

NO. 69816-8-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JAKE J. SIGURDSON,

Appellant.

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BRIEF OF RESPONDENT

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2019 AUG 15 PM 1:12

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I  
JULY 15 2019

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>State v. Atsbeha</u> , 142 Wn.2d 904, 16 P.3d 626 (2001) .....	4
<u>State v. Benefiel</u> , 131 Wn. App. 651, 128 P.3d 1251, <u>review denied</u> , 158 Wn.2d 1009 (2006).....	5, 8, 10
<u>State v. Hubbard</u> , 169 Wn. App. 182, 279 P.3d 521 (2012) ...	4, 5, 8, 10
<u>State v. James</u> , 104 Wn. App. 25, 15 P.3d 1041 (2000) .....	9, 10
<u>State v. Jasper</u> , 174 Wn.2d 96, 271 P.3d 876 (2012).....	3, 7, 8, 10
<u>State v. Mares</u> , 160 Wn. App. 558, 248 P.3d 140 (2011) .....	8, 10

### FEDERAL CASES

<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) .....	2, 4, 9, 10, 11
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006).....	4
<u>Melendez–Diaz v. Massachusetts</u> , 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).....	3, 4, 5, 8
<u>United States v. Ballesteros-Selinger</u> , 454 F.3d 973 (9th Cir. 2006)6	
<u>United States v. Smith</u> , 640 F. 3d 358 (D.C. Cir. 2011).....	6
<u>United States v. Weiland</u> , 420 F.3d 1062 (9th Cir.2005) .....	5

### OTHER CASES

<u>Commonwealth v. Ellis</u> , 79 Mass.App.Ct. 330, 945 N.E.2d 983 (2011).....	5
<u>Commonwealth v. McMullin</u> , 76 Mass.App.Ct. 904, 923 N.E.2d 1062 (2010) .....	6
<u>Commonwealth v. Weeks</u> , 77 Mass.App.Ct. 1, 927 N.E.2d 1023, 1027-28 (2010).....	6
<u>Jackson v. United States</u> , 924 A.2d 1016 (D.C. 2007) .....	6, 10, 11
<u>People v. Taulton</u> , 129 Cal.App.4th 1218, 29 Cal.Rptr.3d 203 (2005).....	5
<u>State v. Shipley</u> , 757 N.W.2d 228 (Iowa 2008).....	5, 6

### WASHINGTON STATUTES

RCW 9A.76.170(1) .....	2
RCW 5.44.010 .....	4
RCW 5.44.040 .....	5
RCW 5.45.020 .....	5

**TABLE OF CONTENTS**

I. ISSUES ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT .....3

A. THE TRIAL COURT’S ADMISSION OF CERTIFIED COURT DOCUMENTS, PRODUCED IN THE NORMAL COURSE, TO PROVE A BAIL JUMPING CHARGE VIOLATED NEITHER THE HEARSAY RULE NOR THE CONFRONTATION CLAUSE. ....3

1. Overview: This Case Is Not About Forensic Documents Or An Allegation Of Insufficiency. ....3

2. Standard Of Review. .... 4

3. The Trial Court’s Admission Of The Certified Court Documents Did Not Violate The Defendant’s Right To Confrontation. ....4

IV. CONCLUSION ..... 12

## **I. ISSUES**

The trial court admitted certified court records in a bail jump prosecution. All the court records were produced in the normal course of court business, and none were generated for a specific prosecution. Did the trial court violate the defendant's right of confrontation in admitting the court records, when case authority holds such records to be non-testimonial?

## **II. STATEMENT OF THE CASE**

Defendant Jake Sigurdson was originally charged with second-degree taking a motor vehicle without permission. 1 CP 46-47; Exh. 1. The alleged victim was his grandmother. 1 CP 43-45. At his initial arraignment on June 11, 2013, he was held on \$5,000 bail and given a trial date of July 27, 2012 and an omnibus hearing date of July 6, 2012. Exhs. 2, 3, and 4; 2 CP \_\_ (sub 14, 15 and 16). A week later, on June 19, 2012, he was released on his personal recognizance. Exhs. 5 and 6; 2 CP \_\_ (sub 20 and 21). Once out of custody, however, he failed to appear at his scheduled omnibus hearing on July 6, 2013, and a bench warrant issued for his arrest. Exhs. 7, 8 and 9; (2 CP \_\_, sub 22 and 23).

