

FILED  
CLERK OF COURT  
COUNTY OF SHELBY  
2014 MAY -7 10:11:04  
STATE OF WASHINGTON  
*Ch*

No. 45443-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

CITY OF VANCOUVER

Respondent

vs.

BRINESH PRASAD

Petitioner

---

REPLY BRIEF OF PETITIONER

---

Roger A. Bennett  
Attorney for Petitioner

112 W. 11<sup>th</sup> Street, Suite 200  
Vancouver, WA 98660  
(360) 713-3523  
WSBA # 6536

## TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u> .....	page ii
<u>I. REPLY TO ARGUMENTS OF RESPONDENT</u> .....	page 1
<u>a. Reply to argument that the Petitioner is precluded from raising a Confrontation Clause argument for the first time on appeal</u> .....	page 1
<u>1. The City has waived its argument that appellate review is precluded.</u> .....	page 1
<u>2. The Clear Sixth Amendment violation in this case constituted manifest error, which may be raised for the first time on appeal under RAP 2.5(a).</u> .....	page 4
<u>b. Reply to argument that the “diligent search” letter, Exhibit 2, is not testimonial</u> .....	page 10
<u>1. The “diligent search” letter is nothing more than unsworn testimony of an absent third party</u> .....	page 10
<u>c. Reply to argument that the admission of Exhibit 2 was harmless error</u> .....	page 12
<u>1. Without Exhibit 2, there was no competent proof that the driver’s license status was revoked</u> .....	page 12
<u>d. Reply to argument that the testimony of Mike McQuade cured the constitutional error</u> .....	page 14
<u>1. Mike McQuade was not subject to confrontation as to the alleged “diligent search” of DOL records.</u> .....	page 14
<u>V. CONCLUSION</u> .....	page 21

## **TABLE OF AUTHORITIES**

### **I. TABLE OF CASES**

#### **A. Washington cases**

<u>Lutheran Day Care v. Snohomish County</u> , 119 Wn.2d 91, 113, 829 P.2d 746 (1992) .....	3
<u>State v. O’Cain</u> , 169 Wn.App. 228, 279 P. 3d 926 (2012) .....	5,7
<u>State v. Fraser</u> , 170 Wn.App. 13, 26 282 P. 3d 152 (2012) .....	5,6,7
<u>State v. Scott</u> , 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) .....	6
<u>State v. McFarland</u> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)...	6,8
<u>State v. Jasper</u> , 158 Wn. App. 518, 523, 245 P.3d 228 (2010), 174 Wn. 2d 96, 271 P.3d 876 2012).....	9,10,11,12,20,21
<u>State v. O’Hara</u> , 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009) .....	6,9
<u>State v. Lui</u> , 179 Wn.2d 457, 315 P.3d 493 (2014).....	21

#### **B. United States Supreme Court cases**

<u>Crawford v. Washington</u> , 541 U.S. 36, 50, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	5,11
<u>Melendez -Diaz v. Massachusetts</u> , 557 U. S. 305, 328, 129 S. Ct. 2527, 174 L. Ed. 2d 314 ( 2009).....	7,11

### **II. CONSTITUTIONAL PROVISIONS**

U. S. Constitution, Sixth Amendment.....	1,2,3,4,5,6,7,10,13,15,21
------------------------------------------	---------------------------

### **III. COURT RULES**

RAP 2.5(a) .....	4,5,6,22
Evidence Rule 10.02.....	16,18
Evidence Rule 602.....	16

## **I. REPLY TO ARGUMENTS OF RESPONDENT**

**a. Reply to argument that the Petitioner is precluded from raising a Confrontation Clause argument for the first time on appeal.**

**1. The City has waived its argument that appellate review is precluded.**

The City of Vancouver, for the first time, and very late in the game, has challenged the Petitioner's Sixth Amendment Confrontation Clause issue, on the basis that it was not raised in the trial court.

This matter was first heard in an appellate setting by the Superior Court of Clark County, in a RALJ Appeal. The issue of the Sixth Amendment violation was fully briefed, and argued by the parties at that level. No objection was made by the City on procedural grounds.

Next, the matter proceeded to the Court of Appeals on a Motion for Discretionary Review. The Sixth Amendment issue was fully briefed in that motion, and once again, the City elected to raise no procedural objection. Instead, the City argued the merits of the issue.

