

NO. 61804-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SIONE LUI,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 10 PM 4:39

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. TRICKEY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DEBORAH A. DWYER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	15
1. THE TESTIMONY OF DR. HARRUFF ABOUT THE RESULTS OF THE AUTOPSY DID NOT VIOLATE THE CONFRONTATION CLAUSE.....	18
a. Relevant Facts.....	18
b. The Autopsy Report Is Not Testimonial.....	24
c. Dr. Harruff's Availability For Cross-Examination Satisfied The Confrontation Clause.	29
d. Any Error Was Harmless.....	33
2. THE TESTIMONY OF GINA PINEDA ABOUT THE RESULTS OF THE DNA ANALYSIS DID NOT VIOLATE THE CONFRONTATION CLAUSE.	36
a. Relevant Facts.....	36
b. The DNA Profiles Are Not Testimonial.	43
c. Gina Pineda's Availability For Cross-Examination Satisfied The Confrontation Clause.	46
d. Any Error Was Harmless.....	50
D <u>CONCLUSION</u>	51

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Crawford v. Washington, 541 U.S. 36,
124 S. Ct. 1354,
158 L. Ed.2d 177 (2004).....15-18, 24, 28, 29, 31, 43- 45

Davis v. Washington, 547 U.S. 813,
126 S. Ct. 2266, 165 L. Ed.2d 224 (2006) 16, 17, 29, 43-46

Delaware v. Van Arsdall, 475 U.S. 673,
106 S. Ct. 1431, 89 L. Ed.2d 674 (1986) 33

Melendez-Diaz v. Massachusetts, No. 07-591..... 17, 18, 31, 43, 45, 50

United States v. De La Cruz, 514 F.3d 121
(1st Cir. 2008)..... 31, 32

United States v. Feliz, 467 F.3d 227
(2nd Cir. 2006), cert. denied,
549 U.S. 1238 (2007)..... 28

United States v. Moon, 512 F.3d 359
(7th Cir.), cert. denied, 129 S. Ct. 40 (2008) 50

United States v. Washington, 498 F.3d 225
(4th Cir. 2007)..... 50

Washington State:

Carrick v. Locke, 125 Wn.2d 129,
882 P.2d 173 (1994)..... 26

State v. Banks, 149 Wn.2d 38,
65 P.3d 1198 (2003)..... 33

State v. Heggins, 55 Wn. App. 591,
779 P.2d 285 (1989)..... 20, 26

<u>State v. Kirkpatrick</u> , 160 Wn.2d 873, 161 P.3d 990 (2007).....	34
<u>State v. Kreck</u> , 86 Wn.2d 112, 542 P.2d 782 (1975).....	27
<u>State v. Ramos</u> , 124 Wn. App. 334, 101 P.3d 872 (2004).....	26
 <u>Other Jurisdictions:</u>	
<u>Campos v. State</u> , 256 S.W.3d 757 (Tex. Ct. App. 2008).....	27, 45, 50
<u>Kansas v. Lackey</u> , 280 Kan. 190, 120 P.3d 332 (Kan. 2005), <u>cert. denied</u> , 547 U.S. 1056 (2006).....	28
<u>Moreno Denoso v. State</u> , 156 S.W.3d 166 (Tex. Ct. App. 2005).....	27
<u>People v. Freycinet</u> , 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 (N.Y. 2008).....	28
<u>People v. Geier</u> , 41 Cal.4 th 555, 161 P.3d 104, 61 Cal. Rptr. 3d 580 (2007).....	43, 44, 45, 48, 49
<u>People v. Rawlins</u> , 10 N.Y.3d 136, 884 N.E.2d 1019, 855 N.Y.S.2d 20 (2008).....	45, 50
<u>Rollins v. State</u> , 392 Md. 455, 897 A.2d 821, <u>cert. denied</u> , 549 U.S. 959 (2006).....	28
<u>State v. Crager</u> , 116 Ohio St.3d 369, 879 N.E.2d 745 (2007).....	45, 46, 48
<u>State v. Craig</u> , 110 Ohio St.3d 306, 853 N.E.2d 621 (Ohio 2006), <u>cert. denied</u> , 549 U.S. 1255 (2007).....	27, 30, 31, 32

<u>State v. Davis</u> , 283 Kan. 569, 158 P.3d 317 (2006).....	28
<u>State v. Delaney</u> , 171 N.C. App. 141, 613 S.E.2d 699 (2005)	32

Constitutional Provisions

Federal:

U.S. Const. amend. VI	15
-----------------------------	----

Statutes

Washington State:

RCW 5.45.010	24
RCW 5.45.020	24
RCW 36.24.190	25
RCW 68.50.010	20, 25
RCW 68.50.015	25
RCW 68.50.100	20, 25

Rules and Regulations

ER 703	19, 32, 50
ER 803	24, 31

A. ISSUES

1. Whether the testimony of the chief medical examiner based on an autopsy report prepared by another violates the Confrontation Clause, where the testifying witness contemporaneously reviewed the report, co-signed it, and drew his own conclusions from the objective facts and photographs, and the report itself was not admitted into evidence.

2. Whether the testimony of a lab supervisor based on DNA tests done by others violates the Confrontation Clause, where the testifying witness relied on the results to draw her own conclusions, and only the raw data were shown to the jury.

B. STATEMENT OF THE CASE

Defendant Sione Lui was charged by information with Murder in the Second Degree. Supp. CP ___ (sub #1, Information); CP 16. The State alleged that, sometime between February 2 and February 9, 2001, Lui intentionally caused the death of Elaina Boussiacos. CP 16.

The testimony of numerous witnesses at trial painted a picture of the relationship between Lui and Boussiacos as a troubled one, fraught with jealousy and mistrust. One of Boussiacos' best friends said that Lui had called her on more than one occasion to pump her for information

about Boussiacos, such as any men she might be seeing, or other things she might be doing behind his back. RP¹ 361, 363, 369-70.

When a male friend e-mailed Boussiacos to let her know that he had met a new woman, Lui sent an annoyed response, telling the friend to keep his business to himself. RP 420-21, 444-46; Ex. 4, 167. After a puzzled response from the friend, Lui sent another e-mail, telling the friend to "move on" because "Elaina is too busy with me, work and family," and adding, "You don't need her to help you hookup with anyone." RP 446-47; Ex. 4, 167.²

There was mistrust on both sides. After dating Lui for several months, Boussiacos came across pictures of him in wedding attire, indicating that he had been married before.³ RP 410. Shortly before her death, Boussiacos told a friend that there was no trust in the relationship, based on things Lui had done behind her back. RP 545.

As it turned out, these suspicions were not unfounded. Boussiacos' former boss said that Lui had put his hand on her leg and rubbed it inappropriately at a company Christmas party in 1999, while Boussiacos

¹ The verbatim report of proceedings includes 16 volumes, consecutively numbered.

² The parties argued at some length about what parts of the e-mails could be read to the jury. The trial court severely curtailed Lui's last e-mail, finding most of it too prejudicial to be admitted. RP 428-43; Ex. 4, 167.

³ In fact, Lui's divorce was not final until December 18, 2000, only about six weeks before Boussiacos' death. RP 682.

sat next to him on his other side. RP 454-55. A good friend said that Lui had followed her into a room at Boussiacos' house after a group night out at a club in February 2000, and tried to kiss her. RP 413.

Things apparently came to a head when Boussiacos found out about Sina Packer. Packer, a married woman with three children, had met Lui at a party in late 1997 or early 1998. RP 471. The two quickly began a sexual relationship, meeting at least two or three times a month, sometimes at Lui's apartment and sometimes at a motel. RP 475-78. Lui never mentioned another relationship other than his ex-wife. RP 479. Packer eventually got a second job, which left her tired and drained; as a result, sex with Lui started to taper off in mid-1999, although they continued to see each other into the summer of 2000, and Lui continued to call Packer into late 2000.⁴ RP 480-81.

Boussiacos discovered Packer's phone number on Lui's cell phone; she called Packer to let her know that she was Lui's fiancée. RP 482. Sometime in late January, Lui called Packer and told her that, if Boussiacos should call, Packer should tell Boussiacos that Packer had not talked to Lui in a long time. RP 485-86. Lui and Packer agreed to meet on the following Friday. RP 485, 487.

⁴ Lui and Boussiacos had gotten together in the spring of 1999. RP 424-25. They had lived together since July of 2000. Ex. 43 at 3.

