

NO. 77719-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

---

STATE OF WASHINGTON,

Respondent,

v.

N.M.K.,

Petitioner.

REC'D

JUL 28 2006

King County Prosecutor  
Appellate Unit

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Leroy McCullough, Judge

---

---

SUPPLEMENTAL BRIEF OF PETITIONER

---

---

DANA M. LIND  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

RECEIVED  
JUL 28 2006  
KING COUNTY PROSECUTOR  
APPELLATE UNIT  
BY [Signature]

**TABLE OF CONTENTS**

|   | Page |
|---|------|
| A. <b><u>ARGUMENT</u></b> .....   | 1    |
| 1. N.M.K.'S CONFESSION WAS THE RESULT OF AN ILLEGAL SEIZURE AND SHOULD HAVE BEEN SUPPRESSED. .... | 1    |
| 2. ADMISSION OF TESTIMONIAL HEARSAY VIOLATED N.M.K.'S RIGHT TO CONFRONT. .                        | 11   |
| B. <b><u>CONCLUSION</u></b> .....   | 20   |

**TABLE OF AUTHORITIES**

|  | Page           |
|--|----------------|
| <br><b><u>WASHINGTON CASES</u></b>   |                |
| <u>City of Seattle v. Mesiani</u> ,<br>110 Wn.2d 454, 755 P.2d 775 (1988) . . . . .  | 3              |
| <u>State v. Armenta</u> ,<br>134 Wn.2d 1, 948 P.2d 1280 (1997) . . . . .   | 2              |
| <u>State v. Cook</u> ,<br>104 Wn.2d 186, 15 P.3d 677 (2001) . . . . .  | 5              |
| <u>State v. Hendrickson</u> ,<br>129 Wn.2d 61, 917 P.2d 563 (1996) . . . . .   | 1              |
| <u>State v. Johnston</u> ,<br>38 Wn. App. 793, 690 P.2d 591 (1984) . . . . .   | 1              |
| <u>State v. Jones</u> ,<br>146 Wn.2d 328, 45 P.3d 1062 (2002) . . . . .  | 1              |
| <u>State v. Knox</u> ,<br>86 Wn. App. 831, 939 P.2d 710 (1997) . . . . .   | 7              |
| <u>State v. Kronich</u> ,<br>131 Wn. App. 537, 128 P.3d 119 (2006),<br><u>review granted</u> , 2006 Wash. LEXIS 515<br>(No. 78428-1, 7/6/06) . . . . . | 11, 14, 15, 19 |
| <u>State v. Larson</u> ,<br>93 Wn.2d 638, 611 P.2d 771 (1980) . . . . .  | 1-5            |

**TABLE OF AUTHORITIES (CONT'D)**

Page

**WASHINGTON CASES (CONT'D)**

State v. Mendez,  
137 Wn.2d 208, 970 P.2d 722 (1999) . . . . . 2

State v. Mote,  
129 Wn. App. 276, 120 P.3d 596 (2005) . . . . . 4, 5, 8, 9

State v. N.M.K.,  
129 Wn. App. 155, 118 P.3d 368 (2005) . . . . . 13

State v. O'Neill,  
148 Wn.2d 564, 62 P.3d 489 (2003) . . . . . 2, 6-8, 10, 11

State v. Parker,  
139 Wn.2d 486, 987 P.2d 73 (1999) . . . . . 1

State v. Rankin,  
151 Wn.2d 689, 92 P.3d 202 (2004) . . . . . 1-5, 8-10

State v. Ray,  
130 Wn.2d 673, 926 P.2d 904 (1996) . . . . . 20

State v. Thorn,  
129 Wn.2d 347, 917 P.2d 108 (1997),  
overruled in part by  
State v. O'Neill,  
148 Wn.2d 564 (2003) . . . . . 6, 7, 10

