's case. See Brief of Respondent at 43-49; State's Supplemental Brief at 5-6.

violates the Confrontation Clause. Courts reaching that conclusion prior to *Melendez-Diaz* include: *McMurrar v. Indiana*, 905 N.E.2d 527 (2009) (quality assurance manager of lab testified to drug test performed by analyst); *Maine v. Mangos*, 957 A.2d 89, 2008 ME 150 (2008) (confrontation violation where DNA lab supervisor testified based on work of 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); *Florida v. Johnson*, 982 So.2d 672 (Fla., 2008) (laboratory supervisor testified about results of a drug test performed by a subordinate); *Roberts v. United States*, 916 A.2d 922 (D.C. 2007) (DNA expert gave opinions regarding probability of a match based on work of analyst who tested samples); *State v. Hopkins*, 134 Wn. App. 780, 142 P.3d 1104 (2006), *rev. denied*, 160 Wn.2d 1020, 163 P.3d 793 (2007) (discussed in section 2, below); *New York v. Goldstein*, 6 N.Y.3d 119, 843 N.E.2d 727, 810 N.Y.S.2d 100 (2005) (psychiatrist based her opinion regarding defendant's sanity on interviews with third parties who had contact with defendant), *cert. denied*, 547 U.S. 1159, 126 S.Ct. 2293, 164 L.Ed.2d 834 (2006); *Michigan v. Lonsby*, 268 Mich. App. 375, 707 N.W.2d 610 (2005) (crime laboratory serologist's testimony that stain on bathing suit was semen violated *Crawford* because it was based on work of another serologist from same laboratory); *Smith v. Alabama*, 898 So.2d 907 (2004) (testimony of medical examiner violated Confrontation Clause because it was based in part on the work of a pathologist who actually performed autopsy).

Favorable cases decided after *Melendez-Diaz* include: *Michigan v. Payne*, 285 Mich. App. 181, 774 N.W.2d 714 (2009) (Confrontation Clause violated when witness who testified about DNA testing was not the analyst who performed the tests); *Virgin Islands v. Vicars*, No. 08-3960, 2009 WL 2414378 (3d Cir. Aug. 7, 2009) (Confrontation Clause violated when second medical expert testified about results of sexual assault examination performed by non-testifying doctor.); *North Carolina v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009) (chief medical examiner improperly based conclusions on work of pathologist who performed autopsy and dentist who identified victim from remains); *North Carolina v. Galindo*, 683 S.E. 2d 785 (N.C. App. 2009) (chemist improperly gave opinion regarding weight and nature of drugs when he relied on report of analyst who actually performed tests).

Further, the U.S. Supreme Court'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), demonstrates that Lui's understanding of *Melendez-Diaz* is correct. In *Crager*, as here, the State introduced DNA evidence through an expert witness. *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 the final report." *Id.* at 373. He came to

² This unpublished case may be cited as authority in Washington because the federal courts permit it to be cited as authority. *See* Fed. R. App. Pro. 32.1; GR 14.1(b).

an independent opinion regarding the conclusions. *Id.* The Ohio Supreme 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).

In Lui’s case, the trial court relied on *Crager* when admitting the expert testimony at issue here. *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, -- U.S. --, 129 S.Ct. 2856, 174 L.Ed.2d 598 (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).

On remand from the U.S. Supreme Court, the Ohio Supreme Court reversed Crager's conviction and ordered "a new trial consistent with *Melendez-Diaz v. Massachusetts.*" *Ohio v. Crager*, 123 Ohio St.3d 1210, 914 N.E.2d 1055 (2009).

This Court should therefore take review and grant Lui the same relief that Crager received.

2. THE COURT OF APPEALS DECISION CONFLICTS WITH ANOTHER DECISION OF THE COURT OF APPEALS. RAP 13.4(B)(2).

In *State v. Hopkins*, supra, Division Three of Court of Appeals recognized that the Confrontation Clause prohibits one medical expert from testifying in place of another. In that case, the child victim of sexual abuse was examined by a nurse practitioner, who prepared a report. Her supervising doctor then testified at trial, relying on the nurse's report. *Hopkins*, 134 Wn. App. at 784. The Court accepted that the victim's statements to the nurse fit within the hearsay exception of ER 803(a)(4) (statements for the purpose of medical diagnosis), and the nurse's report could fit within the exception under RCW 5.45.020 (business records) if the proper foundation were laid. *Id.* at 788-89. Nevertheless, the doctor's testimony violated the Confrontation Clause. *Hopkins*, 134 Wn. App. at 790-91. The nurse's report was "testimonial" because she would have understood that it would be available for use at a later trial. *Id.*, citing *Crawford*, 541 U.S. at 51-52.

The trial judge in this case recognized that *Hopkins* supported Lui's position, but did not believe he was bound to follow Division Three

precedent. The Court of Appeals believed *Hopkins* to be distinguishable because “in that case, there is no suggestion that the doctor did anything other than read the nurse's statements to the jury.” *State v. Lui* at *7 n. 16. In fact, the doctor gave an expert opinion that the physical exam was “consistent with the reported sexual activity.” *Hopkins*, 134 Wn. App. at 784. Apparently, the doctor relied on the nurse for physical findings but also reached an independent conclusion concerning their meaning. That is no different from Dr. Harruff giving opinions in this case based on the observations of Dr. Raven.

