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NO. 61804-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SIONE LUI,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. TRICKEY

**STATE'S SUPPLEMENTAL BRIEF ADDRESSING
MELLENDEZ-DIAZ V. MASSACHUSETTS,
129 S. CT. 2527 (JUNE 25, 2009)**

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A. INTRODUCTION

The State submits this supplemental brief solely to address the effect of the United States Supreme Court's opinion in Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, ___ L. Ed. 2d ___ (June 25, 2009), on the Confrontation Clause issues raised by Lui in this case. Both parties referred to the pending opinion in Melendez-Diaz in their initial briefing in this case. The Supreme Court issued its opinion after the State filed its Brief of Respondent, but before Lui filed his Appellant's Reply Brief. Thus, Lui was able to, and did, place his arguments based on Melendez-Diaz before this Court. The State takes this opportunity to do the same, thus providing the Court with advocacy from both parties as to the effect of Melendez-Diaz on the issues presented in this appeal.

B. RELEVANT FACTS

The facts are fully set forth in the Brief of Respondent. The relevant facts for purposes of this brief relate to the testimony of Dr. Richard Harruff, Chief Medical Examiner for King County (set out in detail at BOR 18-23) and forensic DNA expert Gina Pineda

(set out in detail at BOR 36-43). These facts are summed up in brief here for the Court's convenience.

Dr. Harruff testified at trial about the autopsy of the victim, Elaina Boussiacos. While Harruff did not personally conduct the autopsy, he contemporaneously reviewed the work of the pathologist who did, and he co-signed the report. Harruff's testimony was based in large part on photographs. The autopsy report was not admitted into evidence.

Gina Pineda testified at trial about DNA results relevant to this case. Pineda is the associate director and technical leader of Orchid Cellmark, a private DNA laboratory in Dallas, Texas. She supervises the daily duties of the forensic scientists there, and she is responsible for maintaining standard operating procedures and quality control. While Pineda did not personally conduct the DNA testing for this case, she supervised a portion of the testing directly, and she reviewed the supporting documentation as well as the results for the remainder of the tests. Pineda showed charts with raw data and explained them to the jury, but the reports prepared by the DNA analysts were not admitted into evidence.

C. ARGUMENT

In Melendez-Diaz, the defendant was charged with distribution of cocaine. 129 S. Ct. at 2530. In support of its case, the State submitted sworn "certificates of analysis" attesting to the fact that the substance at issue contained cocaine. Id. at 2530-31. Melendez-Diaz objected to the admission of these certificates, asserting that the Confrontation Clause required the analysts to testify in person. Id. at 2531. The trial court overruled the objection, and admitted the sworn certificates. Id. The jury found Melendez-Diaz guilty. Id. Massachusetts appellate courts affirmed the conviction.

The United States Supreme Court granted certiorari. Id.

The Court summed up the issue before it as follows:

The Massachusetts courts in this case admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine. The question presented is whether those affidavits are "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

Id. at 2530.

A majority of the Court (five justices) concluded that, under the decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct.

1354, 158 L. Ed. 2d 177 (2004), the affidavits were testimonial statements and the analysts were witnesses for purposes of the Sixth Amendment right to confrontation; accordingly, the defendant had a right to be confronted with the analysts at trial. Id. at 2532. Reversing the Massachusetts court, the Supreme Court held succinctly and specifically that "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* affidavits." Id. at 2542.

Four justices dissented. Id. at 2543. These justices concluded that "[l]aboratory analysts who conduct routine scientific tests are not the kind of conventional witnesses to whom the Confrontation Clause refers." Id. at 2558.

Justice Thomas, one of the five in the majority, filed a concurring opinion. Id. at 2530, 2543. Thomas made it clear that, while he joined with the other four in this case, the reach of the Confrontation Clause was in his view narrowly constricted:

I write separately to note that I continue to adhere to my position that **"the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."** . . . I join the Court's opinion in this case because the documents at issue in this case "are quite plainly affidavits" As such, they "fall within the core

class of testimonial statements" governed by the Confrontation Clause.

Id. at 2543 (citations omitted) (emphasis added).

Shortly after issuing its opinion in Melendez-Diaz, the Court took action in several related cases in which defendants had filed petitions for certiorari. In State v. Crager, 116 Ohio St.3d 369, 879 N.E.2d 745 (2007), the Court vacated the judgment and remanded the case to the Supreme Court of Ohio "for further consideration" in light of the opinion in Melendez-Diaz. Crager v. Ohio (No. 07-10191), 129 S. Ct. 2856 (June 29, 2009). In People v. Geier, 41 Cal. 4th 555, 161 P.3d 104, 61 Cal. Rptr. 3d 580 (2007), the Court denied certiorari. Geier v. California (No. 07-7770) 129 S. Ct. 2856 (June 29, 2009).

Both Crager and Geier bear similarities to this case. In each case, the State introduced DNA evidence through the testimony of an expert who did not personally conduct the testing. Crager, 879 N.E.2d at 747; Geier, 161 P.3d at 131. In Crager, the State introduced into evidence two reports of DNA testing that had been prepared by the non-testifying analyst. 879 N.E.2d at 749. While it is not possible to ascertain with certainty exactly what was admitted in Geier, the opinion speaks of "handwritten notes" recording

procedures followed, and concludes that "[i]n simply following Cellmark's protocol of noting carefully each step of the DNA analysis, recording what she did with each sample received, Yates did not 'bear witness' against defendant. . . . Records of laboratory protocols followed and the resulting raw data acquired are not accusatory." 161 P.3d at 132, 140.

Thus, it is possible that the Supreme Court's different treatment of seemingly similar cases is related to exactly what was contained in any written documents admitted into evidence. We will not know for certain how the Supreme Court will resolve a case like Lui's, where the laboratory reports were not admitted into evidence, until such a case comes before the Court.

This does not mean that we have no indication of how a case like this one would fare in the Supreme Court. Justice Thomas, who gave the majority in Melendez-Diaz its fifth vote, has made it clear that he will find a Confrontation Clause violation *only* where extrajudicial statements are contained in "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Melendez-Diaz, 129 S. Ct. at 2543. Nothing of the sort was admitted in this case. Thus, it is reasonable to predict that Justice Thomas would join with the four justices who

dissented in Melendez-Diaz in rejecting a Confrontation Clause claim should a case like Lui's come before the Supreme Court.

D. CONCLUSION

The Supreme Court's opinion in Melendez-Diaz, holding that admission of sworn affidavits in lieu of live testimony violated the defendant's constitutional right to confront the witnesses against him, neither addresses nor resolves the Confrontation Clause issue before this Court. If anything, Justice Thomas's concurrence indicates that a majority of the Supreme Court would likely find no violation under the circumstances of this case.

For the reasons set forth in the Brief of Respondent, the State respectfully asks this Court to affirm Lui's conviction for Murder in the Second Degree.

DATED this 17th day of August, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **David B. Zuckerman**, the attorney for the appellant, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104, containing a copy of the **STATE'S SUPPLEMENTAL BRIEF ADDRESSING MELLENDEZ-DIAZ v. MASSACHUSETTS, 129 S. Ct. 2527 (June 25, 2009)** in **STATE V. SIONE P. LUI**, Cause No. **61804-1-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name



Date

08/17/2009

Done in Seattle, Washington

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