Next, the Commissioner granted Discretionary Review on the Sixth Amendment Confrontation Clause issue.

The City, having a full opportunity to seek modification of the Commissioner's Ruling, elected not to do so. The City could have challenged the Commissioner's ruling, by asking a panel of judge to modify the Ruling granting review, on the theory that the issue had not been preserved.

Instead, the City sat back, and waited for Petitioner to brief the issue on the merits, and then, apparently realizing that the merits weigh very heavily against the City, for the first time sprang the procedural trap.

Petitioner argues that the City has waived its procedural objection, by proceeding through three avenues of review; RALJ Appeal, Motion for Discretionary Review, and an available Motion for Modification without raising the issue of preclusion. By doing so, the City demonstrated a willingness, at multiple levels of review, to have the issue decided upon the merits, at least until it became clear that it has no viable argument on the merits.

Just as the City argues that failure to raise an issue at the trial level may preclude review on appeal, failure to raise the preclusion issue after multiple opportunities in the appellate process should

also preclude the late interjection of the issue of preclusion.

The City had the opportunity on several occasions to claim that the Sixth Amendment Confrontation Clause issue was not properly before the court. The City eschewed each and every opportunity. The Ruling of the Commissioner, granting review of the Confrontation Clause issue therefore became the law of the case.

"The term "law of the case" means different things in different circumstances. In one sense, it refers to "the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand." (Footnote omitted.) 15 L. Orland & K. Tegland, Wash. Prac., Judgments § 380, at 55 (4th ed. 1986). The term also refers to the "rule that the instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law." (Footnote omitted.) 15 L. Orland & K. Tegland, supra at 56. Finally, "the term is employed to express the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case or which were necessarily implicit in such prior determination." (Footnote omitted.) Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992).

In this same appeal process, the Commissioner, in reliance upon the procedural posture of both parties, and upon the briefing submitted by both sides, determined that the Confrontation Clause issue was appropriate for further review.

Implicit in that ruling was a determination that the merits

should be addressed. The Commissioner clearly and unequivocally identified the issue upon which review was granted, and did not grant review on the issue of whether or not the Petitioner was precluded from raising the Confrontation Clause claim. That ruling was reasonable and appropriate, given the fact that the City never raised the preclusion issue when ample opportunities existed to do so.

It is the City which comes tardy to court, raising a new issue for the first time before this panel of judges on appeal. The court should decide the issue on the merits.

**2. The Clear Sixth Amendment violation in this case constituted manifest error, which may be raised for the first time on appeal under RAP 2.5(a).**

RAP 2.5(a) provides:

“RULE 2.5  
CIRCUMSTANCES WHICH MAY AFFECT  
SCOPE OF REVIEW

a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.

However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial

court jurisdiction,(2) failure to establish facts upon which relief can be granted, and (3)manifest error affecting a constitutional right.”

The application of this Washington procedural rule was discussed in State v. O’Cain, 169 Wn.App. 228, 279 P. 3d 926 (2012), and State v. Fraser, 170 Wn.App. 13, 26 282 P. 3d 152 (2012), cited in the Brief of Respondent. Contrary to the analysis of the Respondent, however, those cases do not impose an absolute bar to consideration of a Sixth Amendment Confrontation Clause issue which was not argued at trial.

In O’Cain, supra, the Court held that hearsay admitted into the record, a statement by a victim to a physician for purposes of medical diagnosis and treatment, was not subject to the Confrontation Clause at all, because it was not testimonial. Under Crawford v. Washington, 541 U.S. 36, 50, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), therefore, it didn’t matter whether or not the defendant was denied an opportunity to cross examine the declarant, because no such right exists as to non-testimonial hearsay which is admitted under a state hearsay rule exception.

Therefore, the Defendant in O’Cain could show no actual prejudice; a showing of which is required in order to establish manifest error, in order to satisfy the exception in RAP 2.5(a).

In State v. Fraser, *supra*, the Court recognized that the state courts may permit Sixth Amendment Confrontation Clause challenges to be raised on for the first time on appeal:

“As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Constitutional errors are treated specially because they often result in serious injustice to the accused. Scott, 110 Wn.2d at 686. On the other hand, permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders, and courts. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To warrant review, the asserted error must be "manifest." What makes an error "manifest" is a showing of actual prejudice. McFarland, 127 Wn.2d at 333.