This Court should therefore take review to resolve the split between divisions of the Court of Appeals.

3. THIS CASE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(B)(4).

The issue presented in this case has significant implications for trial preparation in a substantial portion of criminal cases in this state. Prosecutors need to know whether they must produce at trial all experts who contributed to the State's forensic analysis. Defense lawyers need to know whether it is their responsibility to track down and subpoena some of the experts who may have influenced the State's ultimate conclusions.

F. CONCLUSION

The Court should accept review and reverse the Court of Appeals.

DATED this 22nd day of December, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing Petition for Review on the following:

Ms. Deborah Dwyer, Senior DPA
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Mr. Sione Lui #319129
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12/22/2009
Date


Steven Plastrik

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 61804-1-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
SIONE P. LUI,)	Published Opinion
)	
Appellant.)	FILED: November 23, 2009
)	

Lau, J. — Sione Lui appeals his jury trial conviction for second degree murder in the strangulation death of his fiancée, Elaina Boussiacos. He argues that his Sixth Amendment right to confront the witnesses against him was violated when the State’s medical examiner and DNA (deoxyribonucleic acid) expert testified based partially on forensic evidence developed by others. He relies principally on the Supreme Court’s recent decision in Melendez-Diaz v. Massachusetts, __ U.S. __, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), which held that a drug analyst’s “certificate of analysis” was testimonial and fell within the scope of the confrontation clause. We hold that no Sixth Amendment confrontation clause violation occurred here because Lui had a full

opportunity to test the basis and reliability of the experts' opinions and conclusions. And because Melendez-Diaz does not preclude a qualified expert from offering an opinion in reliance upon another expert's work product, we affirm Lui's conviction.

FACTS

On February 9, 2001, Elaina Boussiacos was found dead in the trunk of her car. The State charged Sione Lui with her murder.

Lui and Boussiacos began dating in 1999. By the end of 2000, they were living together in a Woodinville apartment. They spoke of getting married, but both were jealous and their relationship was volatile. Shortly before her death, Boussiacos told a friend there was no trust in their relationship because of things Lui had done behind her back. Boussiacos had discovered that Lui was seeing another woman. In late January 2001, she told someone else it was over between her and Lui and they would have to decide which of them would move out.

On January 28, Boussiacos bought a plane ticket to visit her mother in California. The flight was scheduled to leave on Saturday, February 3, at 8:30 a.m. The night before her departure, she dropped her son off with his father around 9:30 or 9:45 p.m. But she failed to leave on her flight the next morning.

Lui reported Boussiacos missing on February 7. He told a police investigator that she had returned home around 10 p.m. on Friday, February 2, he slept on the couch after she went to bed, and when he awoke the next morning, she was already gone. He claimed that he and Boussiacos had not had sex in the prior two weeks. He suggested that she may have had car trouble and some man may have grabbed her. He also speculated that someone could

have followed her if she had been sneaking out to smoke.

On February 9, detectives discovered Boussiacos's body in the trunk of her car, which was parked in a lot not far from Lui's apartment. Dr. Kathy Raven, a pathologist in the King County Medical Examiner's Office, performed an autopsy. Dr. Raven was unavailable to testify at Lui's trial because she had relocated to Nevada and was testifying in another case. The State called Dr. Richard Harruff to testify instead. Dr. Harruff, the Chief Medical Examiner and pathologist for King County and Dr. Raven's supervisor, had co-signed the autopsy report. He explained, "To co-sign means that I have reviewed the report, the photographs, the materials collected, as evidence, I have discussed the case with the principal pathologist, and I signed to indicate that I agree with the findings." Verbatim Report of Proceedings (VRP) (Apr. 16, 2008) at 1335-36.

He also testified that Dr. Raven performed Boussiacos's autopsy on February 10, 2001, and at that time, he reviewed her work and agreed with her findings. He further testified that he discussed with Dr. Raven the wording to be used in the autopsy report to document the injuries observed during the autopsy. Dr. Harruff explained that in his supervisory role, he would not have signed the autopsy report unless it was completely accurate. And when describing his professional credentials, he said that as a forensic pathologist for many years, he developed expertise on strangulation injuries. Finally, Dr. Harruff said he recalled viewing Boussiacos's body at some point because strangulation is a subtle type of injury that tends to generate more discussion within the medical examiner's office.

Lui objected that Dr. Harruff's testimony was based on hearsay, but the trial court overruled this objection, noting that experts can rely on hearsay under ER 703.¹ Lui also argued that the testimony would violate his right to confront the witnesses against him. The trial court ruled that Dr. Harruff could testify because "the confrontation requirement is satisfied by him being in court." VRP (Apr. 16, 2008) at 1347.