Witness non-cooperation made proceeding on the original TMV charge problematic. 2 CP \_\_ (sub 35, State's trial

memorandum). Instead, the State amended the charge to bail jumping, RCW 9A.76.170(1), committed on July 6, 2012. 1 CP 36-37. On the morning of trial on that single, amended charge, the State asked for an in-limine ruling on the admissibility of certified court documents, Exhs. 1 through 9 (1 CP 46-47; 2 CP \_\_, sub 14, 15, 16, 20, 21, 22 and 23). The State had planned to introduce these through Heidi Percy, a court clerk, who would simply explain why and how they are generated and what they mean. Verbatim Report of Proceedings (hereafter "RP") 6, 19-20. The defendant argued that the documents were hearsay and, moreover, violated his right to confront witnesses against him, which he could not do when the evidence against him was paper. RP 5-7, 11; 1 CP 38-42. The State responded that all the documents were authorized by statute, were part of the public file, and had been produced in the normal course of business, and thus were not testimonial under Crawford (cited below). The trial court agreed with the State and admitted Exhibits 1 through 9. RP 12-13, 15, 20.

Given the court's ruling, the defendant elected to waive jury. He stipulated to his identity at the prior hearings and agreed to proceed solely on the now-admitted documentary evidence. RP 21; 1 CP 33-34, 35. The trial court found the defendant guilty. RP

24-25. The defendant was sentenced within the standard range.  
RP 35; 1 CP 3-13. This appeal followed.

### III. ARGUMENT

#### A. THE TRIAL COURT'S ADMISSION OF CERTIFIED COURT DOCUMENTS, PRODUCED IN THE NORMAL COURSE, TO PROVE A BAIL JUMPING CHARGE VIOLATED NEITHER THE HEARSAY RULE NOR THE CONFRONTATION CLAUSE.

##### 1. Overview: This Case Is Not About Forensic Documents Or An Allegation Of Insufficiency.

Two things should be noted at the outset. First, this case does not involved documents specifically produced for litigation, like the case-specific forensic lab analysis in Melendez-Diaz, or the cover letter to a certified abstract of driving record, bearing the notation that a diligent search of records indicate a driver's license was suspended as of a particular date, like in Jasper (citations to both cases below). All nine exhibits admitted here were documents produced by a superior court in the normal course, under the same cause number, and would have been generated *in exactly the same form* whether or not there had ever been an amended charge of bail jumping filed.

Secondly, there is no claim, below or here, that the documentary evidence, assuming it was properly admitted, remained insufficient to prove the charge.

## **2. Standard Of Review.**

Whether or not to admit evidence is a question generally within the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913, 16 P.3d 626 (2001). But an alleged Confrontation Clause violation is reviewed de novo. State v. Hubbard, 169 Wn. App. 182, 185, 279 P.3d 521 (2012).

## **3. The Trial Court's Admission Of The Certified Court Documents Did Not Violate The Defendant's Right To Confrontation.**

Both below, and now on appeal, the defendant alleges he was deprived of the right to confront witnesses. But the Confrontation Clause applies only to testimonial hearsay statements and not to statements that are non-testimonial. Davis v. Washington, 547 U.S. 813, 823–824, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Testimonial statements are those which a declarant would reasonably expect to be used prosecutorially. Crawford, 541 U.S. at 51–52.

At the outset, “[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status.” Melendez–Diaz v. Massachusetts, 557 U.S. 305, 321, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009); RCW 5.44.010 (certified

court record); RCW 5.44.040 (certified public record); RCW 5.45.020 (business record). And, further, “[b]usiness and public records are generally admissible absent confrontation . . . because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial.” Melendez–Diaz at 324 (holding, however, that forensic drug analysis certificates, prepared in anticipation of a specific criminal trial, are “testimonial”).

Thus, for example, records of prior convictions are not “testimonial.” State v. Benefiel, 131 Wn. App. 651, 656, 128 P.3d 1251, review denied, 158 Wn.2d 1009 (2006) (prior judgment and sentence was not testimonial; it did not constitute statement the declarant believed would be used by State at later trial); accord, e.g., United States v. Weiland, 420 F.3d 1062, 1077 (9th Cir.2005); Commonwealth v. Ellis, 79 Mass.App.Ct. 330, 332–333, 945 N.E.2d 983, 986-87 (2011); People v. Taulton, 129 Cal.App.4th 1218, 1222-25, 29 Cal.Rptr.3d 203 (2005).

