No. 09-69

In the Supreme Court of the United States

ROBERT LEWIS NORWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DAVID E. HOLLAR
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's rights under the Confrontation Clause of the Sixth Amendment were violated by the admission of a certificate of no records at his trial to establish that petitioner had no reported income, when the state employment officer who provided the certification did not testify.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 09-69

ROBERT LEWIS NORWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 555 F.3d 1061.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. On April 24, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 18, 2009. On June 2, 2009, Justice Kennedy further extended the time to July 18, 2009, and the petition was filed on July 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner

was convicted of possession of more than five grams of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 180 months of imprisonment, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1a-16a.

1. On April 30, 2006, Spokane police officers came to petitioner's home in response to a 911 call. Petitioner's girlfriend informed the officers that petitioner had struck her in the chest and threatened to shoot her and her sons. When petitioner admitted that he had smoked marijuana, he was arrested. A search of his pockets incident to the arrest turned up 0.86 grams of cocaine base and $2531 in cash. The officers then obtained and executed a search warrant for petitioner's home and vehicle, discovering $7000 in cash in seven tightly wrapped bundles, 7.7 grams of cocaine base on a metal plate bearing petitioner's fingerprint, a digital scale dusted with drug residue, 42.4 grams of marijuana, and a loaded semiautomatic handgun. Pet. App. 3a; Gov't C.A. Br. 8-11.

2. In June 2007, a grand jury in the Eastern District of Washington returned a second superseding indictment charging petitioner with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e); one count of possession of five grams or more of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); and one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). Second Superseding Indictment 1-3.

a. The felon-in-possession charge was severed and tried first. Dkt. 54. The jury was unable to reach a verdict and the court declared a mistrial. Dkt. 94, 98, 108. The district court later granted the government's motion to dismiss that count without prejudice. Dkt. 144, 145. That count is not at issue here.

b. Petitioner was then tried before a jury on the remaining two counts. To show that petitioner's large sums of cash reflected drug proceeds and not employment income, Drug Enforcement Agency Task Force Agent Richard Taylor testified at trial that he had asked a woman at the Washington Department of Employment Security to search its files to determine if petitioner had reported receiving any income in Washington between 2004 and 2007. Pet. App. 18a-19a, 22a. The government offered into evidence the two-page results of that search. The first page was a standardized computer printout containing eight fields designated to report employer and employee identification and wage information. A note near the top of the report stated "No wages reported for the individual when SSN only appears." Gov't Exh. 20, at 1. With the exception of petitioner's Social Security number, all of the fields on the form were blank. The second page of the exhibit was dated August 8, 2007, and consisted of a notarized certification from Jodi Arndt, a Department of Employment Security Assistant Records Officer, declaring that "a diligent search of the department's files failed to disclose any record of wages reported for [petitioner] from January 1, 2004 through March 31, 2007." Pet. App. 4a, 22a. Arndt did not testify at the trial.

Petitioner objected to admission of the exhibit on the ground that it was "not only hearsay" but also presented a "Sixth Amendment confrontation problem." Pet. App.

19a. The government responded that the document was a self-authenticating certification of the nonexistence of a record and thus admissible under Federal Rules of Evidence 902(4) and 803(10). Pet. App. 20a. The district court overruled the objection and admitted the exhibit. *Ibid.*

Petitioner's girlfriend testified at trial that he had no bank account and never received paychecks, although he occasionally worked part-time cleaning rental properties. He also had recently cashed a sizeable retirement check and was a successful gambler. C.A. E.R. 386-394.

The jury found petitioner guilty on both counts, and the district court sentenced him to 180 months of imprisonment. Pet. App. 5a.

3. The court of appeals affirmed. Pet. App. 1a-16a. As relevant here, it concluded that the admission of Arndt's affidavit into evidence did not violate the Confrontation Clause. *Id.* at 6a-9a. The court noted that under *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Confrontation Clause forbids only the admission of testimonial statements. Relying on circuit precedent, the court of appeals determined that a certificate of the nonexistence of a record "is nontestimonial in nature because it is similar to a business record." Pet. App. 7a (citing *United States* v. *Cervantes-Flores*, 421 F.3d 825, 832 (9th Cir. 2005) (per curiam), cert. denied, 547 U.S. 1114 (2006)).