Boussiacos called Packer, and they agreed to meet on Wednesday, January 30, 2001. RP 487-88. When they met, Boussiacos told Packer that she did not intend to go through with her planned marriage to Lui; in fact, she referred to Lui as her ex-fiancée. RP 497-98. Boussiacos showed Packer her engagement ring, which she had in a little black leather bag. RP 498-99. The two concluded that Lui was a liar. RP 499.

While they were together, Packer called Lui with the cell phone's speaker on so that Boussiacos could hear. RP 499-500. Lui again cautioned Packer to tell Boussiacos that he and Packer had not talked in a long time. RP 500. Boussiacos made her presence known to Lui, and the conversation ended shortly after that. RP 501-02. After the call had concluded, Boussiacos told Packer that it was over between herself and Lui, and that they would have to decide who would move out. RP 502.

Other testimony showed that, while Lui and Boussiacos were reportedly engaged to be married, the proposed wedding was in doubt even before Boussiacos found out about Sina Packer. A number of friends reported that, in late 2000 and early 2001, Boussiacos had expressed serious doubts about her impending marriage. RP 371-72, 394, 414, 530-31, 606-10. In late January 2001, when Boussiacos called her mother to talk about her upcoming visit to California, she told her mother that things

weren't working out with Lui and she was not going to marry him; she would not marry a man who was not trustworthy. RP 697-98.

Lui himself seemed to realize that the relationship was in trouble. In May of 2000, Boussiacos went to California for a wedding. RP 411. A friend who saw her just before she left found her seemingly distracted by problems with Lui. RP 411-12. The next day, Lui called the friend, distraught and crying because he feared that Boussiacos was leaving him. RP 412-13. Lui said that he had cheated on Boussiacos and had asked her to marry him. RP 413. He said he wasn't sure that she was coming back to him, and he didn't want to live without her. Id. When Lui spoke with his ex-wife on the evening of February 2, 2001, he told her that things were not going well with Boussiacos. RP 684-86.

Boussiacos mirrored the ups and downs of the relationship in her treatment of her engagement ring – sometimes she wore it, and sometimes it lay hidden in her purse. One friend observed that Boussiacos seemed to stop wearing her ring when she was mad at Lui. RP 371. When Boussiacos met with Sina Packer during the week before Boussiacos was murdered, clearly a low point in the relationship, Packer noticed that Boussiacos was carrying the ring in a small leather bag. RP 498.

One thing that Boussiacos' friends and acquaintances were unanimous about was the attention she paid to her personal appearance.

She always dressed nicely, and always wore makeup when she went out. RP 365, 377-78, 605. One friend said that Boussiacos was her "most put together friend" – she took "extremely good care of herself" and "always looked like she stepped out of the magazine." RP 409. She was "high maintenance," and "into style and looks." RP 533. She would "primp" before going out. RP 391. Her former husband recalled her spending two hours on makeup, hair and dress before going out. RP 655-56. Her mother said that Boussiacos always dressed nicely and wore makeup when she visited in California. RP 707.

Boussiacos would never wear sweatpants and a t-shirt outside the house, except at the gym. RP 411. According to a friend, she usually wore a t-shirt and shorts or sweatpants to bed. RP 365-66. Another friend never saw Boussiacos wear pajamas for sleeping. RP 390. Boussiacos' mother said that Boussiacos had visited her on several occasions, and she had seen what her daughter wore for bed -- sweatshirts and sweatpants, or shorts and a shirt; she never knew her to wear pajamas. RP 691-92.

The one reported time that Boussiacos' appearance did not fit this picture was at her meeting with Sina Packer, after she had discovered Packer's relationship with Lui. Packer said that Boussiacos' hair was pulled back in a ponytail, she wore hardly any makeup, and she looked "maybe drained out." RP 502-03. The next time that Boussiacos'

appearance did not fit the norm was after her death – when she was found in the trunk of her car, dressed in sweatpants and a long-sleeved white t-shirt, supposedly on her way to the airport. RP 864-66; Ex. 169 at 14-15.

On Friday night, February 2, 2001, the last night she was seen alive, Boussiacos dropped off her 10-year-old son, Anthony Negron, with his father, James Negron, at a pre-arranged meeting place in Seattle. RP 657-60, 673, 675, 676. The exchange took place at around 9:30 or 9:45 p.m.; Boussiacos gave Anthony a hug and a kiss goodbye, and he got into the car his father was driving. RP 660, 671. Boussiacos was driving a truck; her upper body was clothed in something white. RP 660, 671.

The plan called for Negron to drop Anthony off at school on Monday morning, and Boussiacos would pick him up after work. RP 658-59. Negron did not hear from Boussiacos that weekend, but this was not unusual. RP 661. At about 5:00 – 5:30 p.m. on Monday, Negron got a call from Anthony, who reported that his mother had not arrived to pick him up. RP 661-62. Shortly thereafter, Negron received a phone call from Lui, asking if Lui could take Anthony home with him. RP 662. Negron demurred, and went to pick Anthony up himself. RP 662-63.

Police met with family members on February 7, 2001. RP 730. Lui said that he believed someone "very smart and professional" was

responsible for Boussiacos' disappearance.⁵ RP 731. Lui volunteered that she was "very physically fit."⁶ Id. He speculated that she could have had car trouble, and some man might have grabbed her. RP 732.

In an interview with Detective Doyon on February 8, 2001, Lui reported that Boussiacos had returned home at around 10:00 – 10:15 p.m. on the previous Friday night (February 2nd). Ex. 43 at 8, 13.⁷ Boussiacos had driven Lui's truck to drop Anthony off, because her 1994 Nissan had a flat right front tire. Id. at 12. They put the small spare tire on; Boussiacos held the flashlight while Lui changed the tire. Id. at 12-15.

Lui said that they finished this task between 10:00 – 10:30 p.m., and watched the 11:00 news. Ex. 43 at 14-15. Boussiacos then went into the bedroom to put her clothes together for her trip; she was going to California the next day to visit her mother. Id. at 16-17. She changed into her nightgown, then came back out and sat on the couch with Lui and watched a little more television. Id. at 16. Boussiacos went to bed; Lui stayed up a while longer, and slept on the couch. Id. at 17, 19, 29-30.

⁵ Lui repeated this on April 6, 2007: "[T]his is, was done by somebody professional, someone that knows her, someone that had something in the past and ah, some, some sick, I don't, some very sick, sick person that [is] very professional." Ex. 169 at 28.

⁶ Even if physically fit, Boussiacos, at 5'4" tall and about 130 lbs, would hardly have been a match for an average man. Ex. 23 at 15. Lui, a rugby player, was 6'1" tall and weighed 230 lbs. RP 421-23; Supp. CP ____ (sub # 2, Finding of Probable Cause, at 4).

⁷ The State has numbered the pages of this transcript for ease of reference.

Lui said that when he awoke the next morning between 7:00 – 8:00, he saw that Boussiacos' car was gone. Ex. 43 at 33. He did not hear from her all weekend. Id. at 41. His first hint that anything was wrong was a call from her mother on Monday afternoon, informing him that Boussiacos had never arrived in California.⁸ Id. at 38-39.

Lui called 911 to report Boussiacos missing. Ex. 23. During the next few days, he distributed flyers around Woodinville with pictures of Boussiacos and her car. Ex. 169 at 37-38; RP 1739-43.

Lui said that he had heard nothing from Boussiacos since Friday night at around 11:30 p.m., when she went to bed. Ex. 43 at 41. He said that he and Boussiacos were engaged, and "highly in love." Id. at 2, 7. He said they had planned their wedding for February 15th, but had called it off because they had to "work on some things"; he mentioned her smoking. Id. at 20-21, 23-24. Lui was adamant that the two had not had sex in the last two weeks; premarital sex was against his beliefs as a Mormon, and he was trying to set a better example. Id. at 20-23. He minimized

⁸ While Boussiacos had been scheduled to arrive at her mother's house in California on Saturday, February 3rd, between 12:00 – 1:00 p.m., her mother did not have the phone number at the Woodinville house because the couple had moved in just recently, nor did she have Lui's cell phone number; consequently, she was only able to reach Lui after calling Boussiacos' workplace on Monday and getting his phone number. RP 700-03. She had tried repeatedly, in vain, to reach her daughter on her cell phone. RP 701-02.

Boussiacos' discovery of Packer, insisting that they had "put that aside."

Id. at 25-28.