Court records, generated in the normal course, do not constitute testimonial evidence. State v. Hubbard, 169 Wn. App. at 184-87 (minute entry of prior sentencing, reflecting service of no-contact order, not testimonial); accord, State v. Shipley, 757

N.W.2d 228, 235 (Iowa 2008) (certified abstract of driving record); Commonwealth v. Weeks, 77 Mass.App.Ct. 1, 5, 927 N.E.2d 1023, 1027-28 (2010) (“docket sheets are not prepared for an upcoming case and are not testimonial”); Commonwealth v. McMullin, 76 Mass.App.Ct. 904, 923 N.E.2d 1062, 1063-64 (2010) (certified copies of records from district court and registry of motor vehicles not testimonial); Jackson v. United States, 924 A.2d 1016, 1018-22, (D.C. 2007) (in bail jump trial, certified court records reflecting presence, failure to appear, notice to appear, and bench warrant were all produced in the normal course of court business and their admission did not violate Confrontation Clause); United States v. Ballesteros-Selinger, 454 F.3d 973, 976 (9th Cir. 2006) (admission of immigration judge’s memorandum decision does not implicate Confrontation Clause).

But while a court clerk can, by affidavit or seal, authenticate an otherwise admissible record, he or she cannot, without testifying, provide an evidentiary interpretation of the substance or effect of an existing record. United States v. Smith, 640 F. 3d 358, 362-63 (D.C. Cir. 2011) (finding Confrontation Clause violation where clerk’s letter stated it appeared, from examination of records, that defendant had been convicted of a felony).

Washington authority recognizes this distinction. In the consolidated cases in Jasper, the Supreme Court held that “certifications declaring the existence or nonexistence of public records are in fact testimonial statements, which may not be introduced into evidence absent confrontation” State v. Jasper, 174 Wn.2d 96, 100, 271 P.3d 876 (2012). There, the State introduced not only certified copies of Department of Licensing suspension letters and orders, and certified copies of driving abstracts, but also affidavits from a legal custodian of records indicating that “after a diligent search,” the official record indicates that each driver’s license was suspended as of a specific date of violation. Jasper, 174 Wn.2d at 102, 104. The Jasper court held that the clerks’ affidavits as to the existence or nonexistence of records, tailored to and prepared for a specific case, were testimonial and thus their admission, without their authors to testify, violated the Confrontation Clause. Jasper, 174 Wn.2d at 109, 112-16.

But the Jasper court did not hold that the other underlying documents, such as the certified abstract of driving record, were testimonial as well. As explained in a subsequent case of another Division of this Court,

[T]he Jasper court distinguished between nontestimonial, self-authenticating certified records and testimonial clerk certifications attesting to the nonexistence of a public record. [Citations to Jasper and Melendez-Diaz omitted.] A clerk's certification attesting to the nonexistence of a public record is a declaration describing the result of a public records search conducted in contemplation of litigation. [Citation to Jasper omitted.] *By contrast, a certified public record such as a clerk's minute entry simply memorializes facts as they occurred in court, without reference to future litigation. See [State v.] Mares*, 160 Wn. App. [558] at 564 [248 P.3d 140 (2011)] (records custodian may authenticate or provide a copy of an otherwise admissible record but may not create a record for the sole purpose of providing evidence against a defendant); State v. Benefiel, [citation omitted] (prior judgment and sentence was not testimonial; it was not a statement made for purpose of establishing some fact and did not constitute statement the declarant believed would be used by State at later trial).

State v. Hubbard, 169 Wn. App. at 185-86 (emphasis added).

Hubbard (holding minute entry of prior sentencing, reflecting service of no-contact order, not testimonial), Mares (finding certified copy of driver's license not testimonial) and Benefiel (prior judgment and sentence not testimonial) are dispositive. The documents at issue here, like those there, were produced in the ordinary course of court business, and were not specially generated to be used in a particular prosecution. As such, they are not

“testimonial,” and their admission did not violate the Confrontation Clause.

The pre-Crawford case of State v. James, cited by the State below, examined substantially similar documentation in a bail-jump prosecution and concluded all but one were admissible under a four-prong test. This test required that the public document must

(1) contain facts rather than conclusions that involve independent judgment, discretion, or the expression of opinion; (2) relate to facts that are a public nature; (3) be retained for public benefit; and (4) be authorized by statute.