State v. Young,  
135 Wn.2d 498, 957 P.2d 681 (1998) . . . . . 2, 3, 7

TABLE OF AUTHORITIES (CONT'D)

|  | Page                       |
|--|----------------------------|
| <br><u>FEDERAL CASES</u>   |                            |
| <u>Crawford v. Washington</u> ,<br>541 U.S. 36, 124 S. Ct. 1354,<br>158 L. Ed. 2d. 177 (2004) . . . . .  | 12-15, 18                  |
| <br><u>Delaware v. Prouse</u> ,<br>440 U.S. 648, 99 S. Ct. 1391,<br>59 L. Ed. 2d 660 (1979) . . . . .  | <br>3                      |
| <br><u>Ohio v. Roberts</u> ,<br>448 U.S. 56, 100 S. Ct. 2531,<br>65 L. Ed. 2d 597 (1980),<br><u>overruled by</u> ,<br><u>Crawford v. Washington</u> ,<br>541 U.S. 36, 124 S. Ct. 1354,<br>158 L. Ed. 2d 177 (2004) . . . . . | <br><br><br><br><br><br>18 |
| <br><u>Old Chief v. United States</u> ,<br>519 U.S. 172 (1997) . . . . .   | <br>19                     |
| <br><u>United States v. Cervantes-Flores</u> ,<br>421 F.3d 825 (9th Cir. 2005) . . . . .   | <br>13, 16, 17             |
| <br><u>United States v. Kim</u> ,<br>25 F.3d 1426 (9th Cir. 1994),<br><u>cert. denied</u> , 513 U.S. 1030 (1994) . . . . .   | <br><br>6                  |
| <br><u>United States v. Rueda-Rivera</u> ,<br>396 F.3d 678 (5th Cir. 2005) . . . . .   | <br>13, 16                 |

**TABLE OF AUTHORITIES (CONT'D)**

Page

**FEDERAL CASES (CONT'D)**

United States v. Weiland,  
420 F.3d 1062 (9th Cir. 2005) . . . . . 17

White v. Illinois,  
502 U.S. 346, 112 S. Ct. 736,  
116 L. Ed. 2d 848 (1992) . . . . . 13

Wong Sun v. United States,  
371 U.S. 471, 9 L. Ed. 2d 441,  
83 S. Ct. 407 (1963) . . . . . 1

**OTHER JURISDICTIONS**

City of Las Vegas v. Walsh,  
91 P.3d 591 (Nev. App. 2004),  
reversed on other grounds,  
City of Las Vegas v. Walsh,  
124 P.3d 203 (Nev. 2005) . . . . . 15

Commonwealth v. Verde,  
827 N.E.2d 701 (Mass. 2005) . . . . . 16, 17

Luginbyhl v. Commonwealth,  
618 S.E.2d 347 (Va. App. 2005) . . . . . 16, 18

Moreno Denoso v. State,  
156 S.W.3d 166 (Tex. App. 2005) . . . . . 16, 17

**TABLE OF AUTHORITIES (CONT'D)**

|  | Page   |
|--|--------|
| <br><b><u>OTHER JURISDICTIONS (CONT'D)</u></b>   |        |
| <u>Napier v. Indiana</u> ,<br>827 N.E.2d 565 (Ind. App. 2005) . . . . .                            | 16, 17 |
| <u>People v. Cascio</u> ,<br>932 P.2d 1381 (Colo. 1997) . . . . .                                  | 8, 9   |
| <u>People v. Niene</u> ,<br>8 Misc.3d 649, 798 N.Y.S.2d 891<br>(N.Y. CityCrim. Ct. 2005) . . . . . | 15, 16 |
| <u>People v. Pacer</u> ,<br>6 N.Y.3d 504, 847 N.E.2d 1149 (2006) . . . . .                         | 15, 19 |
| <u>People v. Paynter</u> ,<br>955 P.2d 68 (Colo. 1998) . . . . .                                   | 8, 9   |
| <u>People v. Rogers</u> ,<br>8 A.D.3d 888 (N.Y. App. 2005) . . . . .                               | 15     |
| <u>People v. Schreck</u> ,<br>107 P.3d 1048 (Colo. App. 2005) . . . . .                            | 17     |
| <u>People v. Walker</u> ,<br>697 N.W.2d 159 (Mich. App. 2005) . . . . .                            | 18     |
| <u>Rackoff v. State</u> ,<br>621 S.E.2d 841 (Ga. App. 2005) . . . . .                              | 16     |
| <u>Rembusch v. State</u> ,<br>836 N.E.2d 979 (Ind. App. 2005) . . . . .                            | 16     |

