

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
SYDNEY DAVIS,  
  
Defendant and Appellant.

C061536

(Super. Ct. No.  
08F06253)

ORDER MODIFYING  
OPINION

[NO CHANGE IN  
JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on October 12, 2011, be modified as follows:

At the end of the first paragraph on page 13, after the "(Ibid.)" citation following the sentence ending "Justice Thomas joined the court's opinion," add as footnote 6 the following footnote, which will require renumbering of all subsequent footnotes:

We recognize that Justice Thomas, one of five votes in *Melendez-Diaz*, did in fact join the opinion that we refer to as the "plurality" opinion. While on its face the opinion could be dubbed a "majority" opinion, we refer to it as a plurality opinion because the language of Justice Thomas's concurrence makes clear that his assent to the opinion was not a blanket endorsement of its entire rationale. Justice Thomas

specifically explained why he joined the opinion: "I join the Court's opinion in this case because the documents at issue in this case 'are quite plainly affidavits,' [citation]. As such, they 'fall within the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Melendez-Diaz, supra*, 557 U.S. at p. \_\_\_\_ [174 L.Ed.2d at p. 333], italics added.) To construe Justice Thomas's act of joining the court's opinion as creating a majority opinion in all respects would render Justice Thomas's separate concurrence a dead letter, something we are not prepared to do. (Cf. *Positive Software Solutions, Inc. v. New Century Mortg. Corp.* (5th Cir. 2007) 476 F.3d 278, 281-282 [considering Justice White's "significantly qualified" "'joinder'" of the opinion in *Commonwealth Coatings Corp. v. Continental Cas. Co.* (1968) 393 U.S. 145 [21 L.Ed.2d 301] and giving effect to the language of his concurrence].) We give effect to Justice Thomas's act of joining the opinion and the language of his separate concurrence by treating the analytical consistency between the opinion and Justice Thomas's separate concurrence as the controlling precedent. Moreover, the analytical consistency between the two was all that was necessary to reach the result, further justifying allegiance to the common ground.

There is no change in the judgment.

BY THE COURT:

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RAYE, P.J.

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ROBIE, J.

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BUTZ, J.