Lui mentioned that his sister, Paini, had called him from Hawaii on Saturday morning (February 3rd) at around 1:00 a.m., after he had fallen asleep on the couch. Ex. 43 at 30-32. He acknowledged that she was returning a call from him; he speculated that he might have dialed her number from his cell phone by accident, and said that he could not remember anything about the conversation.⁹ Id. at 31-32; Ex. 169 at 53.

There was additional reason to believe that Lui had not slept quietly through that Friday night. His downstairs neighbor, a sound sleeper, was awakened at about 3:15 a.m. by the sound of someone walking around upstairs; his wife was awakened as well. RP 566, 583-84.

Police located Boussiacos' car on Friday, February 9th, in the parking lot of the Woodinville Athletic Club. RP 836-39, 950-51. The owner of the club, Kathryn Wozow, had first noticed the black car backed in close to the dumpster on Saturday morning, February 3rd, at around 7:00 a.m. when she arrived for work. RP 742-43. The car had a spare tire on it. RP 757. Both Wozow and her daughter, the club's manager, said that the car did not move all week. RP 745,758. Finally, on Friday, Wozow asked

⁹ Lui's "accident" explanation was belied by Paini's testimony. Paini said that, when she returned home on Friday evening, her grandmother told her that Lui had called. RP 809-10. The phone in Paini's home did not have caller I.D. RP 827.

a police officer who worked out at the club to run the license plate, and they learned that the car belonged to a missing person. RP 745-46.

Upon opening the locked trunk, police discovered Boussiacos' body. RP 860-61. She was clothed in black sweatpants, torn underwear, and a white long-sleeved t-shirt; her bra was stuffed up inside her shirt. RP 864-67. She had tennis shoes on her feet, with the laces tied somewhat oddly, over to the far side of each shoe.¹⁰ RP 914-16, 972. There was bruising on her neck, and a small amount of blood on her shirt. RP 865.

The interior of the car contained a number of items. On the front seat were a pair of black boots, a pair of jeans, a shirt, and a yellow flashlight. RP 886, 888. A green gym bag on the front floorboard contained a random array of toiletries, including a 24-ounce bottle of lotion, an almost empty bottle of hair gel, another bottle of gel with no top that was leaking, and a container of foundation powder with no lid; there was no mascara and no toothbrush. RP 897-99. Tossed in the back seat and on the floor were a white sweatshirt, a hair dryer, a red shirt and a black leather jacket. RP 900-01. There was also a neatly packed black suitcase; in addition to clothes, the suitcase contained another bottle of

¹⁰ There was no debris on the bottom of the tennis shoes, despite the fact that the driveway of the Woodinville house was carpeted in leaves and needles and other debris, and there was similar debris on the front floorboard of Boussiacos' car around the gas pedal and brake. RP 882, 972, 988.

lotion, another pair of black boots, and another pair of tennis shoes, these with the laces tied in the front. RP 905-11.

After discovering Boussiacos' body, police contacted Lui and took him downtown to interview him. RP 951-53. When they told Lui that her body had been found, he covered his face and moaned, but was not tearful. RP 953. He repeatedly said, "Let's go get her," but never asked where she had been found, or if police knew who had killed her. RP 954-55.

Police arranged for a bloodhound track on February 14th.¹¹ RP 959-60. Detective Gulla went to Lui's home and collected some clothing, which he took to the parking lot where the car had been found. RP 961. After smelling the clothes, the dog took off through the brush, tracked through a shopping center next to the Woodinville Athletic Club, through a Park-and-Ride lot and a condominium complex, up a grassy slope, along a road, and up a driveway to Lui's front porch.¹² RP 961-62, 1070-77.

¹¹ This bloodhound had followed a 12-day-old trail in the past. RP 1061. The best scent trails are laid in cool air. RP 1068-69. The weather was cold that February. RP 964.

¹² Lui's friend Sam Taumoefolau said that he and Lui had walked from Lui's house to the shopping center to distribute flyers on Tuesday, February 6th, after work. RP 1739-40. Sam added that, later that week, he and Lui had dropped off a flyer at the Woodinville Athletic Club and then walked home "through the cutoff there by the parking lot." RP 1772-74. Sam did not explain why they were walking in the dark and cold, instead of driving. Sam was certain that Boussiacos' car was not in the Athletic Club's parking lot when he and Lui walked through there. RP 1775-76. Wozow and her daughter testified that no one had come to the club that week asking to post a missing person flyer; the club had a bulletin board where they would have posted such a flyer if asked. RP 747, 763.

Jodi Sass, a forensic scientist in the DNA unit of the Washington State Patrol Crime Laboratory ("WSPCL") examined certain items of evidence related to the case. RP 1146, 1174. After obtaining a positive result for semen on the underwear found on Boussiacos' body, Sass was able to extract a DNA profile; the male component matched Lui's DNA,¹³ while the female component matched Boussiacos'. RP 1209-11, 1220-21. Sass obtained a trace male component from the shoelaces in the shoes found on Boussiacos' body, but not enough to generate a profile. RP 1228-33. While Sass could not get a full profile from the male component of the vaginal wash, Lui could not be excluded – all of the peaks that Sass was able to get lined up with his. RP 1237-38. Vaginal swab samples were sent to another lab for Y-STR testing; this technology, which targets only the Y-chromosome, was not in use at WSPCL. RP 1165, 1238-39. A blood drop from the stick shift of Boussiacos' car did not match Boussiacos, Lui, or James Negron. RP 1224, 1239-40.

The murder remained unsolved until 2007. Detective Bartlett called Lui in March 2007 and told him that she was reviewing the Boussiacos murder. RP 1313-14. Bartlett told Lui that she had information on two suspects; this was untrue, but she said it so that Lui

¹³ The likelihood of the male fraction being someone other than Lui was 1 in 8.6 quadrillion. RP 1221.

would feel comfortable talking with her. RP 1314-15. Lui never asked any questions about the supposed suspects, nor did he inquire as to the status of the investigation. RP 1315. Recounting the events surrounding the death, Lui told Bartlett that he and Boussiacos had been saving money to buy a home and were planning to get married; he specifically denied that the wedding had been called off. RP 1317-19. Lui repeated his assertion that they had been abstaining from sex, perhaps for as long as two months before her death.¹⁴ RP 1321-22. Lui said that Boussiacos was going to California to tell her mother about the upcoming marriage, and that it was an exciting time for them. RP 1322. Lui denied that his relationship with Packer was an issue. RP 1325-26, 1422-24.

Lui told Bartlett that he thought Boussiacos was killed by someone whom she knew; he said he had thought about her ex-husband, but James Negron was a born-again Christian.¹⁵ RP 1428. Lui said that Boussiacos was very jealous, while he described himself as "very laid back." RP 1429. He speculated that perhaps she had been sneaking out to smoke, and someone had followed her. RP 1430.

¹⁴ In a subsequent taped statement, Lui adamantly denied that he had had sex with Boussiacos on the night before her disappearance. Ex. 169 at 63, 107.

¹⁵ Lui alluded to James Negron's alleged gang connections in a later statement, asserting that Negron "used to kill people" and that Boussiacos was afraid of him. Ex. 169 at 27. Negron had established an alibi in relation to Boussiacos' murder. RP 1428.

Boussiacos' engagement ring was not found with her body. RP 1703. When asked, Lui said that he thought her mother had it. RP 1431. During a subsequent taped statement, Lui again denied having the ring. Ex. 169 at 50-51. He insisted that Boussiacos always wore the ring, and that he believed she was wearing it when she left for California. Id. at 80. Evidence introduced at trial established that Lui had given a ring identical to Boussiacos' ring to his current wife, who continued to wear it until police obtained it from her and placed it in evidence. RP 844-57, 1608-22, 1628-29, 1701-12.

Lui did not testify at his trial. A jury found him guilty as charged. CP 19. The trial court imposed a standard-range sentence of 200 months of confinement. CP 36-44.

C. ARGUMENT

Lui contends that his Sixth Amendment right "to be confronted with the witnesses against him" was violated by the State's introduction of scientific testimony through expert witnesses who did not themselves perform the scientific analyses about which they testified. U.S. Const. amend. VI. The Supreme Court has not addressed this type of scientific testimony since its landmark decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). However, based on

the Court's analysis in Crawford, and in its succeeding opinion in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed.2d 224 (2006), the type of testimony presented here comports with the Confrontation Clause.