**TABLE OF AUTHORITIES (CONT'D)**

Page

**OTHER JURISDICTIONS (CONT'D)**

Rollins v. State,  
866 A.2d 926 (Md. App. 2005) . . . . . 16

Shiver v. State,  
900 So.2d 615 (Fla. App. 2005) . . . . . 15

State v. Carter,  
114 P.3d 1001 (Mont. 2005) . . . . . 16, 17

State v. Godshalk,  
885 A.2d 969 (N.J. 2005) . . . . . 16, 17

State v. Norman,  
125 P.3d 15 (Or. App. 2005) . . . . . 16

**RULES, STATUTES AND OTHERS**

Const. art. I, § 7 . . . . . 1, 2, 7, 9

ER 803(a)(7) . . . . . 13

RCW 5.45 . . . . . 13

RCW 9A.72.085 . . . . . 14

U.S. Const. amend. 4 . . . . . 1, 3, 7-9

U.S. Const. amend. 6 . . . . . 11, 18

**TABLE OF AUTHORITIES (CONT'D)**

Page

**RULES, STATUTES AND OTHERS (CONT'D)**

Wayne R. LaFave, The Present and  
Future Fourth Amendment,  
1995 U. Ill. L.Rev. 111 . . . . . 3

A. ARGUMENT

1. N.M.K.'S CONFESSION WAS THE RESULT OF AN ILLEGAL SEIZURE AND SHOULD HAVE BEEN SUPPRESSED.

The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. "It is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution." State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004) (quoting State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002)).

Warrantless searches and seizures are per se unreasonable and violate constitutional protections. Rankin, 151 Wn.2d at 695; State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). The state has the burden to rebut this presumption by establishing one of the "jealously and carefully drawn" exceptions to the warrant requirement." Hendrickson, 129 Wn.2d at 70. Where the initial warrantless seizure is unlawful, all evidence obtained as a result of the seizure -- including a confession -- must be suppressed. State v. Larson, 93 Wn.2d 638, 645-46, 611 P.2d 771 (1980) (citing Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963)); State v. Johnston, 38 Wn. App. 793, 800, 690 P.2d 591 (1984).

Under article I, section 7, a seizure occurs when, considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. Rankin, 151 Wn.2d at 695 (citing State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003)). This determination is made by objectively looking at the actions of the police officer. Rankin, at 695 (citing State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998)). "It is elementary that all investigatory detentions constitute a seizure." Rankin, at 695 (citing State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997)).

A passenger is not seized when an officer merely stops the car in which the passenger is riding. Rankin, at 695 (citing State v. Mendez, 137 Wn.2d 208, 222, 970 P.2d 722 (1999)). However, under our state constitution, "passengers are unconstitutionally detained when an officer requests identification 'unless other circumstances give the police independent cause to question [the] passengers.'" Rankin, at 695 (quoting Larson, 93 Wn.2d at 642)). It matters not whether the officer demands identification or merely requests it. Rankin, 151 Wn.2d at 696-97.

In so holding, this Court distinguished between police-citizen interactions where the citizen is pedestrian, as in State v. Young,<sup>1</sup> and those where the citizen is a passenger, as in Larson:

We think there are good reasons for making a distinction between pedestrians and passengers. As we have said, "'many [individuals] find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.'" City of Seattle v. Mesiani, 110 Wn.2d 454, 457, 755 P.2d 775 (1988) (quoting Delaware v. Prouse, 440 U.S. 648, 662, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)). Indeed, a passenger faced with undesirable questioning by the police does not have the realistic alternative of leaving the scene as does a pedestrian. As the noted commentator Professor LaFave observed, the passenger is forced to abandon his or her chosen mode of transportation and, instead, walk away into a frequently foreign location thereby risking the departure of his or her ride while away. See Wayne R. LaFave, The Present and Future Fourth Amendment, 1995 U. Ill. L.Rev. 111, 114-15.

Rankin, 151 Wn.2d at 697.

Thus, in Rankin, where the officer requested the passenger's identification for the sole purpose of conducting a criminal investigation "notwithstanding the fact that the officer lacked any articulable suspicion of criminal activity," the passenger was seized as a matter of law. Rankin, at 699. Because the state did not justify the seizure by establishing an

---

<sup>1</sup> 135 Wn.2d at 511 (asking for identification from pedestrian does not constitute a seizure).

exception to the warrant requirement -- such as officer safety concerns -- the evidence obtained as a result required suppression. Id. & n.5.

Here, Officer Osterdahl was investigating a reckless driving incident. When he encountered the suspect car, a Honda, parked in a McDonald's lot about four blocks from the incident, N.K. was seated in the front passenger seat. Under Rankin and Larson, Osterdahl could not request his identification in the absence of an independent basis to support the request.<sup>2</sup> Like the officers in Rankin and Larson, however, Osterdahl requested N.K.'s identification for the sole purpose of criminal investigation "notwithstanding the fact that the officer lacked any articulable suspicion that he was engaged in criminal activity." Rankin, at 699.