Dr. Harruff testified that Boussiacos was strangled to death.² He described signs of strangulation visible from the photographs taken during the autopsy, and testified that it generally takes four minutes to strangle someone to death. In his opinion, Boussiacos could have died on February 2 or 3 based on her body temperature when found.³ But on cross-examination, he also testified that determining

¹ ER 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

² At trial, there was no material dispute that Boussiacos was strangled to death. And Lui asserted a general denial to the murder charge.

³ Dr. Harruff acknowledged that he was not at the scene and did not personally measure Boussiacos's body temperature. On the time of death, he testified on direct,

"Q. Doctor, can you tell us what the temperature of Ms. Boussiacos' body was at the time?

"A. If, well, the internal temperature taken at 10 minutes after midnight was recorded as 38.4 degrees Fahrenheit, compared with an ambient temperature, that means the temperature inside, temperature inside of the environment, where the body was resting, was 30.5 degrees Fahrenheit.

"Q. When estimating the time of death, do the weather conditions have to be taken into account as well as the victim's temperature?

"A. Yes.

"Q. Why is that?

time of death is very difficult. He acknowledged the possibility that she could have died on February 4, 5, 6, or 7.⁴

"A. The body is going to cool off according to the difference of temperature in the body and the temperature outside of the body.

"So it is just like any other cooling, loss of heat from one object to the environment. Weather conditions will determine what the temperature was outside and at some point the body and the environment would become equal.

"But, the environment may be changing from one time or place to another. So it would be important to know not just the temperature at the time that the body temperature was recorded, but also the temperature of the environment sometime before that temperature measurement was taken.

"I mean, obviously, during the daytime it is warmer in the nighttime. It is cooler.

"The body will warm up, cool down, depending upon what is the environment.

"Q. So given those conditions, is it ever possible to set an exact time of death for any one?

"A. No. It is extremely difficult and not possible to fix the time exactly.

"Q. Given the weather at the time at the scene and her body temperature, is that consistent with the time of death, some time between the night of February 2nd in the morning of February 3rd?

"A. Again, the observations were made February 9th, late in the night and early morning on February 10th, just after midnight. So we have, according to the dates that you asked, that was a 7-day difference.

"Q. About?

"A. From the 2nd to the—

"Q. 6 to 7?

"A. 6 to 7 day difference. The environment was very cold. Certainly, variable during the day and the night. There is no reason to think that that period of time is not possible from the observations recorded." VRP (Apr. 18, 2008) at 1354-56.

⁴ "Q. Regarding the time of death, you say that it is hard to determine.

"A. Yes, very difficult, yes.

"Q. All right. We know that the victim was last seen alive on Friday the 2nd of February. Now, are you saying that the condition that the body was found is consistent with her having died on the 3rd?

"A. That is in the range of possibilities, depending upon the environment, which the body was between the time of death and when the examination was performed.

"Q. Is death on the 4th within the range of possibilities?

"A. Yes.

"Q. Death on the 5th?

"A. Yes.

"Q. Death on the 6th?

Dr. Harruff also testified that Boussiacos's blood was submitted to the Washington State Toxicology Laboratory for drug and alcohol testing. When asked about the test results for nicotine, he stated, "[n]icotine was not detected in the blood." VRP (Apr. 16, 2008) at 1398.

Over Lui's objections, the State also presented the expert testimony of Gina Pineda, an associate director of Orchid Cell Mart, a private DNA testing company. Pineda previously worked for a similar company called Reliagene Technologies until Orchid Cell Mart acquired it. Reliagene tested Boussiacos's shoelaces, and Orchid Cell Mart tested Boussiacos's vaginal wash. Pineda did not personally conduct the tests, but she reviewed the notes and reports of the technicians who did.⁵ Pineda explained that the testing results are reduced to a machine printout that any expert can review and draw conclusions from. Pineda also testified about the laboratory's chain of custody procedures, the protocols and tests involved, laboratory technician training and certification, and other quality assurance measures.⁶

"A. Probably so.

"Q. On the 7th?

"A. It is possible, but then at that point the likelihood decreases, but still possible." VRP (Apr. 16, 2008) at 1398-99.

⁵ In this case, at least six different people were involved in generating and assessing the DNA results.

⁶ Pineda testified as follows:

"Q. I want to refer or direct your attention to the actual testing that was done in this case.

"With regard to the items that went to Reliagene, what was your role in that testing?

"A. I was a case reviewer in that case.

"Q. What does that mean?

"A. That means that every case that goes through our laboratory has to undergo a technical review, as well as an administrative review.

"A technical review makes sure that all of the standard protocols were followed. All of the controls produced expected results. It also checks to make sure that the interpretation of the profile is adequate, as far as inclusion or exclusion of any individuals in the case.

"It also entails signing the report. So that was my role in this case, as I did a technical and administrative review of the work that was done at Reliagene.

"I concurred with the interpretation of the results from the case analysts, I, therefore, signed a report.

"Q. With regard to the information that you looked at, obviously, I think that we have heard you didn't do any of the direct testing yourself; correct?

"A. Correct.

"Q. Did you look at all of the testing and the procedures that were documented by the analysts?

"A. Yes, I did.

