

Supreme Court No. 84045-8
Court of Appeals No. 61804-1-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

SIONE P. LUI,
Defendant-Appellant.

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

The Honorable Michael J. Trickey, Judge

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STATE OF WASHINGTON
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I. INTRODUCTION

The issue in this case is whether the Confrontation Clause is violated when a State expert witness testifies at trial based on the work of a non-testifying expert. In Mr. Lui's case, a supervisor from Orchid Cellmark testified in place of the analysts who actually performed the DNA analysis. Further, the forensic pathologist who testified was not the one who performed the autopsy or prepared the autopsy report.

The relevant facts and procedural history are set out in the Opening Brief of Appellant, Appellant's Reply Brief, Appellant's Supplemental Brief Regarding *Melendez-Diaz*, and the Petition for Review. Rather than repeating previous briefing, Lui will focus here on new cases applying the U.S. Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, -- U.S. --, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), to facts similar to Lui's.

II. NEW CASE LAW

As the State has noted, *Ohio v. Crager*, 116 Ohio St.3d 369, 879 N.E.2d 745 (2007), is a case "remarkably similar to this one." Brief of Respondent (BOR) at 46. In *Crager*, the State's testifying DNA expert was not the same one who performed the analysis. The Ohio Supreme Court found that procedure satisfied the Confrontation Clause. As Lui

pointed out in Appellant's Reply Brief, the U.S. 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 a "grant, vacate and remand" 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).¹

In fact, the lower court has now recognized upon further consideration that its original decision was based on a faulty premise. On

¹ On the other hand, 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 certiorari any precedential value." *Teague v. Lane*, 489 U.S. 288, 296, 109 S.Ct. 1060, 103 L.Ed.2d 334, *rehearing denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989) (citations and internal quotations omitted).

remand, the Ohio Supreme Court vacated Crager's conviction and remanded for a new trial. *State v. Crager*, 123 Ohio St.3d 1210, 914 N.E.2d 1055 (2009), *reconsideration denied*, 124 Ohio St.3d 1446, 920 N.E.2d 375 (2010).

The U.S. Supreme Court has issued grant, vacate and remand orders in several other cases in view of *Melendez-Diaz*. At least three of those shed light on how the U.S. Supreme Court would view Lui's case. *See Moore v. Ohio*, 130 S.Ct. 1685, 176 L.Ed.2d 176 (March 1, 2010); *D.G. v. Louisiana*, 130 S.Ct. 1729, 176 L.Ed.2d 176 (March 1, 2010); *Barba v. California*, 129 S.Ct. 2857, 174 L.Ed.2d 599 (June 29, 2009). In all three, the lower court denied a confrontation challenge.

Barba is a murder case. As here, the DNA was tested by Cellmark and a supervisor rather than the analyst testified at trial. *See People v. Barba*, 2007 WL 4125230 (Cal. App. 2007). In *Moore*, two police chemists testified about a drug analysis performed by a non-testifying chemist. *State v. Moore*, 2008 WL 2058533 (Ohio App. 2008). In *D.G.*, the doctor who performed a sexual assault examination testified about statements the victim made to him. *State ex rel D.G.*, 11 So.3d 548 (2009), *writ denied by, State ex rel D.G.*, 9 So.3d 877 (2009).

Several additional lower courts have recognized that *Melendez-Diaz* prohibits the sort of surrogate testimony that took place in Lui's case. *State v. Brewington*, -- S.E.2d --, 2010 WL 1957477 (N.C.App. May 18, 2010), is particularly instructive regarding the DNA evidence in this case. In *Brewington*, the State's forensic chemist testified that a certain substance was cocaine, although she was not the one who analyzed the substance. *Id.* at *1. As in this case, the State did not attempt to admit the documents generated by the analyst. Rather, the testifying expert relied on the analyst's report in reaching her own opinion. *Id.* at *4. The appellate court found that *Melendez-Diaz* "clearly resolve[d] the admissibility of (1) an expert utilizing data collected by another person to form an independent opinion and (2) the impermissible reiteration of another's findings and conclusions." *Id.* at *4. As *Melendez-Diaz* explained, confrontation "is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Brewington* at *7, quoting *Melendez-Diaz*, 174 L.Ed.2d at 326-27. The *Brewington* Court cited several passages from *Melendez-Diaz* discussing the need to confront an analyst regarding various sources of error. *Id.*

These excerpts make clear that the purpose of requiring the analysts themselves testify is so that their honesty, competence, and the care *with which they conducted the tests* in question could be exposed to "testing in the crucible

of cross-examination.” *Id.* at ----, 174 L.Ed.2d at 326 (citation omitted). Thus, to allow a testifying expert to reiterate the conclusions of a non-testifying expert would eviscerate the protection of the Confrontation Clause.

Brewington at *7 (emphasis in original).

The testifying expert in *Brewington*, however, did not actually perform any tests. *Id.* at *8-9.

It is clear from the testimony of Special Agent Schell that she had no part in conducting any testing of the substance, nor did she conduct any independent analysis of *the substance*. She merely reviewed the reported findings of Agent Gregory, and testified that if Agent Gregory followed procedures, and if Agent Gregory did not make any mistakes, and if Agent Gregory did not deliberately falsify or alter the findings, then Special Agent Schell “would have come to the same conclusion that she did.” As the Supreme Court clearly established in *Melendez-Diaz*, it is precisely these “ifs” that need to be explored upon cross-examination to test the reliability of the evidence. *Melendez-Diaz*, 557 U.S. at ----, 174 L.Ed.2d at 327 (methodology that forensic drug analysts use “requires the exercise of judgment and presents a risk of error that might be explored on cross-examination”).