Only after the appellate court has determined the asserted error to be a manifest constitutional error may the court undertake a harmless error analysis. State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). Thus, determining whether the defendant was actually prejudiced by an alleged error is a different analysis than whether an error warrants a reversal. O'Hara, 167 Wn.2d at 99. Determination of actual prejudice requires a focus on whether the error is "obvious on the record." O'Hara, 167 Wn.2d at 100. "It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object." O'Hara, 167 Wn.2d at 100. The appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error. O'Hara, 167 Wn.2d at 100.

We acknowledged in O'Cain that under Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the States "may adopt procedural rules" governing the exercise of confrontation clause objections. Melendez-Diaz, 129 S. Ct. at 2534 n.3, quoted in O'Cain, 169 Wn. App. at 237. Arguably, RAP 2.5(a) is a procedural rule by which Washington State allows defendants to raise confrontation clause objections for the first time on appeal if they can show a manifest error. If so, we alternatively hold that Fraser has failed to make a showing that the alleged error was manifest."

In the Fraser case, the appellant raised a Sixth Amendment Confrontation Clause claim for the first time on appeal, challenging the admission of cell phone record reports which were compiled by a phone company employee, who did not testify at trial. Another witness, who had not compiled the reports, sponsored them at trial. The records were offered to show that the defendant was obsessed with a third person, and jealous of the victim, giving the defendant a motive to kill the victim in the case.

Defendant did not object to the records on Sixth Amendment grounds, and raised the claim for the first time on appeal. Division One of the Court of Appeals held that the defendant failed to show manifest error, because there was overwhelming evidence submitted through other sources demonstrating the existence of the



necessary element of the driver's license status of some person with a name similar to the defendant on trial.

The obvious defect in these "diligent search" letters was plainly identified in State v. Jasper, 158 Wn. App. 518, 523, 245 P.3d 228 (2010) *affirmed* at 174 Wn. 2d 96, 271 P.3d 876 (2012), and had to be known to the DOL and to prosecutors and Municipal and District Court judges across the state. The error was "obvious on the record," State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), and is the reason that "custodians of the records" have now come to exist in DWS cases.

Nevertheless, DOL has continued to churn such letters out, and prosecutors apparently continue to offer them into evidence. Unfortunately, at least one trial court judge continues to admit them.

Therefore, the concern expressed in Fraser, *supra*, that trial court judges should not be expected to foresee Constitutional errors unless they are raised at trial is not applicable in this case. Defense counsel vigorously objected to all the City's exhibits on numerous grounds, and simply dropped the ball by failing to specify the most obvious. Clearly this was not a case of some tactical error by defense counsel to allow the evidence in, when it was object to on numerous other grounds.

Because the admission of the diligent search letter violated the Sixth Amendment Confrontation Clause, and the error resulted in actual prejudice to the Petitioner, the error was manifest, and the court has discretion to review the error on appeal. As pointed out by the Commissioner in his Ruling Granting Discretionary Review, the issue is one of public interest, and should be addressed. There is no prejudice to the City. The City caused the error, and has had full and fair opportunity to litigate the issue at every stage of appellate review.

**b. Reply to argument that the “diligent search” letter, Exhibit 2, is not testimonial.**

**1. The “diligent search” letter is nothing more than unsworn testimony of an absent third party.**

As argued in Petitioner's Opening Brief, there really is no issue that the “diligent search” letter violates the Sixth Amendment Confrontation Clause. That issue was put to rest in State v. Jasper, 158 Wn. App. 518, 523, 245 P.3d 228 (2010) *affirmed* at 174 Wn. 2d 96, 271 P.3d 876 (2012) by both the Court of Appeals and the state Supreme Court.

It is confusing that the City would argue otherwise. There simply is no conceivable justification for the argument that Exhibit #

2 was not testimonial, since some (totally anonymous) person purports to testify that a diligent search was performed, and then draws a conclusion relative to the driver's license status.

Despite the City's concession that the exhibit was constitutionally defective and its admission constituted error, the City employs a "harmless error" analysis which was implicitly rejected on identical facts in Jasper.

In Jasper, both Appellate Courts determined that reversal was the appropriate remedy, despite the fact that a "CCDR" and a "Notice of Revocation" letter (similar to Exhibits 1 and 3 in the Prasad trial, but possibly duly certified) were held to be admissible in that case. (In the Prasad trial, neither should have been admitted as public records, because none of the three exhibits were duly certified.)