In Crawford, the Court addressed whether admission at trial of a tape-recorded statement, given in response to police questioning by a witness who did not testify, violated the defendant's Sixth Amendment right to confrontation. 541 U.S. at 38-40. The Court ultimately announced a complete ban on out-of-court statements that are "testimonial," unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant about the statement. Id. at 59, 68. While the Court in Crawford declined to set out a comprehensive definition of "testimonial," it suggested the broad contours of the term: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Id. at 68. The court included business records among statements that are not "testimonial." Id. at 56.

In Davis, the Court was faced with the question whether statements given to law enforcement personnel in the course of a 911 call were "testimonial." 547 U.S. at 817. The Court again declined to announce an all-encompassing definition of "testimonial," but nevertheless further refined the concept, bringing in the circumstances under which the

statement was made as well as the primary purpose of the interrogation. Id. at 822, 828. In finding the 911 caller's statements identifying the defendant as her assailant nontestimonial, the Court contrasted the witness's statements in Crawford, which were given hours after the fact and described past events, with those in Davis, which described events as they were actually happening. Id. at 826-28.

The Court in Davis advanced the Confrontation Clause analysis in an important way. While Crawford stopped short of limiting the reach of the Clause to testimonial hearsay ("even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object"), Davis made this explicit: "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Crawford, 541 U.S. at 53; Davis, 547 U.S. at 821.

Lui refers in his brief to a case currently before the United States Supreme Court, Melendez-Diaz v. Massachusetts, No. 07-591.¹⁶ AOB at 26. The question presented in that case is: "Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence subject to the demands of the Confrontation Clause

¹⁶ The case was argued before the Court on November 10, 2008; a decision should be forthcoming in the near future. It may be appropriate to order supplemental briefing on the effect, if any, of Melendez-Diaz on the issues raised in this appeal.

as set forth in Crawford v. Washington, 541 U.S. 36 (2004)."¹⁷ The Supreme Court's opinion in Melendez-Diaz is unlikely to resolve this appeal, since it does not address a situation where a different expert appears for cross-examination.

1. THE TESTIMONY OF DR. HARRUFF ABOUT THE RESULTS OF THE AUTOPSY DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Lui argues that, by calling Dr. Harruff in place of the pathologist who conducted the autopsy, the State violated his Sixth Amendment right of confrontation. This is not correct. The autopsy report, which was prepared pursuant to statute, contained contemporaneously recorded factual observations. The report itself was not admitted at trial. Dr. Harruff, who had contemporaneously reviewed the autopsy results and co-signed the report, reached his own conclusions based on the facts and photographs in the report. Lui's confrontation right was fully protected.

a. Relevant Facts.

The State called Dr. Richard Harruff, Chief Medical Examiner for King County, to testify based on findings from the Boussiacos autopsy. RP 1333. Dr. Harruff started by explaining the protocols and procedures of the King County Medical Examiner's Office for handling bodies and

¹⁷ This is the Supreme Court's formulation of the question presented, and may be found on the Court's website under docket No. 07-591.

related evidence, and for conducting autopsies. RP 1334-35. The office conducts over 1300 autopsies per year; Harruff personally conducts about 300 of these, and supervises many more. RP 1335. In homicide cases, Harruff reviews the report, the photographs and the evidence, and discusses the case with the principal pathologist; he then co-signs the report to indicate that he agrees with the findings. RP 1335-36.

While pathologist Kathy Raven had performed the autopsy in this case, Harruff had contemporaneously reviewed her work and co-signed the report. RP 1337-38, 1340-41, 1343. He agreed with Raven's findings; he would not have signed the report if he did not believe it was accurate. RP 1340. Raven no longer worked for the Medical Examiner; she had relocated to Reno, Nevada, and was testifying in another court on this date. RP 1337, 1343. In preparation for his testimony, Harruff reviewed the autopsy report, as well as relevant photographs and notes. RP 1341.

The defense objected to Harruff's testimony, arguing that it was based on hearsay. RP 1341-42. The State relied on ER 703.¹⁸ RP 1342. The trial court rejected the hearsay objection. RP 1346. The court noted

¹⁸ ER 703 provides that: "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."

that the autopsy report itself would not be admitted, but only Harruff's opinion, which could properly be based on hearsay. RP 1368. The court also relied on a Court of Appeals opinion that held that an autopsy report was a business record, and that testimony based on the report did not violate the Confrontation Clause.¹⁹ RP 1477-78.

The court questioned whether Lui's Sixth Amendment right to confrontation was at issue. RP 1346. The State responded that the autopsy report was not testimonial, in that it was not prepared for litigation but rather pursuant to a public health requirement that autopsies be done in unattended, unanticipated deaths.²⁰ RP 1346-47. Finding the autopsy report "part testimonial and part non-testimonial," the court nevertheless found that any confrontation right was satisfied because Harruff had co-signed the report at the time, and was in court and available for cross-examination. RP 1347, 1368-69.

Dr. Harruff explained in some detail how autopsy technicians are trained to handle and package evidence. RP 1348-51. He explained that the pathologist will generally go to the scene, to view the body in context

¹⁹ State v. Heggins, 55 Wn. App. 591, 779 P.2d 285 (1989).

²⁰ The relevant statutes, RCW 68.50.010 and 68.50.100, are discussed infra.

and take basic measurements such as body temperature.²¹ RP 1351-52.

The body is then loaded into a clean body bag, taking care to maintain the condition and positioning of any clothing. RP 1356. When the body arrives at the medical examiner's office, photographs are taken. RP 1357.

Photographs taken in the course of the autopsy showed the lower part of Boussiacos' body clothed in sweatpants. RP 1360. Her underpants were positioned above the level of the sweatpants, with the crotch riding up into the labia of the perineal region; the underpants were torn on the right side. RP 1360-61. She was wearing a long-sleeved white pullover shirt, pulled up toward the chest region; a bra was wadded up underneath the shirt. RP 1361-62. There was a small amount of red staining on the front of the shirt. RP 1361.²²

Photographs documented the positioning of the socks and the manner in which the left shoelace was tied. RP 1362-63. The socks were twisted up, not placed normally on the feet; the heel portion was pulled up

²¹ The internal temperature of Boussiacos' body, taken at the scene at 10 minutes after midnight on February 10, 2001, was 38.4 degrees Fahrenheit. The ambient air temperature was 30.5 degrees. The body warms and cools with its environment. While it is not possible to fix the time of death based on body temperature alone, the temperature of this body was not inconsistent with death occurring approximately 7 days earlier. RP 837, 1354-56.

²² These observations were virtually identical to those made at the scene by Detective Peters. RP 864-68.

too far, so that it was not over the heel. RP 1363-65; Ex. 86, 119. The shoelace on the left shoe was tied all the way over to the side. Ex. 86.

Photographs also detailed Boussiacos' injuries. There was blunt force injury to her face. RP 1376. There was bruising and scraping in the armpit areas, implying some downward pressure, possibly from knees positioned on the chest. RP 1379-81. Skin was scraped off the back of her left hand. RP 1382. There were large abrasions on her neck; taken together, they indicate an object or objects that applied force to the neck on both sides and on the front. RP 1383-84. There were smaller abrasions on the front of the neck, possibly made by fingernails. RP 1384-85.

Dr. Harruff testified to his particular expertise in strangulation injuries, arising primarily from his training as a forensic pathologist, and from giving trainings and providing information and testimony in recent years about such injuries. RP 1385. He described the two basic types of strangulation: ligature and manual. RP 1386. Boussiacos' injuries showed features of both; there was a band-like abrasion on the left side of the neck (indicating ligature strangulation), as well as little curve-type abrasions on the front of the neck that could be fingernail marks (indicating manual strangulation)²³. RP 1386-90. The scraping of the skin

²³ Fingernail marks could also result from the victim trying to remove a hand or ligature from her neck. RP 1386-87.

indicated movement between the object producing the force and the skin surface; this would generally indicate that the victim was struggling while the assailant applied pressure to her neck. RP 1388.

Dr. Harruff also noted petechiae – little dot-like red areas on the skin and on the mucous membranes of the eyes and mouth. RP 1392. These are due to the rupture of blood vessels in the skin, and are important indicators of strangulation. RP 1392-96.

Strangulation causes a lack of oxygen to the brain; the brain can continue to function for about 10 seconds before a person loses consciousness. RP 1396. Death generally results in about four minutes. RP 1397. The cause of death in this case was asphyxia due to neck compression. RP 1405.