"So every time that [an] analyst does anything in the laboratory, that's documented. We have work sheets in conjunction with these standard operating procedures. So we require our analysts, for example, every time that they put a sample into the oven, they have to record the time and the date that that sample was placed in the oven, as well as when it was taken out.

"Everything is thoroughly documented. Each step of the procedure has a permanent record that is maintained in the form of a case file.

"Every step was reviewed by me in this case. Everything that was, I could see that everything was done adequately from this documentation.

"Q. All right.

"With regard to the results that were obtained, did you simply rely on the conclusion made by the analysts in the case, or did you do your own quantification come to your own results?

"A. I came to my own results.

"

"I did look at the electronic data from the results in the samples in this case. I did draw my own interpretation and my own conclusions from it.

"

"Q. Based upon your knowledge of the workings of Orchid, was . . . it handled and preserved in the same ways that you previously testified regarding the other samples in this case?

"A. Yes, it was. Not only based on the standard of the operating procedures, I have also reviewed all of the laboratory documentation and the supporting documents

Based on her independent review of the testing results, Pineda concluded that Lui—unlike 99.7 percent of the population—could not be excluded as a major donor to the DNA on the shoelaces. She also testified that the vaginal wash testing revealed a single male donor and that Lui—unlike 99.8 percent of the population—could not be excluded as the donor.⁷

In closing argument, the prosecutor summarized the State's evidence against Lui. She pointed to witnesses who described Lui as jealous and possessive. She argued from other witness statements that Boussiacos decided to end the relationship shortly before being killed. She emphasized that Lui was alone with Boussiacos on the night of February 2, 2001, the last time anyone reported seeing her alive. Under the State's theory of the case, Lui strangled Boussiacos to death that night or the following morning, which was consistent with Dr. Harruff's opinion regarding the time of death.

The prosecutor also argued that Lui's version of events was not credible. She cited several examples of him giving different accounts to different witnesses. He told some people that he and Boussiacos had ended their relationship, but others that they

that indicate that the testing was performed appropriately." VRP (Apr. 21, 2008) at 1505–36.

⁷ On cross-examination, Lui's counsel questioned Pineda about why the words "predominate contributor" were used in the laboratory's written report summarizing the vaginal wash results. She responded that the word "predominate" was used "in order to be conservative" because "there was some additional peaks detected below threshold," but that based on her independent review of the data and her discussions with the laboratory analysts, her opinion was that there was a single contributor. VRP (Apr. 21, 2008) at 1568–1570.

were still planning to marry. He gave varying accounts of his relationship with another woman. He told some people that Boussiacos's trip to California was long planned, but others that he did not know about it until the night before. The prosecutor also noted that Lui claimed not to have had sex with Boussiacos but that Pineda's testimony regarding the vaginal wash DNA test results suggested the contrary. And she mentioned that no nicotine was found in Boussiacos's system despite Lui's suggestion that she might have been abducted while sneaking outside to smoke.

The prosecutor further argued that Lui dressed Boussiacos and attempted to make it appear that she left the house on her own. Pineda's testimony about the DNA testing of Boussiacos's shoelaces supported this argument. Additionally, the prosecutor argued that Boussiacos was not wearing makeup as she customarily did and the materials found in her car were not what she would have packed for her visit to California. And in rebuttal closing argument, the prosecutor again emphasized Lui's motive and opportunity to kill Boussiacos.

The jury convicted Lui of second degree murder as charged. The court sentenced him within the standard range. He now appeals.

ANALYSIS

Relying principally on Melendez-Diaz, Lui contends that the admission of Dr. Harruff and Pineda's testimony violated his right to confront the witnesses against him. He argues that they relied on forensic evidence developed by others who he had no opportunity to cross-examine. In Lui's view, these individuals—Dr. Raven and various DNA laboratory technicians—were witnesses against him and he had the right to face them in the courtroom. We review

an alleged violation of a defendant's confrontation rights de novo. State v. Kirkpatrick, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" U.S. Const. amend. VI. In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Court reviewed the history and purpose of this clause. The Court noted that the right to confront one's accusers was deeply rooted in English common law by the time of the American Revolution, but that it was occasionally dispensed with in favor of the civil-law practice of permitting judicial officers to privately examine witnesses with no opportunity for cross-examination. Crawford, 541 U.S. at 43. During the reign of Queen Mary, the adoption of this continental procedure became more common, which led to English efforts to curb the practice and its perceived abuses. Crawford, 541 U.S. at 43–44. The Court described similar controversies at the time of the American Revolution and ratification of the Constitution and concluded that the confrontation clause was adopted in response. Crawford, 541 U.S. at 47–49. Thus, the "principal evil" at which the clause was directed was the civil-law system's use of ex parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases. Crawford, 541 U.S. at 51. This practice denies the defendant a chance to test his accuser's assertions "in the crucible of cross-examination" in accord with the common-law tradition. Crawford, 541 U.S. at 60.