State v. James, 104 Wn. App. 25, 32, 15 P.3d 1041 (2000). The lone inadmissible document was a declaration by the prosecutor that the defendant had failed to appear on his scheduled court date (accompanying a motion for issuance of a bench warrant). James, 104 Wn. App. at 29, 33-34. The James court found this last document did not meet the four-prong test because it contained the prosecutor’s own legal conclusion, made as an advocate, in a document that was produced for the specific prosecution rather than made as a routine court record. James, 104 Wn. App. at 33-34.

The James court’s result (if not its analysis) in large measure survives post-Crawford, in having drawn the same distinction

among items of documentary records evidence as that now set forth in Jasper, Hubbard, Mares, and Benefiel.

Here, no case-specific forensic document, prepared for a prosecution, declaring a legal conclusion from the presence or absence of other documents or presence or absence of other facts, was ever admitted. As in James, and as, for example, in Jackson (discussed below), the only documentary evidence submitted was that produced in the ordinary course of court business. See Exs. 1 – 9. These documents would have been produced, in identical form, had there never been a bail jump prosecution. These documents were not testimonial, and thus there was no Confrontation Clause violation. See Hubbard, 169 Wn. App. at 194-84; Mares, 160 Wn. App. at 564; Benefiel, 131 Wn. App. at 656; and Jackson, 924 A.2d at 1018-22.

The defendant disagrees, arguing that reliance on James, as a pre-Crawford case, is misplaced. But he ignores Jasper, Hubbard, Benefiel, and Mares. See BOA 2-5 (citing none of them). And he states that among the documentary evidence admitted, there was, in effect, testimony by the prosecutor, in a motion and affidavit for bench warrant. BOA 4. But a review of the admitted exhibits indicates no such motion and affidavit was ever admitted.

See Exs. 1 – 9, esp. 8 (order for issuance of bench warrant) and 9 (bench warrant itself).

In Jackson, a *post-Crawford* bail jump prosecution, the government offered certified copies of superior court records, made in the normal course. Specifically, these were: (1) a docket entry, indicating presence of the defendant, the new trial date, and a checked box indicating advice given of penalties for failure to appear; (2) a second docket entry, indicating the defendant's not being present and his failure to appear, on the new date; (3) a "notice to return to court," with an advice of penalties for non-appearance, and the defendant's signature; and (4) a certified copy of the ensuing bench warrant. Jackson, 924 A.2d at 1018-19. None of these documents were produced for, or tailored to, a particular subsequent prosecution. The Court of Appeals of the District of Columbia concluded:

Because the challenged documents were created in the regular course of court operations, primarily for administrative purposes rather than with a primary eye towards future prosecution, we are satisfied that they did not constitute testimonial statements and that their admission did not violate Jackson's rights under the Confrontation Clause.

Jackson v. United States, 924 A.2d at 1022. The same result obtains here.

**IV. CONCLUSION**

The judgment and sentence for bail jumping should be *affirmed*.

Respectfully submitted on August 14, 2013.

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By:   
\_\_\_\_\_  
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August 14, 2013

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COURT OF APPEALS DIV I  
 STATE OF WASHINGTON  
 2013 AUG 15 PM 1:12

**Re: STATE v. JAKE J. SIGURDSON  
COURT OF APPEALS NO. 69816-8-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

CHARLES F. BLACKMAN, #19354  
Deputy Prosecuting Attorney

cc: Washington Appellate Project  
Appellant's attorney

*Handwritten notes:*  
 keta  
 August 13

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

2013 AUG 15 PM 1:12

COURT OF APPEALS  
STATE OF WASHINGTON  
*[Signature]*

THE STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
JAKE J. SIGURDSON,  
  
Appellant.

No. 69816-8-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 14<sup>th</sup> day of August, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

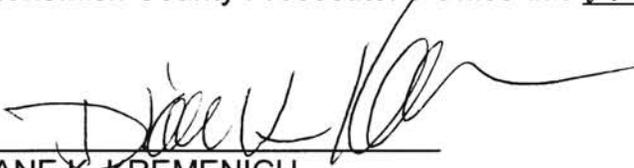
WASHINGTON APPELLATE PROJECT  
1511 THIRD AVENUE, SUITE 701  
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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 14<sup>th</sup> day of August, 2013.



DIANE K. KREMENICH  
Legal Assistant/Appeals Unit