The admission of Exhibit # 2 violated Crawford v. Washington, 541 U.S. 36, 50, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), Melendez-Diaz v. Massachusetts, \_\_\_\_ U.S. \_\_\_\_, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) and State v. Jasper, supra. At trial, Petitioner Prasad had no opportunity to cross examine anyone who had testimonial knowledge as to the process or accuracy of the alleged "diligent search" and the conclusion that the driver's license

of some person named Brinesh Prasad was suspended or revoked.

Jasper is the controlling precedent on this issue.

**c. Reply to argument that the admission of Exhibit 2 was harmless error.**

**1. Without Exhibit 2, there was no competent proof that the driver's license status was revoked.**

The City devotes significant paper and ink to arguing the general proposition that duly certified DOL documents are admissible under RCW 5.44.040, and that despite the obvious and manifest error in admitting Exhibit 2, the other exhibits, 1 and 3, were sufficient to prove the City's case.

Counsel misses the point, of course, that exhibits 1 and 3 were separate documents, uncertified, not under seal, and totally inadmissible. There were three separate exhibits. No exhibit was attached to any other exhibit. The City argues that Exhibits 1 and 3 were attached at some point in time to the inadmissible Exhibit 2, but there was no evidence presented in the case to establish that.

It is a total mystery as to how any of these exhibits found their way to Clark County, Washington for trial. No witness testified as to their source, nor chain of custody, nor that anyone on Earth had ever seen any of them before trial, nor that they were ever

attached to each other. None of the exhibits were duly certified. Not one of them bore any certification that the document was a copy of an original on file with the DOL, nor that it was an accurate copy.

Just as the “diligent search” language in exhibit 2 violates the Sixth Amendment Confrontation Clause, the recitation/testimony on Exhibit 2 as to “attachments” is an out of court statement by some unknown person, not under oath, and not subject to cross examination. The City and the trial court assumed that Exhibits 1 and 3 were the so-called attachments, with no evidence in the record whatsoever to support that theory. Mike McQuade could not testify as to what attachments were referenced by Exhibit 2—he had not prepared it, and had never seen it before coming to court.

The City and the trial court bootstrapped exhibits 1 and 3 into evidence on the unsupported assumption that they were admissible public records, but there was no proof of that, and any inference that they were the so called unattached attachments is based entirely upon the testimonial assertion contained in Exhibit 2. No one knows who made that assertion, who attached anything to Exhibit 2, and why there was nothing attached to Exhibit 2 when it materialized in court. Although there is no record to prove that

Exhibits 1 and 3 were ever attached to Exhibit 2, there is likewise nothing in the record to establish that Exhibits 1 and 3 were themselves true and accurate copies of public records. Merely stapling or attaching some extraneous documents to what (incorrectly) purports to be a public record does not transmogrify the orphan documents into certified copies of public records.

**d. Reply to argument that the testimony of Mike McQuade cured the constitutional error.**

**1. Mike McQuade was not subject to confrontation as to the alleged “diligent search” of DOL records.**

Next, the City seeks to salvage the sinking boat of its prosecution by reliance upon the testimony of “custodian of records” Mike McQuade. The first observation which is significant is that Mike McQuade’s testimony was immaterial to the outcome of the case. The trial court made no finding which discussed or gave any weight whatsoever to McQuade’s testimony

Much of Mike McQuade’s testimony was excluded from consideration by the trial court. As has become a recurring and unfortunate theme in this appeal, the City attorney mis-states the evidence admitted at trial.

The Court Commissioner granted review on the issue as of whether or not the testimony of the courtroom “custodian of records” was sufficient to establish the driver’s license status of some person named Brinesh Prasad, or whether the person supposedly conducting the “diligent search” of DOL records was the required witness, for 6<sup>th</sup> Amendment purposes.

There is a misconception in the Commissioner’s ruling that Shannon Smiley was the person who allegedly conducted a “diligent search” of DOL records. There is no evidence of that in the record. The “diligent search letter, exhibit # 2, is not signed by its author. Shannon Smiley certified nothing more than that she is a custodian of records for DOL. She said absolutely nothing about the authenticity of the exhibits themselves, nor how they were prepared, nor by whom.