Every autopsy includes testing of bodily fluids for the presence of drugs or alcohol; neither was found to be present in this case. RP 1397-98. Nicotine was not detected in the blood. RP 1398.

The autopsy report itself was not admitted into evidence. RP 1368 (court notes that "the report itself is not going into evidence"), 1372 (court directs that "a clean copy of the autopsy report [be] marked as an unadmitted exhibit"); Ex. 168 (Autopsy Report – "Identification only").

b. The Autopsy Report Is Not Testimonial.²⁴

The autopsy report in this case was not prepared by the police or at their behest. It was not prepared for litigation, but pursuant to statutory authority and the regular course of business of the Medical Examiner's Office. Under these circumstances, the report was a business record, and would not be considered "testimonial" within the meaning of Crawford.

A document that qualifies as a business record is specifically excepted from the prohibition on hearsay. ER 803(a)(6). Business records are defined by statute:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020. The term "business" includes "every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not." RCW 5.45.010.

²⁴ The trial court concluded that the autopsy report was "part testimonial and part non-testimonial." RP 1368. The State agrees that any opinions or conclusions in the report would not qualify as business records, and would probably be considered testimonial. However, Harruff did not rely on Raven's opinions or conclusions, but on objective facts (primarily photographs) to give his own opinions and conclusions to the jury.

Under Washington law, the county coroner has jurisdiction over certain human remains, including the bodies of "all deceased persons who come to their death suddenly when in apparent good health without medical attendance within the thirty-six hours preceding death," or where "the circumstances of death indicate death was caused by unnatural or unlawful means," or where "death occurs under suspicious circumstances," or where "death results from unknown or obscure causes," or where "the death is caused by any violence whatsoever," or where "death apparently results from . . . strangulations," or where "a body is found dead." RCW 68.50.010. "[T]he coroner, in his or her discretion, may make or cause to be made by a competent pathologist, toxicologist, or physician, an autopsy or postmortem in any case in which the coroner has jurisdiction of the body." RCW 68.50.100. The coroner is charged with determining the cause and manner of death. See RCW 68.50.015 (county coroner or medical examiner immune from civil liability for determining cause and manner of death).

Counties with populations of 250,000 or more may replace the office of the coroner with a medical examiner. RCW 36.24.190. King County has created a Medical Examiner's Office within the Department of Public Health; the Medical Examiner retains all the duties of a coroner

except for the holding of inquests, which is vested in the county executive.

Carrick v. Locke, 125 Wn.2d 129, 134, 882 P.2d 173 (1994).

In State v. Heggins, 55 Wn. App. 591, 779 P.2d 285 (1989), abrogation on other grounds recognized by State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004), the Court of Appeals was faced with a situation virtually identical to the one in this case. Dr. Reay, Chief Medical Examiner for King County, testified at trial as to autopsy results. Id. at 594. While the autopsy had been performed by one of Reay's assistants, Reay had reviewed the autopsy report and signed it. Id. Based on photographs and objective facts from the report, Reay gave his opinion as to the nature of the wound and the cause of death. Id. The report itself was not admitted into evidence. Id. at 596 n.1. The court found that the autopsy report, "as utilized here by Reay," satisfied the requirement that a business record must describe an "act, condition or event" rather than opinions or statements as to cause. Id. at 596.

Similarly, Dr. Harruff's testimony referred to objective facts (primarily photographs) from the autopsy report; the report itself was not admitted. The report recorded an "act, condition or event" made in the regular course of business "at or near the time of the act, condition or

event."²⁵ Harruff identified the report, outlined how autopsies are done in the Medical Examiner's Office, and described his review of the reports in general and this report in particular. RP 1334-38, 1348-52, 1356-57. The trial court properly concluded that the testimony was admissible. RP 1477-78. See State v. Kreck, 86 Wn.2d 112, 113-15, 542 P.2d 782 (1975) (laboratory report of blood test admissible as business record, along with testimony of supervising toxicologist); Campos v. State, 256 S.W.3d 757, 763 (Tex. Ct. App. 2008) (autopsy report was nontestimonial; opportunity to cross-examine medical examiner who did not conduct autopsy, but testified on basis of facts in report, was sufficient to protect defendant's confrontation right).

Some courts have gone further, approving the admission of the autopsy report itself. See State v. Craig, 110 Ohio St.3d 306, 853 N.E.2d 621, 639 (Ohio 2006) ("We agree with the majority view under *Crawford* and conclude that autopsy records are admissible as nontestimonial business records."), cert. denied, 549 U.S. 1255 (2007); Moreno Denoso v. State, 156 S.W.3d 166, 181-82 (Tex. Ct. App. 2005) (copy of autopsy report properly admitted, even without testimony of pathologist, because

²⁵ Boussiacos was killed at some point between February 2nd and February 9th, 2001. The autopsy on her body was completed on February 10, 2001. RP 1338.

such a report is not testimonial under *Crawford*); United States v. Feliz, 467 F.3d 227 (2nd Cir. 2006) (admitting autopsy reports as both business records and public records, and allowing medical examiner who had not conducted autopsies to testify as to cause of death based on facts in reports), cert. denied, 549 U.S. 1238 (2007).

Other courts have taken a middle road, allowing the autopsy report itself to be admitted, even in the absence of the pathologist who conducted the autopsy, so long as subjective conclusions are redacted. These courts have then allowed a different pathologist to testify to his or her own conclusions as to such things as cause and manner of death, based on objective observations contained in the report. See Rollins v. State, 392 Md. 455, 897 A.2d 821, cert. denied, 549 U.S. 959 (2006); Kansas v. Lackey, 280 Kan. 190, 120 P.3d 332, 350-53 (Kan. 2005), cert. denied, 547 U.S. 1056 (2006), overruled on other grounds by State v. Davis, 283 Kan. 569, 158 P.3d 317 (2006); People v. Freycinet, 11 N.Y.3d 38, 892 N.E.2d 843, 862 N.Y.S.2d 450 (N.Y. 2008).

As a business record, factual information from the autopsy report is not testimonial. See Crawford, 541 U.S. at 36 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a

conspiracy."). A report of an autopsy performed by the Medical Examiner, whose office falls within the Department of Public Health and who is charged by statute with this duty in cases of sudden, unattended deaths, bears little resemblance to the police interrogations that were the principal concern of the Court in Crawford and Davis. See Crawford, 541 U.S. at 68; Davis, 547 U.S. at 823.

In any event, the autopsy report was not testimonial as used here. The report itself was not admitted into evidence. Dr. Harruff relied on facts derived from the autopsy -- primarily photographs of Boussiacos' clothing and injuries. He offered his own opinions, based on his particular expertise in strangulation injuries, and drew his own conclusions. Those conclusions were the testimonial evidence that was placed before the jury, and Lui had a full and fair opportunity to confront Dr. Harruff.

c. Dr. Harruff's Availability For Cross-Examination Satisfied The Confrontation Clause.

Even if the autopsy report is "testimonial" within the meaning of Crawford and Davis, Dr. Harruff 's testimony satisfied Lui's confrontation right. While Harruff did not personally participate in the dissection of Boussiacos' body, he reviewed the pathologist's work and notes at the time, and signed the report to indicate his agreement with the findings.

Under these circumstances, Harruff's presence at trial and availability for cross-examination satisfied Lui's confrontation right as to this evidence.

The Supreme Court of Ohio found the Confrontation Clause satisfied under almost identical circumstances. In Craig, the defendant was charged six years after the fact with the abduction, rape and murder of a 12-year-old girl. 853 N.E.2d at 626. The medical examiner, Dr. Kohler, testified in place of the retired medical examiner who had conducted the autopsy on the victim.²⁶ 853 N.E.2d at 637. Kohler described the internal and external examination of the body, and the multiple injuries the child had suffered. Id. Kohler recounted the various tests that had been conducted, and the results of those tests. Id. Kohler identified the photographs taken during the autopsy. Id. Kohler provided her own expert opinion on the cause and time of death, and testified that the injuries were consistent with vaginal and anal penetration. Id.

The Ohio court found that Kohler's testimony satisfied the defendant's confrontation right, reasoning that:

The jury was fully aware that Dr. Kohler had not personally conducted or been present during [the victim's] autopsy. Moreover, the defense had the opportunity to question Dr. Kohler about the procedures that were performed, the test

²⁶ There was no showing that the retired medical examiner was unavailable. Craig, 853 N.E.2d at 637.

results, and her expert opinion about the time and cause of death.

