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No. S081700

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

WILLIE LEO HARRIS,

Defendant and Appellant.

Automatic Appeal from the Superior Court
of Kern County
Case No. SC071427a
Honorable Roger D. Randall, Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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DEATH PENALTY

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INTRODUCTION

In a recent case, *Melendez-Diaz v. Massachussets* (2009) ___U.S.___, 129 S. Ct. 2527; 174 L. Ed. 2d 314, the United States Supreme Court extended its holding in *Crawford v. Washington* (2004) 541 U.S. 36, to cover the presentation of scientific data. The Sixth Amendment, the Court ruled in *Melendez-Diaz*, requires that the scientist who develops the data be present in court for cross-examination. In that case, the offending evidence came in the form of a document. In this case, the DNA evidence was presented not by the scientist who did the analyses, but rather the deputy director of the laboratory.

In this Supplemental Brief, appellant will argue that the natural consequence of *Melendez-Diaz* is to invalidate the DNA evidence presented at trial, which, in concert with the many other evidentiary errors detailed in appellant's opening brief, led to an erroneous conviction.

The argument is numbered as if it would have been placed in the Opening Brief, between arguments IX and X, to wit: IX-A

ARGUMENT

IX-A. THE ADMISSION OF THE DNA-RESULTS BY TESTIMONY OF THE DEPUTY DIRECTOR OF THE TESTING LABORATORY RATHER THAN THE SCIENTIST WHO OBTAINED THE RESULTS VIOLATED APPELLANT'S CONFRONTATION CLAUSE RIGHT TO CROSS-EXAMINATION

A. FACTUAL BACKGROUND

The DNA results which confirmed that appellant's sperm was found in a vaginal swab from the victim – a crucial link in the rape charge – was presented by Charlotte Word, the Deputy Director of Cellmark Laboratories. (28 RT 6470.) It is clear from her testimony that she was not the individual who performed the DNA analysis, and the name of that scientist is not found in her testimony. (28 RT 6474-6476.)

The DNA tied to Harris was found in a sperm fraction from a urine sample found pooled between Manning's legs. (28 RT 6415 (testimony of criminalist); 6498 (Word)). It was also present on a vaginal swab taken from Manning. (28 RT 6501-6503.)

B. THE PRESENTATION OF THE DNA RESULTS BY A LABORATORY SUPERVISOR RATHER THAN THE EMPLOYEE WHO DID THE ANALYSIS WAS A VIOLATION OF THE SIXTH AMENDMENT

In *Crawford v. Washington, supra*, 541 U.S. at p. 68, the United States Supreme Court overturned years of Confrontation Clause jurisprudence to rule that a witness's testimony against a defendant is

inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. (*Id., at 54.*)[1]

At issue in this case is the meaning of the term "testimony," for Word testified as an expert relying on the report of one of her staff DNA analysts. That question was in part answered in *Melendez-Diaz v. Massachussets, supra*. At issue there was the introduction in a drug case of a "certificate" from a forensic analyst that the substance found by the police was in fact cocaine. Melendez-Diaz raised a *Crawford*-based objection below, which was rejected on several grounds, and the Supreme Court reversed. The report in question was in fact testimonial, the Court held, because though denominated a "certificate," it was an "affidavit," and, more important, it was prepared for the purpose of introduction at trial. The certificates were functionally identical to live, in-court testimony, doing "'precisely what a witness does on direct examination.'" (129 S.Ct. at p. 2532, quoting *Davis v. Washington* (2006) 547 U.S. 813, 830 [emphasis deleted].)

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[1] It should be noted that appellant's trials herein took place in 1998 and 1999, well before the decision in *Crawford*, and thus well before the defendant's attorneys would have been expected to raise an objection to the admission of the Word testimony based upon the Confrontation Clause.

Similarly, in this case, the report of the DNA analyst was functionally identical to live, in-court testimony, but when presented by Ms. Word was hearsay and, per *Crawford* and *Melendez-Diaz*, inadmissible . The fact that Ms. Word was available for cross-examination does not erase the Confrontation Clause violation. Even though the defense was willing to stipulate to her qualifications (28 RT 6469), the prosecutor's questioning and her answers about her prodigious experience and qualification consumed four transcript pages. But her qualifications were not the issue for the purpose of the Confrontation Clause; those of the person who performed the analysis were, and he or she was not present to be cross-examined. Similarly, Ms. Word's descriptions of her laboratory's procedures, while impressive, could not provide the specific procedures used by the absent analyst. As explained in *Melendez-Diaz*, the Confrontation Clause commends:

> "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the *Sixth Amendment* prescribes." [*Crawford*, *supra*, 541 U.S., at pp. 61-62.]

(129 S.Ct. at p. 2536) Confrontation, the Court explains, is needed to weed out both the fraudulent and the incompetent analyst, an analysts lack of

proper training or deficiency in judgment. (*Id.* at pp. 2536-2537). The cross-examination of Ms. Word in this case could no more supply the relevant confidence in these matters than could the analysts declaration found to be wanting in *Melendez-Diaz*. (See also, *People v. Dungo* (2009) 176 Cal. App. 4th 1388 [rejecting use of expert using pathologists report rather than testimony from the pathologist who performed autopsy].)

