NO. 78428-1 and 77719-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KYLE KEITH KRONICH,

Petitioner.

and

STATE OF WASHINGTON,

Respondent,

v.

N. K.,

Petitioner.

BRIEF AMICUS CURIAE OF WASHINGTON STATE

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I. IDENTITY AND INTEREST OF AMICUS

The State of Washington is the *amicus curiae* in this case. Washington State Department of Licensing (Department) is the agency most directly affected by the decisions in *State v. Kronich* and *State v. N.K.* inasmuch as it is required by RCW 46.01.030(3) to administer the laws of this state governing driver records. Its duties include maintaining a case record of traffic infraction and criminal convictions on each driver. RCW 46.52.120. The Department is also charged with providing certified abstracts of driving records which are required to include the status of the driver's driving privilege in this state. RCW 46.52.130. As a result, it provides certified copies of driving records or statements that no record exists to various parties, including city and county prosecutors and the individuals named in the driving record. *See* RCW 46.52.130(1) for a list of the various potential recipients. As a result of its role as the provider of records concerning the status of a person's driver's license, the State in general and the Department in particular clearly have an interest in whether such records are considered testimonial or non-testimonial under *Crawford v. Washington,* 541 U.S. 36 (2004).

The issue presented by *State v. Kronich* and *State v. N.K.* is not limited to driver's license records, however. Many businesses and professions in this state are subject to licensing requirements and the

Legislature has often made unlicensed practice a crime. Unlicensed practice is a crime in the case of certified public accountants (RCW 18.04.370), funeral directors and embalmers (RCW 18.39.330), engineers and land surveyors (RCW 18.43.120), thirty-six health care professions listed in RCW 18.130.040 (RCW 18.130.190(7)), real estate appraisers (RCW 18.140.220), fire system sprinkler contractors (RCW 18.160.100), security guards (RCW 18.170.160), and bail bond agents (RCW 18.185.170). As potential providers of records or statements of absence of record regarding the status of a person's license in a criminal unlicensed practice case, the licensing authorities for any of the foregoing businesses or professions have an interest in whether such records are considered testimonial or non-testimonial under *Crawford.*

II. ISSUE

The State will address the following single issue common to both *State v. N.K.* and *State v. Kronich*:

> Are the Department's driving records, including certification of the absence of a record, non-testimonial hearsay under *Crawford v. Washington* which do not invoke the Petitioners' Sixth Amendment right of confrontation? *U.S. Const. amend. VI.*

III. ARGUMENT

A. Department Is Required to Maintain Driving Records and to Provide Abstracts of Driving Records

The Department is responsible for administering the laws of this state relating to driver records. RCW 46.01.030(3). The Department's recordkeeping duties include receiving from the courts an abstract of the court record for each case in which there has been found to be a violation of the laws regulating the operation of vehicles on the highways. RCW 46.52.101(1). In turn, the "director [of the Department] shall keep a case record on every motor vehicle driver licensed under the laws of this state, together with information on each driver, showing all the convictions and findings of traffic infractions certified by the courts . . . ." RCW 46.52.120(1).

In *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004), the Court concluded in another context that the Department's driving records are presumptively reliable. Courts have found that these records are kept for the benefit of the public. *State v. Chapman*, 98 Wn. App. 888, 891, 991 P.2d 126 (2000); *State v. Monson*, 53 Wn. App. 854, 858, 771 P.2d 359, *aff'd*, 113 Wn.2d 833, 784 P.2d 485 (1989).

The Department is also authorized to prepare a certified abstract of an individual's driving record which can be provided to the individual

named in the abstract (RCW 46.52.130(1)(a)) and to city and county prosecuting attorneys (RCW 46.52.130(1)(h)). Other statutorily specified recipients include: an employer or prospective employer for purposes of determining whether the individual named in the record should be permitted to drive a commercial vehicle or school bus; an employee or agent of a transit authority checking prospective vanpool drivers for insurance and risk management purposes; an insurance carrier for underwriting purposes; and an alcohol/drug assessment and treatment agency. RCW 46.52.130(1), RCW 46.52.130(10) and RCW 46.52.130(11).

The contents of the abstract of driving record are set out in RCW 46.52.130(6) as follows:

> 6) The abstract, whenever possible, shall include:
> (a) An enumeration of motor vehicle accidents in which the person was driving;
> (b) The total number of vehicles involved;
> (c) Whether the vehicles were legally parked or moving;
> (d) Whether the vehicles were occupied at the time of the accident;
> (e) Whether the accident resulted in any fatality;
> (f) Any reported convictions, forfeitures of bail, or findings that an infraction was committed based upon a violation of any motor vehicle law;
> *(g) The status of the person's driving privilege in this state*; and
> (h) Any reports of failure to appear in response to a traffic citation or failure to respond to a notice of infraction served upon the named individual by an arresting officer.

(emphasis supplied.)

The Department's statutory responsibility to maintain driving records and to provide abstracts of driving records is independent and separate from the existence of a criminal case involving the individual named in the driving record. Indeed, the list of potential recipients of the certified record indicates what the courts in *Chapman,* and *Monson,* have recognized–that driving records are maintained for the public benefit to meet various public safety needs and not solely in connection with any particular case.