Id. at 637-38.²⁷

The United States Court of Appeals for the First Circuit came to the same conclusion, again under virtually identical facts. In United States v. De La Cruz, 514 F.3d 121, 127 (1st Cir. 2008),²⁸ the defendant was charged with distribution of heroin resulting in death. The medical examiner gave his expert opinion on the cause of death, although he did not personally conduct the autopsy. Id. at 132. The court found the Confrontation Clause satisfied:

An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*.

Id. at 133. The court was "unpersuaded that a medical examiner is precluded under *Crawford* from either (1) testifying about the facts contained in an autopsy report prepared by another, or (2)

²⁷ The trial court also admitted the autopsy report itself into evidence, finding it admissible as a business record under Evid. R. 803(6). Craig, 853 N.E.2d at 637, 638.

²⁸ De La Cruz has filed a petition for certiorari in the United States Supreme Court (No. 07-1602). The Court has neither accepted nor denied the petition, apparently holding it in abeyance pending the Court's decision in Melendiz-Diaz, *supra*.

expressing an opinion about the cause of death based on factual reports – particularly an autopsy report – prepared by another." Id. at 134.

An expert witness may base his opinion or inferences on facts or data made known to him at or before the hearing; these facts or data need not be admissible in evidence, so long as they are of a type reasonably relied on by experts in that field in forming opinions or inferences on the subject at issue. ER 703. The First Circuit observed that "a physician's reliance on reports prepared by other medical professionals is 'plainly justified in light of the custom and practice of the medical profession.'" De La Cruz, 514 F.3d at 134 n.5.

In keeping with this custom and practice, the basis of Dr. Harruff's conclusions on the cause and manner of Boussiacos' death were objective facts, mostly in photographic form, derived from the autopsy done on her body. Harruff reasonably relied upon them, and was present for cross-examination. There was no Confrontation Clause violation. See State v. Delaney, 171 N.C. App. 141, 613 S.E.2d 699 (2005) (no confrontation violation where expert in analysis of controlled substances testified based on tests done by a different chemist); Craig, 853 N.E.2d at 637-38 (no

confrontation violation where medical examiner testified based on report of autopsy conducted by a different medical examiner).

In the end, the conclusions drawn from the photographs were Harruff's own. His availability for cross-examination satisfied Lui's confrontation right under the Sixth Amendment.

d. Any Error Was Harmless.

Violations of the Confrontation Clause may be harmless. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed.2d 674 (1986). The test to determine whether a constitutional error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003).

There can be no doubt that the introduction of evidence derived from the autopsy report was harmless here. Dr. Harruff used the report, with its accompanying photographs, to discuss the injuries to Boussiacos' body, and the condition of her clothing. RP 1360-66, 1375-96. Even without the autopsy photographs, it was clear from the scene photographs taken by Detective Peters that the victim did not crawl into the trunk of her car, close herself in and die a natural death. Her underwear was torn, her sweatpants were pulled down, her bra was stuffed up between her breasts, and there was bruising on her neck and blood on her shirt. RP 860-68.

In any event, this case was never about *whether* the victim died by homicidal violence, or exactly *how* she was killed, but *who* killed her and left her body in the trunk of her car.²⁹ Defense counsel pointed out in closing that fingerprints found in the victim's car were "from places where the driver of the car, the killer, would put them," but "they are not his [Lui's]." RP 1868. "There is blood on the stick shift, where the killer would grab the shift in order to operate the car, on the skirt of the stick shift. It is not his. Whose is it?" RP 1868-69.

Nor did the defense ever dispute the conclusion that Boussiacos was strangled. In fact, counsel made use of that conclusion in attempting to convince the jury that Lui was not the one who killed her, arguing that a moment of irrationality born out of jealousy and anger (the prosecution's theory) would not likely lead to "steadily applied, deliberate pressure for a long enough [sic] to take somebody's life." RP 1862.

Lui nevertheless portrays the autopsy testimony as significant. He points to Dr. Harruff's response that the temperature of the body could be consistent with the victim being killed on February 2nd or February 3rd. RP 1355-56. Before agreeing with this, however, Harruff pointed out that those dates posited a six or seven-day time period between death and the

²⁹ Where evidence does not relate to a disputed issue, it is likely to be harmless. State v. Kirkpatrick, 160 Wn.2d 873, 893, 161 P.3d 990 (2007) (Sanders, J., concurring).

body temperature measurement, and that the body would warm and cool as its environment changed from day to night. RP 1354-56. Nor did the State have to prove that Boussiacos was killed on February 2nd or 3rd – the charging period was February 2 through February 9, 2001. CP 16.

Lui also points to Harruff's testimony that no nicotine was detected in Boussiacos' blood. RP 1398. Lui had told Detective Bartlett that Boussiacos would sometimes sneak out and smoke, and that maybe someone had followed her. RP 1430. Given that this was simple conjecture on Lui's part, the lack of nicotine hardly impeaches his credibility. Nor was there any testimony, on direct or cross-examination, as to how long nicotine would stay in the blood. This evidence could hardly have been significant under these circumstances.

Nor was the fact that strangulation results in little bloodshed significant for the State's case. First of all, since Lui did not come to the attention of police until days after Boussiacos' disappearance, the lack of bloodstains in his home or on his clothing was not surprising. In any event, there was no question, based solely on the testimony of detectives and scene photographs, that Boussiacos did not die from a gunshot wound, a stab wound, or anything that would produce significant bloodshed.

Finally, Lui claims that Harruff's testimony about the time it would take to kill someone by strangulation proved the intent necessary for

murder. As pointed out above, the issue in this case was not *how* Boussiacos died, but *who* killed her. Moreover, Lui used this testimony to his advantage, arguing that a fit of jealous rage would not likely last for the long minutes it would take for Boussiacos to die from strangulation.

2. THE TESTIMONY OF GINA PINEDA ABOUT THE RESULTS OF THE DNA ANALYSIS DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Lui also challenges the testimony of an expert other than the one who performed the DNA analysis, as a violation of his confrontation right. This claim should be rejected. While the analysis was done with an eye toward trial, the scientific data are not testimonial. In any event, the testimony of the laboratory supervisor satisfied the right to confrontation.

a. Relevant Facts.

The State gave notice that Gina Pineda, the witness it intended to call to testify about DNA evidence, was a supervisor; if the State were required to call each person involved in the DNA testing, it would have to call five in all, all from out-of-state.³⁰ RP 1415-16, 1418-19, 1468-69.

Lui objected based on the Confrontation Clause. RP 1419-20. Noting that

³⁰ It is standard procedure in private DNA laboratories for several different analysts to work on a given case. Typically, technicians perform the "wet bench" work and analysts interpret the results. RP 1571-72. In this case, for example, one person (Christine Ackerman) took cuttings from the victim's shoelaces and did the extraction and quantification of that DNA; another (Zoe Knesl) did the amplification; and a third (Hunan Nasir) interpreted the results and wrote the report. RP 1548-52.

the report itself would not be admitted, but only the testifying witness's expert opinion, the trial court allowed the testimony. RP 1421, 1478-80.

Pineda was the associate director and technical leader of Orchid Cellmark, a private DNA laboratory. RP 1483. Prior to her current employment, Pineda had worked for a different DNA company, Reliagene Technologies, in New Orleans, Louisiana; when Orchid Cellmark acquired Reliagene, operations were consolidated in Dallas, Texas. RP 1483-84.

Pineda had a strong educational background for her job. She had a Bachelor of Science degree from Louisiana State University in microbiology and chemistry. RP 1485. She also had a Master of Science degree in pathology, with a concentration in forensic DNA. RP 1485.

Pineda detailed her duties and responsibilities. She told the jury that she was responsible for maintaining standard operating procedures, method implementation, technical trouble-shooting, safety, and quality control. RP 1484. She supervised the daily duties of the forensic department at the Dallas facility. RP 1484. While Pineda did not routinely do testing on specific cases anymore, she regularly took proficiency tests to remain qualified to perform and review DNA testing. RP 1484-85. Pineda was also responsible for ensuring that each analyst at her lab kept up with the twice-yearly proficiency testing. RP 1485-86.

Before assuming her present duties, Pineda was an analyst herself, responsible for receiving cases, processing evidence, obtaining DNA profiles, interpreting the results, reporting the profiles, and testifying in court as needed. RP 1485. Pineda had previously testified as a DNA expert, although this was her first time in a Washington court. RP 1486.

