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 REPLY BRIEF

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THE ARGUMENT AND CONCLUSIONS IN RESPONDENTS SUPPLEMENTAL BRIEF ARE UNDERMINED BY RECENT UNITED STATES SUPREME COURT ORDERS

In his Supplemental Opening Brief, appellant argued that the trial testimony of Charlotte Word, a laboratory official, rather than that of the DNA analyst who performed the testing, was precluded by *Crawford v. Washington*, *supra*, as interpreted in *Melendez-Diaz v. Massachussets* (2009) ___U.S.___, 129 S. Ct. 2527; 174 L. Ed. 2d 314.

Respondent's Supplemental Brief argues (1) that the issue was waived by appellant's failure to object at trial; (2) that *Melendez-Diaz* does not apply to the live testimony of the lab director; and (3) that therefore there was no prejudice.

Appellant disagrees, but is also aware that this court has granted review in four cases raising this issue, which are likely to have been decided by the time this case is submitted.[1] Accordingly, this reply will be suitably brief.

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[1] The four cases, in all of which review was granted on December 2, 2009, are: *People v. Dungo*, S176866; *People v. Lopez*, S177046; *People v. Gutierrez*, S176620; and *People v. Rutterschmidt*, S176213.

A. APPELLANT'S FAILURE TO OBJECT AT TRIAL DID NOT WAIVE THE ISSUE ON APPEAL BECAUSE A WELL-ESTABLISHED RULE WAS CHANGED AFTER TRIAL

As an initial matter, appellant must reply to respondent's tiresome assertion that appellant's *Sixth Amendment* arguments are waived by his failure to object to Charlotte Word's testimony at trial.

Respondent's assertion ignores the long-standing rule in this state that the defendant is not required to anticipate a wholesale change in the law such as that wrought by *Crawford v. Washington* (2004) 541 U.S. 36, 68. "A contrary holding would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal. . . ." (*People v. Kitchens* (1956) 46 Cal.2d 260, 263; see also, *People v. Turner* (1990) 50 Cal. 3d 668, 703 [no waiver "when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change"]; *People v. Thomas* (2005) 130 Cal. App. 4th 1202, 1208; *People v. Johnson* (2004) 121 Cal. App. 4th 1409, 1411, fn. 2 [failure to object excused because under pre-*Crawford* hearsay regime of *Ohio v. Roberts* (1980) 448 U.S. 56, 66, defendant had "scant grounds for objection"]; *People v. Sisavath* (2004) 118 Cal. App. 4th 1396, 1400 [*Crawford* announced a new rule re: *6th Amendment* and hearsay]. The waiver rule cannot be fairly applied in this instance.

B. UNITED STATES SUPREME COURT ORDERS VACATING AND REMANDING IN SIMILAR CASES SHOW THAT *MELENDEZ-DIAZ* DOES APPLY IN THIS CASE

Respondent's Supplemental Brief sets forth an extensive argument why *Melendez-Diaz* does not apply in this case. Appellant need not reply in similar detail, first, because his argument is fully set forth in his supplemental brief; but second, because recent orders by the United States Supreme Court make clear – or as clear as they can absent a full opinion – that *Melendez-Diaz* does indeed apply to this case.

On June 29, 2009, the Court granted certiorari, vacated and remanded five cases "for consideration in light of *Melendez-Diaz* . . . ." In two of those cases, including one from California, the facts were similar to those in the instant case – someone other than the analyst who did the work testified to the DNA testing results. (*Barba v. California* (2009) ___U.S.___, 129 S. Ct. 2857, 174 L.Ed.2d 599, vacating *People v. Barba* (No. B185940, Nov. 21, 2007), 2007 Cal. App. Unpub. LEXIS 9390); *Crager v. Ohio* (2009) ___U.S.___, 129 S. Ct. 2856, 174 L.Ed.2d 598, vacating *State v. Crager* (Oh. 2007) 116 Ohio St. 369, 371 [DNA analyst on maternity leave; evidence introduced by state DNA expert]. In *Barba*, just as in this case, a lab director from Cellmark Laboratories testified as to the results of the DNA analysis. The Court of Appeal rejected the application

of *Crawford* (at LEXIS pp. *20-*21), and this court denied review in No. S159091 (February 27, 2008).

The high court's vacating and remanding of *Barba* and *Crager* strongly suggest that it intends *Melendez-Diaz* apply to the situation in those cases that is identical to this case – testimony regarding DNA analysis by someone other than the analyst who performed the test. Indeed, given the reasons set forth in *Melendez-Diaz* underlying the decision, and discussed in appellant's supplemental brief, this result cannot be surprising. (Supp. Brf. at 4-5, discussing and citing *Melendez-Diaz*, 129 S.Ct. pp. 2536-2537.) Those reasons, and the Supreme Court orders discussed above, are entirely consistent, and dispositive.

C. THE ERROR WAS PREJUDICIAL

Absent the DNA evidence provided by Charlotte Word, there remains appellant's admission that he had sex with Manning, but there is no corroboration therefor, further undercutting the rape allegations. Moreover, the error is yet one more to add to the long list of errors which, cumulatively, resulted in a denial of appellant's constitutional rights to due process and a fair trial, and was thus prejudicial. (See Appellant's Opening Brief at pp. 283-285; Appellant's Reply Brief at pp. 43-45.)

DATED: April 1, 2010

Respectfully submitted,

RICHARD I. TARGOW
Attorney at Law

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 864 words, well within the limits for a supplemental brief set forth in rule 8.520(d)(2). No limits appear in the rules for supplemental reply briefs.

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 SUPPLEMENTAL REPLY 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 April 2, 2010, sealed and 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: April 2, 2010

_____
RICHARD I. TARGOW
Attorney at Law