N.K. was seated in the front passenger seat, while another young man was seated directly behind him. No one was seated in the driver's seat or the rear driver's side passenger seat, but two other young men were standing outside the car. 1RP 46. As a matter of common sense and

---

<sup>2</sup> Although Osterdahl asked for N.K.'s name and date of birth, such a request is the functional equivalent of a request for identification. See, e.g., State v. Mote, 129 Wn. App. 276, 120 P.3d 596 (2005) (treating officer's request for passenger's name and birth date as a request for identification). The comparison is appropriate since the officer's purpose in requesting identification is to obtain the individual's name and birth date to check the individual's driving or warrant status. See, e.g., Mote, 129 Wn.2d 282. Indeed, the officer in Rankin "took the identification from Rankin, wrote down the information, and stated, "be right back." Rankin, 151 Wn.2d at 703 (Fairhurst, J., dissenting).

simple deduction, the two people standing outside of the car had to be the driver and rear driver's side passenger. 1RP 46. Whether N.K. may have driven the car at some other time is sheer speculation. Contrary to the Court of Appeals opinion below, Osterdahl did not have an "independent basis" to question N.K. See Rankin, 151 Wn.2d at 699 (equating "independent basis" with "articulable suspicion"); State v. Cook, 104 Wn.2d 186, 190, 15 P.3d 677 (2001) ("independent basis" for questioning a passenger exists if there is reasonable suspicion the passenger is engaged in criminal activity). In this case, Osterdahl had no more than a hunch that N.K. had engaged in criminal activity. His request for identifying information constituted a seizure as a matter of law. Because the state cannot justify the seizure by any exception to the warrant requirement,<sup>3</sup> N.M.K.'s resulting confession must be suppressed. Rankin, at 699.

In its supplemental brief, the state will likely argue this case is distinct from Rankin and Larson, because N.M.K. was in a parked car rather than a car pulled over by police. Division One of the Court of Appeals has made just such a distinction, holding that passengers in parked cars should be treated like pedestrians rather than passengers. State v. Mote, 129 Wn. App. 276, 120 P.3d 596 (2005). In making the distinction,

---

<sup>3</sup> At the suppression hearing, Osterdahl testified "I know I did not feel threatened by this group." RP 50 (7/9/04).

Division One relied on this Court's opinion in State v. Thorn, 129 Wn.2d 347, 917 P.2d 108 (1997), overruled in part by State v. O'Neill, 148 Wn.2d 564, 571 (2003), and this Court's opinion in O'Neill.

In Thorn, an officer saw a flicker of light in a legally parked car and thought someone might be trying to light a drug pipe. The officer walked up to Thorn, who was sitting in the driver's seat of the parked car, and asked, "Where is the pipe?" Thorn, 129 Wn.2d at 349. Thorn gave the officer a marijuana pipe in response and was arrested. During a search incident to arrest, illegal mushrooms were found. The trial court suppressed the evidence and dismissed the case, ruling that Thorn was illegally seized when the officer asked, "Where's the pipe?" Thorn, 129 Wn.2d at 350.

In reversing, this Court rejected the rationale that being in a parked car makes it more difficult to leave than if the person were a pedestrian. Thorn, 129 Wn.2d at 352-53 (citing United States v. Kim, 25 F.3d 1426, 1430 (9th Cir. 1994) (stating that distinction between stopping pedestrian and person in car dissipates when car is parked in public place), cert. denied, 513 U.S. 1030 (1994)). Whether a seizure occurred therefore depended upon the traditional totality of the circumstances test, focusing on whether the police conduct was coercive. Thorn, at 353. Based on the

minimal facts presented, this Court held Thorn did not establish the officer's question was so coercive as to constitute a seizure. Thorn, at 353-54.

Although Thorn was a Fourth Amendment case, this Court adopted its reasoning in O'Neill to hold that the driver of a car parked in a parking lot late at night was not seized under the state constitution when the officer approached and requested the driver's identification.