Petitioner asserted Arndt's affidavit was in fact testimonial because it "was prepared for litigation," but the court rejected that claim based on its view that the affidavit "addressed a class of documents that were not prepared for litigation, and were better classified as business records." Pet. App. 8a. Because any record that petitioner *had* received taxable wages between 2004 and

2007 would have been a record kept in the ordinary course of the Washington Employment Security Department's business, and thus would have been nontestimonial, the court of appeals concluded that the record here, establishing that petitioner *had not* received taxable wages, was equally nontestimonial. *Ibid.*

DISCUSSION

Petitioner contends (Pet. 6-9) that his case should be remanded to the court of appeals for further consideration of his Confrontation Clause challenge in light of *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009). The government agrees.

1. In *Melendez-Diaz*, this Court held that admission of a state chemist's certificates of analysis that attested that material seized by the police and linked to the defendant contained cocaine violated the Confrontation Clause when the chemist did not testify at trial. Relying on *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Court explained that such certificates constituted testimonial affidavits that fell within the Confrontation Clause. *Melendez-Diaz*, 129 S. Ct. at 2532.

One of the Commonwealth's arguments in defending the conviction in *Melendez-Diaz* had been that the records in question were official or business records, which the Court had suggested in *Crawford* were not testimonial. See *Crawford*, 541 U.S. at 56. This Court rejected that argument, concluding that the certificates of analysis "do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless." *Melendez-Diaz*, 129 S. Ct. at 2538.

As to whether the records in question qualified as business or official records: the Court stated that the

business and official records exception at common law related only to "records prepared for the administration of an entity's affairs, and not for use in litigation." *Melendez-Diaz*, 129 S. Ct. 2538 n.7. This Court noted a common law exception to the rule: "A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record." *Id.* at 2539. "[B]ut," the Court observed, the clerk "could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." *Ibid.* Instead, the Court noted, common law cases had required confrontation when "the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it." *Ibid*.

As to the relationship between the business or official records exception and the Confrontation Clause: the Court drew a distinction between official records "created for the administration of an entity's affairs," and official records created "for the purpose of establishing or proving some fact at trial." *Melendez-Diaz*, 129 S. Ct 2539-2540. Under *Crawford*, the Court concluded, "[w]hether or not [records] qualify as business or official records," documents "prepared specifically for use at [a defendant's] trial * * * [are] subject to confrontation under the Sixth Amendment." *Id*. at 2540.

Under *Melendez-Diaz*'s analysis, the district court erred in admitting Arndt's affidavit without requiring that she be called as a witness. Agent Taylor's testimony established that Arndt's affidavit was prepared specifically for use at petitioner's trial, and her report of searching for but failing to find any record of petitioner earning wages in Washington would not fall within the

narrow common law rule permitting only authentication certificates absent a live witness.

2. Where testimonial hearsay is erroneously admitted over objection, a conviction may still stand if the error was harmless. *Melendez-Diaz*, 129 S. Ct. at 2542 n.14. An error is harmless if the government can show beyond a reasonable doubt that the error complained of did not contribute to the conviction. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Here, the only fact established by Arndt's affidavit was that the cash in petitioner's possession did not come from reported income, which supported the inference that it came from drug dealing proceeds. Independently of the large sums of cash, petitioner's distribution paraphernalia strongly suggested he was engaged in drug distribution. The plate with cocaine base and the digital scale were found stacked one on top of the other, Gov't Exh. 7, and the plate bore petitioner's fingerprint, C.A. E.R. 290, 295-296. The obvious inference, wholly apart from the cash, was that petitioner used the equipment to engage in measuring cocaine base for distribution. While the admission of the affidavit thus appears harmless beyond a reasonable doubt, the court of appeals is in the best position to resolve that issue. The appropriate course would be to grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of *Melendez-Diaz*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
DAVID E. HOLLAR
Attorney

SEPTEMBER 2009