B. Driving Records Provided By The Department Are Not Testimonial

1. Definition of Testimonial Hearsay

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment is violated by use in a criminal trial of testimonial hearsay. *Crawford*, 541 U.S. at 68. It considered "use of *ex parte* examinations as evidence against the accused" to be "the principal evil at which the Confrontation Clause was directed." *Id.* at 50. While the Supreme Court declined to provide a comprehensive definition of "testimonial," it did state that:

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. *These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.*

Id. at 68 (emphasis supplied.)

Further, the Supreme Court noted that certain types of hearsay "by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." *Id.* at 56. In his concurrence, Chief Justice Rehnquist noted that the majority's analysis "excludes at least some hearsay exceptions, such as business records and official records. To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process." *Id.* at 76. (internal citation omitted).

2. Definition Does Not Apply to Department's Driving Records

Driving records are maintained by the Department as part of its statutory responsibilities and for the public benefit. As such, they are a far cry from "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" or "police interrogations", which were cited in *Crawford* as examples of testimonial hearsay. 541 U.S. at 68.

Both Kronich and N.K. contend that the certification as to the absence of a public record is testimonial and, hence, should not have been

admitted under *Crawford.* In his Petition for Review, N.K. contends that the letter from the Department certifying to the absence of any record of his having a driver's license (Pet. for Review at App. B) was testimonial because it was the functional equivalent of an affidavit and was prepared in anticipation of trial. Pet. for Review at 11-12. N.K. contends that as a result, the letter falls within the core class of testimonial statements identified by the Supreme Court in *Crawford.* Pet. For Review at 11-12.

Respondents have cited numerous cases in which courts have rejected the argument that a document automatically becomes testimonial by virtue of either being an affidavit or having been prepared in anticipation of litigation. *Kronich* Supplemental Brief of Respondent at 7, 10; *N.K.* Supplemental Brief of Respondent at 21-26. The Department will discuss two cases in which the same conclusion was reached.

A similar conclusion was reached in *U.S. v. Bryant*, No. 3:04-CR-00047-01 (W.D. Va., filed June 15, 2006). *Bryant* involved a challenge to the admissibility of a certification of non-existence of record (CNR) in a criminal case. The court found that:

> [T]he CNR of an IRS custodian, although created for litigation, is analogous to a non-testimonial business record. Its preparation involves the objective, factual exercise of verifying the existence or nonexistence of non-testimonial matter. *The CNR was created by a person without any real interest in or proximity to the case.* Admittedly, the IRS custodian's certification is a "solemn

> declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51. *However, in no sense is the custodian an "accuser"* . . . . (internal citation omitted)

U.S. v. Bryant, No. 3:04-CR-00047-01, slip op. at 2-3 (W.D. Va., filed June 15, 2006)

Card v. State, 927 So.2d 200 (Fla. Dist. Ct. App. 2006), was a case in which the defendant was charged with driving while his license was revoked as a habitual traffic offender. As proof that his license was revoked, the State introduced his driving record without testimony from the records custodian. The defendant contended that the admission of the record without testimony from the records custodian violated his right of confrontation. *Id.* at 201-202. The court disagreed:

> A driving record properly authenticated by the DHSMV [Florida Department of Highway Safety and Motor Vehicles] does not seem to us to be testimonial because it is not accusatory and does not describe specific criminal wrongdoing of the defendant. *Rather, it merely represents the objective result of a public records search.*
>
> Driving records are kept in Florida for the public benefit and are not solely prepared for trial purposes. A driving record contains neither expressions of opinion nor conclusions requiring the exercise of discretion, and is not made or kept for law enforcement or trial purposes. Thus, it clearly falls within the type of hearsay recognized in *Crawford* that is admissible in a criminal trial without implicating the defendant's confrontation rights.

Id. at 203 (emphasis supplied.)

The reasons given in *Bryant* and *Card* for finding official records to be non-testimonial are equally applicable here. The records in question were prepared by Department records custodians who were without any real interest in or proximity to the cases. The custodians were not "accusers." Rather, they were merely reporting the results of a search of records maintained by the Department for the public benefit and not solely for litigation purposes. Their certifications contained neither expressions of opinion nor conclusions involving the exercise of discretion. As such, to require a records custodian to testify regarding this type of record would lead to the very outcome feared by Chief Justice Rehnquist in his concurring opinion in *Crawford*, the inclusion of "numerous additional witnesses without any apparent gain in the truth-seeking process." *Crawford*, 541 U.S. at 76.

IV. CONCLUSION

The records being challenged in these cases are not the type of evidence which raised Sixth Amendment concerns in *Crawford*. They do not fall within the scope of the practices identified by the Supreme Court in *Crawford* as being "the abuses at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 68. Accordingly, the State requests that the Court lay to rest any lingering doubts as to the admissibility of such

evidence by affirming the decisions of the Court of Appeals in *State v. Kronich* and *State v. N.K.*

RESPECTFULLY SUBMITTED this 13th day of September, 2006.

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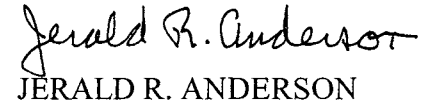

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