It is not improper for a law enforcement officer to engage a citizen in conversation in a public place. Young, 135 Wn.2d at 511. O'Neill was parked in a public place. The occupant of a car does not have the same expectation of privacy in a vehicle parked in a public place as he or she might have in a vehicle in a private location—he or she is visible and accessible to anyone approaching. Significantly, this court has concluded that there was no seizure of a person in a vehicle parked at night in the parking lot of a closed public park, where a police officer approached the vehicle after seeing a light in it, and asked, "Where is the pipe?" Thorn, 129 Wn.2d at 349. Thorn is a Fourth Amendment case, but it demonstrates that no unreasonable intrusion by police occurs when an officer approaches the driver of an automobile parked in a public parking lot and engages him or her in conversation. Additionally, the Court of Appeals determined, under article I, section 7 and the Fourth Amendment, that an officer who approached a vehicle parked on a ferry with the driver apparently asleep, asked repeatedly for the driver to roll the window down, and asked several questions about whether the driver was okay, did not effect a seizure. [State v. Knox, 86 Wn. App. 831, 832, 939 P.2d 710 (1997)]. The court concluded that where a vehicle is parked in a public place, the distinction between a pedestrian and the occupant of a vehicle dissipates. Id. We agree.

O'Neill, 148 Wn.2d at 579.

Based on the foregoing, Division One concluded that Rankin analysis applies only when the passenger is in a car pulled over by police.

The broad statement in Rankin that passengers cannot be asked for identification absent independent cause does not reach occupants in cars parked in public places who happen not to be in the driver's seat. When an officer makes a social contact with occupants of a car parked in a public place, the officer has no cause to seek identification from either the driver or other occupants. It is irrelevant to the officer the position in which a particular occupant is seated. Rather the officer is seeking to talk with all the occupants and find out what is going on. The basis for making a social contact with occupants of a parked vehicle is the same basis for making a social contact with a pedestrian: that police officers may engage citizens in conversation in public places even when there is not enough suspicion to justify a Terry stop.

Mote, 129 Wn. App. at 290.

But this Court impliedly rejected the distinction between parked passengers and pulled over passengers in Rankin, when it rejected the analysis of the Colorado Supreme Court in People v. Paynter, 955 P.2d 68, 75 (Colo. 1998). Rankin, at 698-99. Significantly, the passenger in Paynter was in a parked car on a public street. Paynter, 955 P.2d at 70. For similar reasons as asserted in O'Neill, The Colorado court held Paynter was not seized under the Fourth Amendment by the officer's approach and request for identification:

In [People v. Cascio, 932 P.2d 1381 (Colo. 1997)], we discussed the nature of an encounter between police and citizens sitting in a parked car, concluding that, without more, such an encounter is consensual in nature. See

Cascio, 932 P.2d at 1386 ("[Here], the Cascios were already parked when the deputies spotted them, pulled in behind them, and walked to the van on foot. These circumstances are analogous to a situation in which a police officer who is on foot approached a pedestrian on a sidewalk rather than a full-blown automobile stop.")

Paynter, 955 P.2d at 74.

Rejecting the reasoning of the Colorado Court, this Court held our passengers are entitled to greater protection under Washington's constitution:

However, as noted above, the Washington Constitution affords individuals more protection than the Fourth Amendment, and we must always remain vigilant in guarding these civil rights and refrain from hastily discarding them. . . . In our view, there is no reason to abandon a right that passengers have enjoyed in this state since at least 1980 when such requests for identification from passengers were deemed by this court to be in violation of article I, section 7 or our state constitution.

Rankin, 151 Wn.2d at 698-99.

In holding that Rankin analysis "does not reach occupants in cars parked in public places who happen not to be in the driver's seat," the Mote Court wrongly focused on the subjective intent of the officer. Mote, 129 Wn. App. at 290 ("It is irrelevant to the officer the position in which a particular occupant is seated"). The Mote Court also failed to take into consideration the special vulnerability passengers face when confronted with unwanted police questioning. As this Court noted, the passenger has no realistic alternative of leaving the scene as does a pedestrian: "the

passenger is forced to abandon his or her chosen mode of transportation and, instead, walk away into a frequently foreign location thereby risking the departure of his or her ride while away." Rankin, 697. This risk is no less when the passenger is in a parked car in a public place, such as McDonald's. McDonald's may have been a brief stop along the way. The passenger who leaves still risks losing his ride while away. And unlike a pedestrian, the passenger may be many miles from his home or destination.