The testimony of McQuade, relied upon by the City on appellate review was not sufficient to satisfy the Confrontation Clause, but even more importantly, it was not admitted. It was excluded upon timely objection. Again, we see that the City cites to the record, but fails to quote the actual testimony given. The true, accurate state of the record is this:

“Q: And prior to this trial today, did you personally

review Mr. Prasad's driving record?

A: I did.

Q: And as a result of that review, do you have personal knowledge regarding the status of his driving privileges on 3/24/2012?

A: Yes.

RB: I object. Evidence Rule 10.02. Best Evidence Rule. ER 602. He doesn't have personal knowledge. He only has knowledge of what he saw in records that he looked at which he has not brought into court.

Q: Well he's the Record Custodian Your Honor.

Judge: It's – sus –

RB: He can't testify as to the contents –

Judge: - sustained on – on lack of foundation at this point.

Q: Thank you. And as part of your job as a Records Custodian, did you review the official record in Olympia?

A: Yes.

Q: And as far as the documents you're holding in front of you which have been admitted, do those appear to be true and correct copies of the exhibits – or of the documents that you reviewed in Olympia?

A: Yes they are.

Q: Okay. And what was – upon review of the record, what was Mr. Prasad's driving status on the incident date of 3/24/2012?

A: Revoked.

Q: And does that mean that there was an Order in effect that revoked Mr. Prasad's driving privileges on that date of 3/24/2012?

A: Yeah.

RB: I object. Move to strike. There's no Order here.

Judge: Sustained. And we'll – we'll strike that last response from the record.

Q: On what basis would the Department of Licensing suspend someone's license for one year?

A: The basis is refusing a breathalyzer is a mandatory one year revocation.

Q: Okay.

RB: Well may I object and Voir Dire briefly Your Honor?

Judge: You may.

#### **VOIR DIRE OF WITNESS BY DEFENSE**

RB: Where in – where in the two exhibits you have does it say anything about refusing a breathalyzer?

A: It doesn't.

RB: Okay. So you're referring to some other document?

A: In my diligent search of the record I – I discovered that, correct.

RB: Okay. So now you're testifying as to a document you didn't bring to court then, right?

A: I didn't bring any documents to court sir.

RB: Move to strike. ER 10.02. Best Evidence rule. He can't come in and testify that he saw a piece of paper or document or a computer screen at a different location which he didn't bring to court and that he hasn't compared with the original. So that's U.S. versus Bennett, I think it's 376 F.3d. It's in the memo I gave to the court on Best Evidence Rule.

Q: I'm assuming you're sustaining that objection Your Honor, I'm moving on."

Despite his self-proclaimed title as "custodian of records," Mike McQuade did not claim to have ever had custody of any of the exhibits admitted into evidence. He had not brought any of the exhibits in the case to court from the Department of Licensing, and had no idea how they had come into the possession of the City Prosecutor. RP p. 37, l. 15-25; p. 38, l. 1-20.

While he initially testified that he had seen the City's exhibits before, it became apparent that he meant that he has seen similar types of documents before, but not with the name Brinesh Prasad on them. RP p. 35, l. 24-25, p. 36, l. 1-3, RP p. 38, l. 10-20.

The City concedes that admission of the "diligent search " letter, which purported to establish that the driver's license status was error, but argues that the error was harmless because Mike McQuade's testimony alone was sufficient to so establish the driver's license status. The City states at page 11 and 12 of its brief

“...it is clear that had the prosecution had a live person (as opposed to some other type?) testifying, there wouldn't have been an issue with the CCDR evidence.”

Of course, that all depends on what the “live person testifying” had to say. If the live person had conducted a diligent search, had retrieved records, had brought them to court, had testified that they were true and accurate copies of official public records on file with DOL, and been subject to meaningful cross-examination on the process of the diligent search, then there might not be a problem under the Confrontation Clause. That scenario, however, is nowhere near the straw man testimony of Mike McQuade.

McQuade was not allowed to give testimony as to the contents of the records. At no point did he testify to having conducted the elusive diligent search referenced in exhibit 2 himself, such that he could be characterized as the “witness against the defendant.”

McQuade was nothing but a stand-in, with a title he didn't fully understand. At best, he parroted conclusions which were nothing more than what some unidentified person had stated in the inadmissible, testimonial “diligent search” letter.

DOL has attempted to satisfy State v. Jasper, *supra* by sending warm-body “custodians of the records” to court to testify, when in fact, they are not the proper person to give testimony. If the designated “witness of the day” did not conduct the purported diligent search of records himself, but merely is standing in for someone else who might have done so, the defendant’s right of confrontation is thwarted, and the failure is manifest constitutional error.