But the Court also emphasized that not every out-of-court statement used against a defendant at trial implicates the core concerns of the confrontation clause. For example, "[a]n off-hand, overheard

remark . . . bears little resemblance to the civil-law abuses the Confrontation Clause targeted.” Crawford, 541 U.S. at 51. The Court noted that the scope of the clause is limited to “witnesses’ against the accused—in other words, those who ‘bear testimony.’ ‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” Crawford, 541 U.S. at 51 (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). Thus, the Court concluded the confrontation clause gives defendants the right to confront those who make “testimonial” statements against them and it bars admission of adverse “testimonial” hearsay.⁸ Crawford, 541 U.S. at 53–54.

The Crawford Court declined to offer a comprehensive explanation of what makes a statement “testimonial,” but it listed three possible formulations for the “core class” of testimonial statements covered by the confrontation clause.

[1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51–52 (internal quotation marks and citations omitted). The Court did not endorse any of these formulations because the statements at

⁸ A limitation on the right to confrontation that existed at common law—inapplicable here—applies when a witness is unavailable and the accused had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 54. The Court also stated that the confrontation clause does not bar testimonial statements offered for some other purpose than proving the truth of the matter asserted. Crawford, 541 U.S. at 59 n.9.

issue—made in response to law enforcement interrogation—qualified under all of them.

Crawford, 541 U.S. at 52.

And in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court refined the meaning of “testimonial” statements in the context of law enforcement interrogations. At issue were statements made during a 911 call and, in a companion case, statements made at a crime scene during police interrogation of the alleged victim. Davis, 547 U.S. at 817. The Court concluded that the statements made to the 911 operator were nontestimonial because their primary purpose was to enable police assistance to meet an ongoing emergency. The Court reasoned that the declarant “was not acting as a witness; she was not testifying. . . . No ‘witness’ goes into court to proclaim an emergency and seek help.” Davis, 547 U.S. at 828. In contrast, the statements made at the crime scene were testimonial because they were elicited during police interrogation to prove past events potentially relevant to criminal prosecution. Davis, 547 U.S. at 822. The alleged victim signed a statement summarizing her version of events, and the document was offered at trial when the victim did not appear. Davis, 547 U.S. at 820. The Court concluded that admission of such statements “are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial.”⁹

⁹ Justice Thomas disagreed with the reasoning in the majority opinion in Davis, particularly its focus on the “primary purpose” behind police interrogation. Davis, 547 U.S. at 834. Instead, he argued that the clause was designed to reach only “formalized testimonial materials” and none of the statements made to police in Davis were sufficiently formal to make the declarants “witnesses” within the meaning of the confrontation clause. Davis, 547 U.S. at 836–37.

The majority acknowledged that most of the early American cases excluding

Davis, 547 U.S. at 830.

Recently, the Court again addressed the reach of the confrontation clause in Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527. There, the defendant was charged with distributing and trafficking in cocaine. To prove that the substance officers seized from him was in fact cocaine, the prosecutor submitted three “certificates of analysis” sworn to by laboratory analysts before a notary public.¹ The certificates stated simply, “The substance was found to contain: Cocaine.” Melendez-Diaz, 129 S. Ct. at 2531. A five-member majority of the Court concluded under a “rather straightforward” application of Crawford that the certificates were inadmissible. Melendez-Diaz, 129 S. Ct. at 2531. After determining the certificates were “quite plainly affidavits,” the Court held that they constituted “testimonial” statements because they were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” Melendez-Diaz, 129 S. Ct. at 2532 (quoting Davis, 547 U.S. at 830). Moreover, the statements were “made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use

evidence for lack of confrontation involved very formal testimonial statements such as sworn testimony or depositions under oath. Davis, 547 U.S. at 825–26. Nevertheless, it rejected Justice Thomas’s interpretation out of concern that it could lead prosecutors to avoid calling a defendant’s accusers as live witnesses by sending police officers to conduct “informal” interrogations of those witnesses and then presenting the accusations through the officers’ testimony. “[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.” Davis, 547 U.S. at 826.

¹ The prosecutor presented no expert witness testimony on this point.

at a later trial.”¹¹ Melendez-Diaz, 129 S. Ct. at 2532 (quoting Crawford, 541 U.S. at 52). Consequently, the analysts were “witnesses” for confrontation clause purposes and Melendez-Diaz had the right to confront them. Melendez-Diaz, 129 S. Ct. at 2532. Because he was not given this opportunity, the evidence should not have been admitted. Melendez-Diaz, 129 S. Ct. at 2542. The Court concluded, “The Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error.” Melendez-Diaz, 129 S. Ct. at 2542.

The majority also discussed and rejected several counterarguments. First, it rejected the suggestion that laboratory analysts are not subject to the confrontation requirement because they are not “accusatory” or “conventional” witnesses. Melendez-Diaz, 129 S. Ct. at 2533–35. Second, it rejected the argument that forensic analysts should not have to testify live because their testimony would be the result of “neutral, scientific testing” that is not “prone to distortion or manipulation,” and confrontation would be unlikely to affect their testimony. Melendez-Diaz, 129 S. Ct. at 2536. Third, it rejected the argument that forensic reports qualify for a business or public records exception to the confrontation requirement.¹² Finally, it rejected the suggestion that the

¹¹ While Justice Thomas signed the majority opinion, he noted in a concurrence that he continues to adhere to his view that the confrontation clause is implicated only by extrajudicial statements that are contained in “formalized” testimonial materials. Melendez-Diaz, 129 S. Ct. at 2543. He stated that he joined the majority opinion because the documents at issue satisfied this test.