In contrast, the driver does not take the same risk by leaving, because, presumably, the car belongs to him and he can take the keys with him. Accordingly, he does not risk losing his ride while away. Thus, O'Neill and Thorn are distinguishable from Rankin -- not because they involve "occupants" of parked cars -- but because they involve drivers of parked cars. Because N.M.K. was a passenger, rather than a driver, Rankin applies here and requires suppression of his confession.

Assuming this Court disagrees, however, N.M.K. was illegally seized under non-passenger case law, because there were more coercive circumstances than the request for identification. Osterdahl testified that before requesting identification, he asked N.M.K. to get out of the car and may have patted him down. RP 49-51 (7/9/04). The court entered a finding that Osterdahl asked N.M.K. "to exit the car, and asked his name and birthdate." This unchallenged finding is a verity on appeal. O'Neill,

148 Wn.2d at 571. Regardless of whether N.M.K. was a passenger, he was seized as soon as the officer requested him to get out of the car. O'Neill, at 582 ("Sergeant West was therefore justified in asking O'Neill to exit the vehicle. At that point, a reasonable person in O'Neill's position would not believe himself free to leave."). Because Osterdahl had no reasonable articulable suspicion of criminal activity, the seizure was unlawful.

2. ADMISSION OF TESTIMONIAL HEARSAY VIOLATED N.M.K.'S RIGHT TO CONFRONT.<sup>4</sup>

To establish N.M.K. drove without a license, the state also presented a letter from department of licensing records custodian Travis Boling, who certified

under penalty of perjury that after a diligent search of computer files there is no document or other evidence in said official record to indicate that on September 8, 2003[,] the Department of Licensing had issued a valid license to [N.M.K.]

Ex 2.

This ex parte certification was prepared by a government agent for the sole purpose of establishing an essential fact at trial. Its use by the State to prove an element of the crime violated N.M.K.'s Sixth Amendment right

---

<sup>4</sup> This argument is substantially the same as in the petition for review in State v. Kronich, 131 Wn. App. 537, 128 P.3d 119 (2006), review granted, 2006 Wash. LEXIS 515 (No. 78428-1, 7/6/06).

to confront the witnesses against him. In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d. 177 (2004), the United States Supreme Court clarified that the use of ex parte testimonial evidence by the government violates a criminal defendant's right to confrontation unless the declarant is truly unavailable and has been subject to prior cross examination by the defendant. Id., 124 S. Ct. at 1374. In this case, it is undisputed that the certification was submitted ex parte and that N.M.K. was not provided an opportunity to cross-examine the witness. Consequently, the only issue in deciding whether Crawford applies, is determining whether the declaration provided by DOL and submitted by the state constitutes "testimonial" evidence.

Although the Crawford Court left for "another day any effort to spell out a comprehensive definition of 'testimonial,'" it did provide a list of what it determined to be a "core class" of testimonial statements: "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52 (citations omitted, emphasis added) (quoting White v. Illinois, 502 U.S. 346, 365, 112 S. Ct. 736, 747, 116 L. Ed. 2d 848 (1992)).

The Court of Appeals found that Boling's letter fell within the "absence-of-a-public-record" exception to the hearsay rule (ER 803(a)(7))<sup>5</sup> and that such an exception parallels the business record exception. Because Crawford states that business records are non-testimonial, Division One concluded the document at issue here was non-testimonial as well. State v. N.M.K., 129 Wn. App. 155, 163-64, 118 P.3d 368 (2005); see also United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. 2005); United States v. Cervantes-Flores, 421 F.3d 825 (9th Cir. 2005).

---

<sup>5</sup> ER 803(a)(7) provides:

**(a) Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

**(7) Absence of Entry in Records Kept in Accordance with RCW 5.45.** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

But there are significant distinctions between Boling's letter and a business record. For one thing, it is not a record that DOL keeps in the normal course of business. Rather, it was prepared in anticipation of trial to prove that N.M.K. was not licensed at the time he was allegedly driving. And because the statement was certified under penalty of perjury, it is tantamount to an affidavit under Washington law. See, e.g., RCW 9A.72.085. Affidavits are within that core class of statements Crawford expressly held were testimonial. And clearly, Boling reasonably expected the letter to be used prosecutorially, as he prepared the letter at the prosecutor's behest.<sup>6</sup>

As the Kronich dissent points out, there is a distinction between when a records custodian certifies a true and accurate copy of an original file -- a purely ministerial act if ever there was one -- and the process someone must go through when ultimately certifying the absence of a record:

The certification of the absence of a record begins with a search that is both diligent and knowledgeable and ends with the testimonial statement. The testimonial statement outlines the actions of the records seeker: that he or she knew for what record to search, knew how to find it in the records or database, searched for it diligently, and found no such record.