As a private company, Orchid Cellmark does work for prosecution and defense alike. RP 1486. The company does considerable business outside the criminal area, including DNA profiles for donor purposes, identification of victims after natural disasters, and academic research. RP 1486-87. Both Reliagene and Orchid Cellmark are accredited by the American Society of Crime Laboratory Directors, Laboratory Accreditation Board. RP 1491-92. All analysts are in compliance with industry standards. RP 1492. The DNA method used at Orchid Cellmark, polymerase chain reaction ("PCR"), is in worldwide use. RP 1487.

Pineda described in detail the quality control procedures in her lab. The first level is designed to prevent contamination. Analysts wear lab coats and gloves, and they may open only one tube at a time. RP 1493. They are required to sterilize their work areas, as well as their instruments, between cases. Id. There are separate areas in the lab for different types of analysis. Id. The lab compares the DNA profiles of all analysts and employees to case results, to further guard against contamination. RP

1495. Profiles generated in a case are also compared to all samples that were processed around the same time in the lab. RP 1495-96. With these procedures in place, if contamination occurs, it is fairly evident. RP 1496.

The second level of procedures is aimed at the quality of the result. Analysts run control samples; if the controls do not produce acceptable results, the analyst must start over. RP 1493-94. It is apparent from the profiles generated whether the controls worked properly. RP 1495. While Pineda did not personally conduct the tests in this case, she saw the results. RP 1494. In both labs, all of the quality control measures were followed and all controls produced the expected results, indicating that the tests at both labs were performed successfully. Id.

Pineda also described procedures to guarantee chain of custody. When the lab receives samples, a specific case number is assigned to each case; each sample is then assigned a unique number within that case. RP 1508. As samples are received, they are logged into the lab's computer system, thus enabling the lab to keep track of who has custody of which evidence at what point in time, as well as when and how evidence is returned. RP 1508. Each time an envelope or a bag is opened and then resealed, the person handling the evidence must initial the seal. RP 1509.

Pineda handled both the technical review and the administrative review of this case for Reliagene. RP 1505-06. As technical reviewer, she

made sure that all standard protocols were followed and all controls produced expected results. RP 1506. She checked to make sure that the interpretation of the profile was adequate, as far as inclusion or exclusion of individuals in the case. Id. Pineda concurred with the case analysts' interpretation of the results, and therefore signed the report. RP 1506.

Pineda emphasized that every step taken in the lab had to be documented on work sheets so that a permanent record would be generated for the case file; in this case, Pineda reviewed every step, and satisfied herself that everything had been done properly. RP 1506-07. She did not simply rely on the analysts' conclusions, however. RP 1507. In DNA analysis, the data are reduced by the scientific instruments to an electronic format, known as an electropherogram; this plot has peaks and valleys, and any expert can look at the objective data. Id. Pineda looked at the electronic data from the samples in this case; she made her own interpretations and drew her own conclusions. Id.

Pineda explained the specialized type of DNA analysis, Y-STR,³¹ that was used on the evidence examined at Reliagene and Orchid Cellmark. This technique is performed specifically on the Y-chromosome, thus separating out a male DNA profile where there is a

³¹ "STR" stands for "short tandem repeats." RP 1496. Only males have a Y chromosome. RP 1496-97.

mixture of male and female DNA. RP 1496-97. DNA on the Y-chromosome is inherited only from the father. RP 1500. All of the males in a given family will have the same DNA on the Y-chromosome; Y-STRs are thus unique to a paternal lineage, rather than to an individual. Id.

There are significant advantages to this technique. First and foremost, by looking at the Y-chromosome only, a male profile can be obtained from a sample containing both male and female DNA, even if there is relatively little male DNA in the mixture. RP 1501-02. Also, the number of male contributors can easily be determined. RP 1502.

The Y-STR method is limited, however, in that individuals sharing the same paternal lineage cannot be differentiated based only on the Y-chromosome. RP 1502. Nor can this technique yield the high level of statistical significance that can be obtained with other methods of DNA analysis; since all of the testing is on a single chromosome, the analyst cannot multiply frequencies from different locations. Id.

While an analyst will try to get results at all 17 markers on the Y-chromosome, sometimes only a partial profile can be obtained; the weight of the statistical analysis for Y-STR testing thus depends on the number of markers from which results can be obtained. RP 1503-04. Y-STR testing is widely accepted in the scientific community, and has been admitted in various courts throughout the nation. RP 1505.

Pineda first discussed the results from testing done on Boussiacos' shoelaces.³² RP 1514. Reliagene obtained a partial Y-STR profile from each shoelace (10 of 17 markers from the left, and 8 of 17 from the right). RP 1516. These partial profiles were compared to the known samples from Sione Lui, Enoch Lui (Lui's son) and Anthony Negron (Boussiacos' son). RP 1514-15, 1517. Lui (and his paternal male relatives, including Enoch) could not be excluded as a major donor. RP 1517-18. The testing also detected minor male donors; Anthony Negron could not be excluded as one of these minor donors.³³ RP 1518-19. Statistical analysis revealed that, as to the left shoelace, 99.7% of the population could be excluded as contributors; as to the right shoelace, 99.8% of the population could be excluded. RP 1544-46.

The discussion then turned to the results of the vaginal swabs. Reliagene had received only the DNA extracts from these swabs. RP 1519-20. There was not enough DNA to obtain a male profile. 1532-33.

The final sample upon which Orchid Cellmark performed Y-STR testing was the vaginal wash.³⁴ RP 1535. The lab obtained a 10-locus

³² Raw data from the STR testing was admitted for "Illustrative Purposes Only." Ex. 136.

³³ A third male donor was present in very minor amounts; the lab was unable to determine the identity of this donor. RP 1553-54.

³⁴ Pineda did not supervise the testing of the vaginal wash; however, she reviewed all of the supporting documentation, as well as the results obtained. RP 1561-62. The lab report for the vaginal wash was marked for identification. Ex. 137.

profile, revealing a single male donor. RP 1536-37. Anthony Negron was excluded as a contributor; Sione and Enoch Lui could not be excluded. RP 1537. Statistical analysis showed that 99.8% of the population could be excluded as contributors to this male DNA. RP 1546-47.

b. The DNA Profiles Are Not Testimonial.

A number of courts have found that, at least insofar as raw data are concerned, DNA reports are not testimonial. These courts conclude that, so long as a qualified expert conveys the conclusions to be drawn from those reports and is available for cross-examination, the defendant's right to confrontation is fully protected.

The principal argument advanced in support of labeling a DNA report "testimonial" within the meaning of Crawford and Davis is that the report is prepared "under circumstances that 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 52; see AOB at 17, 20.

This was precisely the argument advanced by the defendant in People v. Geier, 41 Cal.4th 555, 161 P.3d 104, 134, 61 Cal. Rptr. 3d 580 (2007).³⁵ After examining the reasoning of courts from other jurisdictions

³⁵ Geier has filed a petition for certiorari in the United States Supreme Court (No. 07-7770). The Court has neither accepted nor denied the petition, apparently holding it in abeyance pending the Court's decision in Melendez-Diaz, supra.

that had found reports setting out results of scientific tests "testimonial," the Supreme Court of California found that courts with more "nuanced readings" of Crawford had rejected a narrow focus on whether a document might be used in litigation. 161 P.3d at 135. Citing Davis, the Geier court noted the importance of looking also to the circumstances under which the report was prepared. Id. at 137. Acknowledging that the DNA report at issue was prepared at the request of a police agency, and that the preparer could reasonably anticipate that the report might be used at a later criminal trial, the court focused on the fact that the report was a contemporaneous recording of observable events, rather than a documentation of past events.

Id. at 139. The court summed up its reasoning:

Yates's report and notes were generated as part of a standardized scientific protocol that she conducted pursuant to her employment at Cellmark. While the prosecutor undoubtedly hired Cellmark in the hope of obtaining evidence against defendant, Yates conducted her analysis, and made her notes and report, as part of her job, not in order to incriminate defendant. Moreover, to the extent Yates's notes, forms and report merely recount the procedures she used to analyze the DNA samples, they are not themselves accusatory, as DNA analysis can lead to either incriminatory or exculpatory results. Finally, the accusatory opinions in this case – that defendant's DNA matched that taken from the victim's vagina and that such a result was very unlikely unless defendant was the donor – were reached and conveyed not through the nontestifying

technician's laboratory notes and report, but by the testifying witness, Dr. Cotton.