¹² Consequently, the State’s reliance on a business records’ argument here is unpersuasive.

confrontation clause was satisfied because the defendant could have subpoenaed the analysts. Melendez-Diaz, 129 S. Ct. at 2540.

Four members of the Court dissented. They noted that producing a forensic test result often requires multiple people and one possible reading of the majority's opinion would require each of them to testify live. Melendez-Diaz, 129 S. Ct. at 2544–45 (Kennedy, J., dissenting). While the majority did not respond directly to this point, it characterized the dissent's concerns generally as an exaggerated "parade of horrors," and it explicitly rejected the suggestion that the State would need to call every person involved in the chain of custody.

[We] do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. . . . "[G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live.

Melendez-Diaz, 129 S. Ct. at 2532 n.1 (internal citations omitted).

We conclude that Melendez-Diaz is distinguishable from Lui's case. In Melendez-Diaz, the disputed evidence consisted of sworn affidavits of laboratory analysts that were not made available for cross-examination.¹³ The Court emphasized that the certificates were used in lieu of live, in-court testimony. Melendez-Diaz, 129 S.

¹³ Many state statutes permit the use of certificates of analysis but typically restrict them to the identification of controlled substances or DUI cases involving breath alcohol test results and calibration records. Several state statutes permit nearly all laboratory results or forensic science findings to be admitted through certificates. Jennifer L. Mnookin, Expert Evidence and the Confrontation Clause after Crawford v. Washington, 15 J.L. & Pol'y 791, 798 (2007).

Ct. at 2532. Here, in contrast, the autopsy and DNA reports were not offered in lieu of live testimony. Indeed, the reports themselves were not admitted into evidence at all. Rather, Dr. Harruff testified to his own opinions and conclusions about the cause and timing of Boussiacos's death. And Pineda testified to her own analysis of the DNA testing data. The evidence against Lui was the experts' opinion—not their underlying data—and the testimony that was introduced was introduced live. Moreover, in Melendez-Diaz, the disputed evidence was a "bare-bones statement" that the substance tested contained cocaine, and the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." Melendez-Diaz, 129 S. Ct. at 2537. But here, both experts testified extensively about their own expertise and that of their employees, the protocols and procedures used in their respective offices, and the tests employed in Lui's case. Lui had the opportunity to challenge their assertions in the "crucible of cross-examination." This situation is fundamentally different from Melendez-Diaz, where the State improperly used ex parte out-of-court affidavits to prove its case. Here, the very live testimony absent in Melendez-Diaz was present.

Lui argues that the presence of Dr. Harruff and Pineda as live witnesses still violated his right to confrontation because they relied on testimonial reports made by others and related information from those reports to the jury.¹⁴ In Lui's view, Dr. Harruff

¹⁴ Lui argues that the autopsy and DNA reports were testimonial because they satisfied the third formulation proposed in Crawford—"statements that were made under circumstances which would lead an objective witness reasonably to believe that

and Pineda were simply acting as surrogates for the true witnesses against him, and his ability to cross-examine them was not a constitutionally adequate substitute for confrontation of their sources. We disagree.

Lui argues that it is possible for forensic analysts to fraudulently affect laboratory results undetected by their supervisors. He notes that such fraud could be revealed during cross-examination. But the same is true for people involved in the chain of custody, yet the Supreme Court expressly rejected the notion that such individuals must appear as part of the State's case. Melendez-Diaz, 129 S. Ct. at 2352 n.1.

Lui also relies on the following language from Davis.

"[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."

Appellant's Reply Brief at 5 (quoting Davis, 547 U. S. at 826). But our review of the record shows that the expert witnesses here were not acting as mere conduits for the testimonial assertions of their employees.¹⁵ Dr. Harruff testified based on his own

the statement would be available for use at a later trial." Crawford, 541 U.S. at 52. Based on Justice Thomas's concurrence in Melendez-Diaz, it is not clear that a majority of the Court supports this broad definition. But for purposes of our analysis, we assume that the underlying reports are "testimonial."