Id. at *9 (emphasis in original).

The same reasoning applies to the DNA testing in this case.

Supervisor Gina Pineda did not personally observe, for example, whether the samples were properly prepared, whether the analyst followed necessary procedures to avoid contamination, whether the machines were properly calibrated, or whether the print-outs were falsified. At best, she

could say only that *if* all the information provided by the analyst was accurate, she would reach the same conclusion.

United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010), addressed a similar issue. A Border Patrol agent testified that the defendant had not received permission to reenter the country. The agent's testimony was based on a certificate of nonexistence of record (CNR). Although the agent could testify about how such certificates are prepared, his testimony violated the Confrontation Clause because he was not the one who actually searched through the computerized databases. *Id.* at 586.

Commonwealth v. Avila, 454 Mass. 744, 912 N.E.2d 1014 (2009), deals with forensic pathology testimony similar to that presented here. Because the medical examiner who performed the autopsy was no longer employed by the State, a new examiner testified based in part on the autopsy report and diagram prepared by the first one. *Id.* at 759-60. The Court held that "[t]he substitute medical examiner's opinions must be grounded in the evidence presented at trial." *Id.* at 761. For example, the examiner's opinion that a bullet caused a "shored exit wound" would be permissible if based solely on a photograph properly admitted into evidence, but not if based in part on information in the autopsy report. *Id.* at 763 n. 19.

It is true that in this case Dr. Harruff relied to some extent on photographs taken during the autopsy. But the photographs were not authenticated and admitted through witnesses with first-hand knowledge of how they were taken, but rather through the testimony of Dr. Harruff himself. *See, e.g.*, X RP 1358-59. In any event, Dr. Harruff also relied on various observations of Dr. Raven, and even on a toxicology report prepared by the crime laboratory. *See* Appellant's Opening Brief at 9.

Although Dr. Harruff "cosigned" Dr. Raven's report, X RP 1335-36, he was not in the building when the autopsy was conducted. X RP 1339. He did not see how any evidence was collected. *Id.* His memory of his own observations of the body was "quite dim." X RP 1338. "I am not saying, you know, to what degree I looked at it." *Id.* Certainly the body would have been sewn up by the time he could have seen it. X RP 1340. Dr. Harruff relied in part on his discussions with Dr. Raven and his reading of her notes and report. X RP 1335-36, 1341, 1352-53, 1369-70. The State insisted that it was proper for Dr. Harruff to rely on notes taken by Dr. Raven about her investigation of the body at the scene because "they are part of what he reviews to reach his opinion" and "he talked to her about what the scene site was." X RP 1369-70.

For example, Dr. Harruff maintained that the temperature of the victim's body at the time it was found was "significant in terms of setting the time of death." X RP 1354. He admitted that he was not at the scene when the temperature was taken but merely relied on the notes of Dr. Raven. X RP 1352-53. In discussing the victim's injuries, Dr. Harruff relied at times on internal injuries to the head and neck. X RP 1391-92. Any information he had about those injuries could only have come from Dr. Raven's reported observations. Dr. Harruff also explained why the toxicology report is important in identifying the cause of injuries. X RP 1397-98. He then recited the results from the Washington State Toxicology Laboratory. X RP 1398.

The State insisted on presenting Dr. Harruff's testimony rather than inconveniencing Dr. Raven, despite the defense confrontation objection and the reservations of the trial court. The court noted that Washington's rules of evidence would permit an expert to give an opinion based on the work of others, "[b]ut given all the recent litigation on Sixth Amendment and right to confrontation, who knows what may happen to this case years from now." X RP 1346. The prosecutor insisted, however, that there was no confrontation issue because the autopsy report was not testimonial but rather "a public health requirement." *Id.*

Regarding the DNA evidence, the State has argued that any error was harmless. As Lui has pointed out, however, the prosecutor used that evidence to argue that Lui likely committed a sexual assault on Boussiacos either before or after killing her. *See* Reply Brief at 13-15. The United States Supreme Court discussed the prejudice resulting from similar evidence and argument in *House v. Bell*, 547 U.S. 518, 540-541, 126 S.Ct. 2064, 2079, 165 L.Ed.2d 1 (2006). At trial, the prosecution maintained that the semen stains found on the murder victim's underpants came from the defendant, House. Years later, DNA testing proved that the semen belonged to the victim's husband. The State maintained that this was "immaterial" because "neither sexual contact nor motive were elements of the offense."

The Supreme Court disagreed:

When identity is in question, motive is key. The point, indeed, was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase closing argument. Referring to "evidence at the scene," the prosecutor suggested that House committed, or attempted to commit, some "indignity" on Mrs. Muncy. . . . Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this evidence link House to the crime; it likely was a factor in persuading the jury not to let him go free.

Id. at 240-41.

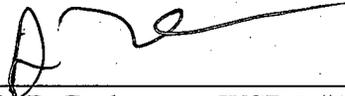
Similarly, the State used the DNA evidence in this case to argue that Lui must have had some form of forced sexual encounter with Boussiacos. Recognizing that there was little sperm found, the State suggested that perhaps Lui was unable to complete the sexual act, and that “final humiliation” so enraged him that he committed the murder.

III. CONCLUSION

As the above discussion shows, cases decided after Lui filed his petition for review confirm that his confrontation rights were violated. This Court should reverse his conviction and remand for a new trial.

DATED this 9th day of June, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United

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