Geier, 161 P.3d at 140. To the extent that the DNA report was a record of laboratory protocols followed and the raw data acquired, the court found it was not "testimonial" within the meaning of Crawford and Davis. Id.

Other courts have reached the same conclusion, for essentially the same reasons. See, e.g., State v. Crager, 116 Ohio St.3d 369, 879 N.E.2d 745, 753 (2007) (rejecting the position that DNA reports were testimonial simply because the lab work that produced them was done at the request of the prosecution or because it was reasonable to expect that the reports would at some point be used in a criminal trial);³⁶ People v. Rawlins, 10 N.Y.3d 136, 884 N.E.2d 1019, 1031, 855 N.Y.S.2d 20 (2008) (noting lab technician's lack of subjective interest in test's outcome; results can inculcate or exculpate a given defendant);³⁷ Campos, 256 S.W.2d at 765 (DNA report provided neutral factual evidence; profiles shed no light on defendant's guilt absent expert opinion as to what the profiles meant).

³⁶ Crager has filed a petition for certiorari in the United States Supreme Court (No. 07-10191). The Court has neither accepted nor denied the petition, apparently holding it in abeyance pending the Court's decision in Melendez-Diaz, supra.

³⁷ Rawlins has filed a petition for certiorari in the United States Supreme Court (No. 07-10845). The Court has neither accepted nor denied the petition, apparently holding it in abeyance pending the Court's decision in Melendez-Diaz, supra.

Given the emphasis in Davis on the circumstances under which a statement was made, the contemporaneous recording of results obtained through standardized scientific tests performed by neutral professionals should not be considered "testimonial." Here, where nothing more than the raw data were shown to the jury, there was no confrontation violation.

c. Gina Pineda's Availability For Cross-Examination Satisfied The Confrontation Clause.

In any event, Pineda's testimony in court, and her availability for cross-examination, satisfied Lui's confrontation right. The highest courts of several states have concluded that confrontation is satisfied by testimony that is indistinguishable in all relevant respects from Pineda's.

In a case remarkably similar to this one, the Supreme Court of Ohio held that the right to confrontation was not violated when a qualified DNA analyst testified at trial in place of the analyst who actually did the testing. In Crager, laboratory testing revealed that DNA evidence tied Crager to the murder victim. 879 N.E.2d at 746. The State introduced the evidence through Steven Wiechman, a DNA expert with the Bureau of Criminal Identification and Investigation ("BCI"), in place of the analyst who did the testing and who was on leave at the time of trial. Id. at 747.

Like Pineda, Wiechman testified as to his qualifications, education, training, and experience as a DNA expert. Id. He described the

safeguards in place in the laboratory to ensure accuracy, including the requirement that each analyst must pass a proficiency test twice yearly. Id. He testified that BCI is accredited by the American Society of Crime Laboratory Directors, Laboratory Accreditation Board. Id. at 748.

Like Pineda, Wiechman described two levels of review, technical and administrative, to ensure accuracy and reliability. Id. Wiechman said that his technical review involved reviewing the analyst's notes, the DNA profiles she generated, her conclusions, and the final report; he made sure that the conclusions were consistent and were supported by the work. Id. He looked at the same data, and came to the same conclusions. Id. at 749.

Like Pineda, Wiechman testified to the results of the analysis. Based on the profiles obtained by the analyst, Wiechman testified to the identity of the person whose DNA was on critical pieces of evidence, as well as the statistical frequency of that particular DNA profile. Id.

Under these circumstances, the court found that Wiechman had conveyed the "testimonial" aspects of the DNA results, and was subject to cross-examination. Id. at 757. The court found no confrontation problem:

We further hold that a criminal defendant's constitutional right to confrontation is not violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing. In that situation, the testifying expert analyst is the witness who is

subject to cross-examination and is the one who presents the true "testimonial" statements.

Crager, 879 N.E.2d at 758.

Similarly, Pineda, a qualified DNA expert, was available to be cross-examined on all aspects of the DNA testing – the methods and procedures employed, the safeguards in effect to ensure accuracy, and the raw data. Pineda interpreted the data and drew her own conclusions, and was available to be cross-examined on these conclusions. Under these circumstances, there was no confrontation violation.

In Geier, the Supreme Court of California was faced with a similar situation. Dr. Robin Cotton, the laboratory director for Cellmark, testified in place of Paula Yates, who performed the DNA analysis. Geier, 161 P.3d at 131-33. Cotton explained that Cellmark is a private, for-profit company that does DNA testing for both prosecution and defense, as well as in paternity cases. Id. at 131. Cellmark is accredited by the American Society of Crime Laboratory Directors. Id.

Cotton detailed her education, training and experience. Id. She described the rigid DNA testing protocols as similar to a recipe ("first you do this and then you do this"); at each point in the procedure, the analyst is required to fill out a form and keep handwritten notes recording her activity. Id. at 132. According to Cotton, the resulting record is such that

a different analyst could reconstruct what the processing analyst did at every step. Id. Based on her review of Yates's notes, Cotton believed that the DNA extraction had been conducted according to protocol. Id. at 133.

Cotton then testified about the results obtained from comparisons of the DNA of known individuals with samples extracted from evidence relevant to the case. Id. at 132. Viewing the profiles generated by Yates, Cotton testified that, in her opinion, DNA extracted from the victim's vaginal swabs matched DNA samples from the victim and the defendant. Id. at 133. Cotton also provided frequency calculations. Id.

Geier argued that this testimony violated his Sixth Amendment confrontation right because Cotton's opinion on the match between his DNA and that extracted from the vaginal swabs was based on tests she did not personally conduct. Id. at 131. After finding that the DNA report was not itself testimonial, the court found that the testifying expert was the one who actually conveyed the testimonial aspects of the DNA evidence:

[T]he accusatory opinions in this case – that defendant's DNA matched that taken from the victim's vagina and that such a result was very unlikely unless defendant was the donor – were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, Dr. Cotton.

Geier, 161 P.3d at 140. The court found no violation. Id. at 131.

Other courts have similarly held that testimony such as that given by Pineda in this case does not violate the Sixth Amendment. See, e.g. United States v. Moon, 512 F.3d 359, 362 (7th Cir.), cert. denied, 129 S. Ct. 40 (2008) ("the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself");³⁸ United States v. Washington, 498 F.3d 225 (4th Cir. 2007) (no confrontation violation where lab director testified based on data from blood tests done by non-testifying technicians in his lab);³⁹ Campos, 256 S.W.3d at 765 (no confrontation violation where lab director testified in place of analyst and used DNA profiles to draw her own inferences and conclusions, which were subject to cross-examination); Rawlins, 884 N.E.2d at 1035 (supervising witness familiar with lab's requirements could illuminate on cross-examination whether protocol was followed).

As an expert witness, Pineda properly relied on data generated by others under ER 703 as well. See argument in §C.1.c., supra.

d. Any Error Was Harmless.

Any error in admitting the DNA results through Pineda's testimony was harmless. Lui lived with Boussiacos. The fact that his DNA was on

³⁸ Moon was a "plain error" case, but the court resolved the issue on the merits.

³⁹ Washington has filed a petition for certiorari in the United States Supreme Court (No. 07-8291). The Court has neither accepted nor denied the petition, apparently holding it in abeyance pending the Court's decision in Melendez-Diaz, supra.

her shoelaces, along with the DNA of her son, was not in itself very damning. Nor was the fact that he had recently had sex with her particularly incriminating; it was unclear why he chose to hide that.

Like many circumstantial cases, this one was more than the sum of its parts – no one piece of evidence was dispositive, but the picture as a whole convinced the jury beyond a reasonable doubt that Lui was guilty of strangling Elaina Boussiacos.

D CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Lui's conviction for Murder in the Second Degree.

DATED this 10th day of June, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

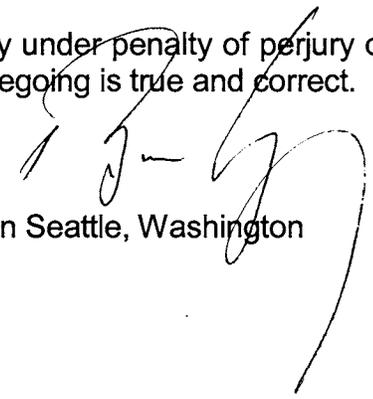
By: Deborah A. Dwyer
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 defendant, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104, containing a copy of the **BRIEF OF RESPONDENT** 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



Done in Seattle, Washington

Date

06/10/2009

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 10 PM 4:39