¹⁵ But even if Dr. Harruff's testimony regarding Boussiacos's nicotine test results and body temperature measurement is viewed as merely repeating the assertions of others, we conclude the error, if any, is harmless. Lui speculated that someone could have followed Boussiacos if she had been sneaking out to smoke. And in closing argument, the prosecutor made a passing reference to the lack of nicotine in her blood. But in the context of the State's entire case, this evidence was marginally relevant. Lui never claimed Boussiacos left the house to smoke. His suggestion was merely conjecture. And there was no testimony about how long nicotine would have been detectable in her blood in any event. The strength of the State's case—and its closing

expertise in strangulation and his independent review of the autopsy photographs and other data recorded in the autopsy report. Similarly, Pineda testified based on her own interpretation of the machine-generated raw data. Both experts applied significant expertise to interpret and analyze the underlying data. And neither witness simply read to the jury from Dr. Raven and the DNA laboratory technicians' reports.¹⁶ Indeed, Pineda deviated from her laboratory's written report when it conflicted with her own opinion. This is not a case where the State produced expert witnesses simply to have them recite out-of-court statements made by others as a way to evade the protections of the confrontation clause. Consequently, Lui's reliance on this passage from Davis is misplaced.¹⁷

While Lui is correct that the expert opinion testimony against him was partially based on the reports of others, expert witnesses are not required to have personal,

argument—centered on motive and opportunity, not the toxicology test result. Similarly, the record demonstrates that Dr. Harruff's time of death testimony based in part on Boussiacos's body temperature measurement supported both the State and Lui's theory about when she died. See footnotes 2 and 3. There is no reasonable probability this evidence contributed prejudicially to the verdict.

¹⁶ Lui relies on State v. Hopkins, 134 Wn. App. 780, 791, 142 P.3d 1104 (2006), in which the court determined that a doctor's testimony relating the contents of a nurse's report was a confrontation clause violation. But in that case, there is no suggestion that the doctor did anything other than read the nurse's statements to the jury. It appears from the opinion that the nurse was unable to testify because of a sudden emergency. Hopkins, 134 Wn. App. at 784.

¹⁷ We also note that this statement was part of the majority's response to Justice Thomas's opinion that the confrontation clause is only implicated by "formalized" testimonial materials, such as sworn statements to police officers. It was not essential to the Court's holding and its applicability to situations not involving police evasion is unclear.

firsthand knowledge of the evidence on which they rely. In re Disability Proceeding Against Keefe, 159 Wn.2d 822, 831, 154 P.3d 213 (2007). In Washington, ER 703 expressly allows experts to base their opinion testimony on facts or data that are not admissible in evidence “[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject” The Federal Rules of Evidence are in accord. See Fed. R. Evid. 703. And ER 705 gives the trial court discretion to permit an expert to relate hearsay or otherwise inadmissible evidence to the jury for the limited purpose of explaining the reasons for his or her opinion.¹⁸ Deep Water Brewing, LLC v. Fairway Res., Ltd., ___ Wn. App. ___, 215 P.3d 990 (2009); State v. Brown, 145 Wn. App. 62, 74, 184 P.3d 1284 (2008).

While Lui’s confrontation challenge presents a separate question than a

¹⁸ A party is entitled to an appropriate limiting instruction in this situation, but Lui did not request any limiting instruction. And on appeal, he does not challenge the admissibility of the disputed evidence based on ER 703 or 705.

Under ER 705, “[t]he expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.” Commenting on the rule, Karl B. Tegland explains,

“If the expert’s opinion is based upon hearsay, Rule 705 permits the court to allow the expert to relate the hearsay to the jury to explain the reasons for his or her opinion.

“Since the hearsay material is admissible only for the limited purpose of explaining the expert’s opinion, it follows that such material is admissible for the limited purpose only if the expert actually relied upon the material in reaching an opinion. The courts will not allow Rule 705 to be used as a vehicle for having an expert witness read from materials, otherwise objectionable as hearsay, when the expert did not rely upon the materials in reaching his or her opinion.” 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook* (2009–10), at 385. In addition, ER 705 is substantially the same as the corresponding federal rule.

challenge based on the rules of evidence, see Crawford, 541 U.S. at 51 (noting that evidence excluded under hearsay rules may be permitted under the confrontation clause, or vice versa), in this case the answer is the same. To the extent the experts here related testimonial hearsay statements to the jury, they did so to explain the bases for their opinions. This is permitted under both the rules of evidence and the confrontation clause.¹⁹ See Allen v. Asbestos Corp., Ltd., 138 Wn. App. 564, 579, 157 P.3d 406 (2007) (“ER 703 permits experts to base their opinion testimony on facts or data that is not admissible in evidence The otherwise inadmissible facts or data underlying an expert’s opinion are admissible for the limited purpose of explaining the basis for an expert’s opinion”); Crawford, 541 U.S. at 59 n.9 (“The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”). The experts’ testimony here is subject, as a matter of right, to an instruction limiting the purposes for which it was offered, but its admission did not violate Lui’s right to confrontation.²

¹⁹ Lui cites a New York case, People v. Goldstein, 6 N.Y.3d 119, 843 N.E.2d 727, 810 N.Y.S.2d 100 (2005), to argue that such out-of-court statements should not be admitted because they cannot assist the jury in evaluating an expert’s opinion unless the jury first assumes they are true. We are not persuaded by this argument. The very fact that an expert has an articulable basis for an opinion can assist the jury in deciding what weight to give the opinion. Moreover, Goldstein is factually dissimilar because it presented a different hearsay question, which involved statements made to a psychiatrist who was evaluating the defendant’s sanity. We decline to adopt its reasoning in this context.