The proper procedure to remedy this error is simple. DOL needs to send to court the true witness against the Defendant: the person who conducted the diligent search of records, who must, in accordance with the role of an actual custodian of records, bring true and accurate copies of the records, which he has compared to the originals on file, to court. That person, and that person alone can be meaningfully examined as to potential flaws in the search and the testimonial conclusion.

Instead, for whatever budgetary or personnel issues that might exist, DOL dispatches a fungible figurehead non-witness, masquerading as one. It is impossible to effectively cross examine a witness who did not perform the diligent search, and who has seen generic forms similar to the City’s exhibits, but not with the

Defendant's name on them.

In State v. Lui, 179 Wn.2d 457, 315 P.3d 493 (2014), this state's Supreme Court recognized that there is a significant burden of having to call every witness from a crime lab who might have participated in the testing of a substance or item, and the Court determined that an expert witness who relied upon testing done by others can render an opinion in court, without the testimony of the contributing lab technicians. That is not the case here. McQuade was no expert, and he added nothing to the conclusions of the unknown, unfronted diligent searcher. There is no reason to believe that any greater burden would be imposed on DOL if it was required to send the right witness, instead of a place holder.

## **II. CONCLUSION**

Driving While Suspended or Revoked is probably the most common charge filed in courts of limited jurisdiction. The appellate courts in the Jasper decisions have recognized that prosecution of this crime by way of testimonial "diligent search" letters violates the Sixth Amendment Confrontation Clause.

In a misguided attempt to remedy the error, DOL and prosecutors simply continued to submit the inadmissible testimonial letters into evidence, under the smokescreen of a purported

“custodian of records” who did not perform the alleged diligent search. A defendant cannot confront the witness against him when the real witness against him does not show up in court, but instead a doppelganger with little or no knowledge of the facts fills in for the true witness.

This is an issue of significant importance to the bench and bar, and despite the fact that trial counsel did not adequately define the issue at trial, should be resolved by this court, under its authority per RAP 2.5(a), and because the City has consented, by its inaction, to consideration and resolution of the issue.

Dated the 5 day of May, 2014.

A handwritten signature in black ink, appearing to read "Roger A. Bennett", written over a horizontal line.

Roger A. Bennett  
Attorney for Petitioner  
WSBA # 6536

FILED  
COURT OF APPEALS  
DIVISION II  
2014 MAY -7 AM 11:34  
STATE OF WASHINGTON  
CLERK

No. 45443-2-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

CITY OF VANCOUVER

Respondent

vs.

BRINESH PRASAD

Petitioner

---

PROOF OF SERVICE OF PETITIONER'S REPLY BRIEF ON  
DISCRETIONARY REVIEW

---

Roger A. Bennett  
Attorney for Petitioner

112 W. 11<sup>th</sup> Street, Suite 200  
Vancouver, WA, WA 98660  
(360) 713-3523  
Rbenn21874@aol.com  
WSBA # 6536

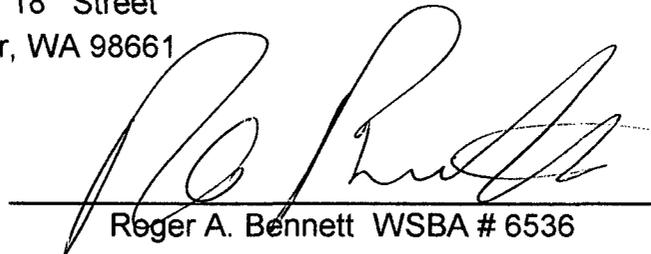
I certify that on the 5<sup>th</sup> day of May, 2014, I served a copy of  
Petitioner's Reply Brief on Discretionary Review on Counsel for  
Respondent by e-mail and courier delivery to her office:

Lacey Blair WSBA # 39341  
Assistant City Attorney, City of Vancouver  
415 W. 6th St., 2nd Floor  
Vancouver, Washington 98660  
(360) 487-8500  
lacey.blair@ci.vancouver.wa.us

and to

Petitioner, Brinesh Prasad, by U.S. Mail, postage prepaid to:

Brinesh Prasad  
3701 ½ E. 18<sup>th</sup> Street  
Vancouver, WA 98661



Reger A. Bennett WSBA # 6536