The foregoing analysis also answers the analysis in *People v. Geier* (2007) 41 Cal.4th 555, *cert. denied,. sub nom. Geier v. California* (2009) ___ U.S. ___ [129 S.Ct. 2856].) In *Geier*, a case with facts similar to those in this case (i.e., a laboratory supervisor's testimony regarding the results of testing done by a subordinate), this Court concluded that the reports were not testimonial and hence were not objectionable under the confrontation clause because the reports "constitute a contemporaneous recordation of observable events rather than the documentation of past events. That is, [the analyst] recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (41 Cal.4th at pp. 605-606; accord, *People v. Guttierrez* (2009) 177 Cal. App. 4th 654; *People v. Rutterschmidt* (2009) 176 Cal. App. 4th 1047; contra, *People v. Dungo*, *supra*, 176 Cal. App. 4th 1388.)

Melendez-Diaz was decided after *Geier*, but shortly before the denial of certiorari in that case, but *Geier* does not answer the *Melendez-Diaz* court's extensive discussion of the ways in which scientific analysis can go awry, ways for which the Confrontation Clause and, more specifically cross-examination, were designed to ameliorate. (129 S.Ct. 2536-2538.) Put simply, *Melendez-Diaz* rejects the distinction "between testimony recounting historical events, which is 'prone to distortion or manipulation,' and the testimony at issue here, which is the 'resul[t] of neutral, scientific testing'" (*Id.* at p. 2536, quoting Brief for Respondent.)

C. THE ADMISSION OF THE DNA ANALYSIS IN VIOLATION OF APPELLANT'S *CONFRONTION CLAUSE* RIGHTS WAS PREJUDICIAL

The admission of the DNA analysis confirming that appellant's sperm was present at the scene and in the vaginal swab was prejudicial, both on its own and in concert with the litany of other evidentiary errors discussed in Arguments VII-X of the Opening Brief, and must be added to the analysis of cumulative error discussed in Argument XI.

1. Prejudice under the Federal Standard

Confrontation Clause violations are subject to federal harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *People v. Cage* (2007) 40 Cal.4th

965, 991-992.) The harmless error inquiry asks: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18.)

As argued elsewhere, this was a close case. (*See* Appellant's Opening Brief at pp. 284-285) There was no physical evidence linking appellant to the items taken from the apartment or to the arson of Manning's car; the only suspicious people seen at either crime scene were white; and at least one witness identified Manning's boyfriend shortly after the crime as the one carrying the television set from her apartment to the car that night.

Absent the DNA evidence, even appellant's admissions to the police that he had engaged in sex with Manning would not have changed the fact that also missing from the prosecutor's case, in addition to the foregoing, would have been the scientific proof of his semen present at the scene and in her vagina. The evidence at issue, admitted in contravention to the cases cited above, gave a scientific patina to the underlying appeal to racial stereotypes inherent in the case and reinforced by the prosecution's closing-argument reference to Willie Horton, repeated by the trial court. (35 RT 7998-7999; *and see* argument in Appellant's Opening Brief at pp. 221-223 and fn. 76.) Moreover, even though Harris ultimately admitted

having sex with Manning that night,[2] the jury was instructed, pursuant to CALJIC No. 2.71, that "Evidence of an oral admission of the defendant should be viewed with caution." (33 RT 7658.)

In light of all of this, it is not clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.

2. Cumulative Error

Argument XI of the Opening Brief, commencing at page 283, argues that, cumulatively, the many guilt phase errors in this case require reversal. Now there is an additional error of Constitutional dimension to add to that list, and the case for reversal is even more compelling.

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[2] Before his arrest for the Torigiani burglary, and on the way back from his blood being drawn for DNA testing, Harris admitted to Detective Herman that he had engaged in sex with Manning, but the night before her death. (29 RT 6764-6768.) When questioned after the burglary arrest by Herman and Detective Stratton, he again asserted that it was Monday night, the night before. (29 RT 6788.) It was only after further confrontation about inconsistencies in his story and under threat of arrest for murder if his DNA was found in the crime-scene evidence that Harris admitted being there Tuesday night, the night Manning was killed. (29 RT 6795-6796.)

CONCLUSION

For the reasons set forth above and in Appellant's Opening Brief, the conviction herein should be reversed.

DATED: December 15, 2009

Respectfully submitted

____
RICHARD I. TARGOW
Attorney for Appellant

CERTIFICATE OF LENGTH OF BRIEF

I, Richard I. Targow, attorney for appellant herein, hereby certify under California Rule of Court 8.520(d), that the length of this brief is 1,715 words, well within the limits for a supplemental brief set forth in rule 8.520(d)(2).

____
RICHARD I. TARGOW

DECLARATION OF SERVICE BY MAIL

Re: People v. Willie Leo Harris ____________ No. S081700

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached APPELLANT'S OPENING BRIEF on each of the following, by placing same in an envelope or envelopes addressed, respectively, as follows:

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Each said envelope was then, on December 15, 2009, deposited in the United States Mail at Sebastopol, California, with postage fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

DATED: December 15, 2009

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