² ER 105 provides, “When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” And if evidence is admissible only for a limited purpose, an appropriate limiting instruction is available as a matter of right. State v. Redmond, 150

And our conclusion is supported by similar cases decided since Melendez-Diaz that have adopted the same rationale. For example, in People v. Rutterschmidt, 176 Cal. App. 4th 1047, 98 Cal. Rptr. 3d 390, 409 (2009), the defendant argued that the expert testimony of a laboratory director regarding his laboratory's toxicology results violated the confrontation clause because the director did not personally test the samples. The appeals court rejected this argument, stating, "There is no federal Supreme Court or California authority for the proposition that Crawford precludes a prosecution scientific expert from testifying as to an opinion in reliance upon another scientist's report." Rutterschmidt, 98 Cal. Rptr. 3d at 411. It distinguished Melendez-Diaz on the critical grounds that the report itself was not admitted in evidence, the toxicology results were not proved via an ex parte out-of-court affidavit, the expert relied upon the data in the report to formulate his opinions, and the expert's opinion and its basis were subject to cross-examination. Rutterschmidt, 98 Cal. Rptr. 3d at 412. It further noted that experts are permitted to offer opinions based on inadmissible hearsay and to explain the reasons for their opinions. Rutterschmidt, 98 Cal. Rptr. 3d at 412-13. Finally, it reasoned that such testimony does not violate the confrontation clause because it is offered to explain the expert's opinion, not for its truth. Rutterschmidt, 98 Cal. Rptr. 3d at 413.

And in People v. Johnson, No. 1-07-3372, 2009 WL 2999142, at * ___ (Ill. App. Sept. 18, 2009), the defendant challenged an expert's testimony regarding DNA test

Wn.2d 489, 78 P.3d 1001 (2003) (trial court erred in failing to give instruction limiting the use of an out-of-court statement to a nonhearsay purpose). The record here shows no limiting instruction was requested or given.

results, arguing that he had no opportunity to cross-examine the analysts who conducted the testing. The court distinguished Melendez-Diaz, noting that “[i]n contrast with certificates presented at trial” there, the DNA expert in the case before it “testified in person as to [her] opinion based on the DNA testing and [was] subject to cross-examination.” The court noted that experts are permitted to disclose underlying facts and data to the jury in order to explain the basis for their opinions. It concluded that the DNA report at issue was offered as part of the basis for the expert opinion, so there was no confrontation violation.

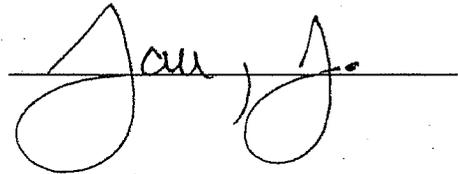
Finally, in People v. Lovejoy, No. 104443, 2009 WL 3063366 (Ill. Sept. 24, 2009), the defendant argued that the admission of a medical examiner’s testimony about toxicology test results violated his right to confrontation because the tests were performed by others. The Illinois Supreme Court rejected this contention. Lovejoy, 2009 WL 3063366, at *24. The medical examiner testified that he was trained in toxicology interpretation and that the toxicology report showed lethal amounts of several medications in the victim’s blood. Lovejoy, 2009 WL 3063366, at *21. He explained how this information provided insight into his own physical observations during the autopsy and that the combination helped him determine the cause of the victim’s death. Lovejoy, 2009 WL 3063366, at *23. The court concluded that the medical examiner’s testimony “was elicited to show the jury the steps [he] took prior to rendering an expert opinion in this case, and was not admitted to prove the truth of the underlying assertion.” Lovejoy, 2009 WL 3063366, at *23. Consequently, Melendez-Diaz was not implicated and there was no confrontation clause violation. Lovejoy, 2009

WL 3063366, at *24.

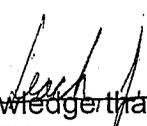
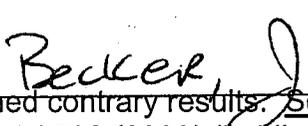
We agree with these well-reasoned cases.²¹ Here, Dr. Harruff and Pineda testified as expert witnesses against Lui. Though their opinions were based partially on forensic work performed by others, the record shows that their opinions and conclusions were independently derived from their significant expertise and analysis that they applied to the forensic work of others. They did not base their opinions solely on testimonial hearsay and merely recount what others who performed forensic work said. And to the extent they disclosed information provided by others to the jury, that information was offered to explain the basis for their opinions as provided for under the Rules of Evidence.

Finally, our review of the record shows that Lui had full opportunity to test the basis and reliability of the experts' opinions and conclusions "in the crucible of cross-examination." Crawford, 541 U.S. at 60. Under these circumstances, we hold that Lui's confrontation rights were not violated.

Affirmed.



WE CONCUR:

 
²¹ We acknowledge that some courts have reached contrary results. See, e.g., People v. Dungo, 176 Cal. App. 4th 1388, 98 Cal. Rptr. 3d 702 (2009) (holding that supervising pathologist could not testify based on autopsy performed by another). But we conclude the line of cases discussed above is more persuasive.

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