---

<sup>6</sup> The letter was dated April 5, 2004, approximately three months after N.K. was charged. CP 1-2.

State v. Kronich, 131 Wn. App. 537, 128 P.3d 119 (2006) (Baker, judge pro tem, dissenting).

A number of jurisdictions agree certificates such as the one at issue here are testimonial under Crawford. See, e.g., People v. Pacer, 6 N.Y.3d 504, 847 N.E.2d 1149 (2006) (affidavit from Dept. of Motor Vehicles that procedure for mailing a notice or revocation was followed to prove defendant knew of revocation was testimonial); People v. Niene, 8 Misc.3d 649, 798 N.Y.S.2d 891 (N.Y. CityCrim. Ct. 2005) (officer's affidavit of absence of license was testimonial); People v. Rogers, 8 A.D.3d 888, 891 (N.Y. App. 2005) ("Defendant had the right to cross-examine witnesses regarding authenticity of the [blood] sample for foundation purposes"); Shiver v. State, 900 So.2d 615, 618 (Fla. App. 2005) ("affidavit of breath test" testimonial); City of Las Vegas v. Walsh, 91 P.3d 591, 593-94 (Nev. App. 2004) (affidavit of nurse on blood draw testimonial), reversed on other grounds, City of Las Vegas v. Walsh, 124 P.3d 203, 207-08 (Nev. 2005).

These decisions generally conclude that authenticating statements found in certifications and affidavits are testimonial because such evidence is prepared for the purpose of litigation. Crawford, 541 U.S. at 51. See, e.g., Walsh, 124 P.3d at 208 (affidavit of blood samples "are made for use at a later trial or legal proceeding"); Shiver, 900 So.2d at 618 ("the only

reason the affidavit was prepared was for use at trial"); Niene, 798 N.Y.S.2d at 893 (the affidavit "was prepared at the request of law enforcement for use in the criminal trial").

As the Court of Appeals observed, however, several jurisdictions have found that certifications such as Boling's are not testimonial. See, e.g., Cervantes-Flores, 421 F.3d at 833 (certificate of non-existence of records not testimonial); Rueda-Rivera, 396 F.3d at 680 (same); State v. Norman, 125 P.3d 15 (Or. App. 2005) (certification of accuracy of breath test not testimonial); Rembusch v. State, 836 N.E.2d 979, 982 (Ind. App. 2005) (certification of breath test instrument not testimonial); Luginbyhl v. Commonwealth, 618 S.E.2d 347, 475 (Va. App. 2005) (same); State v. Godshalk, 885 A.2d 969, 973 (N.J. 2005) (same); Commonwealth v. Verde, 827 N.E.2d 701, 705-06 (Mass. 2005) (toxicologist certification not testimonial); Napier v. Indiana, 827 N.E.2d 565, 568-69 (Ind. App. 2005) (toxicologist certification not testimonial); State v. Carter, 114 P.3d 1001, 1007 (Mont. 2005) (breath test certification not testimonial); Rackoff v. State, 621 S.E.2d 841, 845 (Ga. App. 2005) (inspection certificate for breath test instrument not testimonial); Moreno Denoso v. State, 156 S.W.3d 166, 182 (Tex. App. 2005) (certified copy of autopsy report not testimonial); Rollins v. State, 866 A.2d 926 (Md. App. 2005) (same);

People v. Schreck, 107 P.3d 1048, 1060-61 (Colo. App. 2005) (affidavits used to establish chain of custody for documents not testimonial).

These courts generally conclude that certifications or affidavits used to authenticate records or reports are nontestimonial due to the contents of the certificate or the fact being proven. See United States v. Weiland, 420 F.3d 1062, 1077 (9th Cir. 2005) (although foundation certificate was arguably testimonial, it was merely "routine cataloguing of an unambiguous factual matter" and not testimonial); see also Cervantes-Flores, 421 F.3d at 833 (same); Schreck, 107 P.3d at 1061 (public records affidavit "provided solely to verify the chain of custody and authenticity" of DOC records); Moreno Denoso, 156 S.W.3d at 182 (certified copy of autopsy "report set forth matters observed pursuant to duty imposed by law"); Carter, 114 P.3d at 1007 ("certification reports are nontestimonial in nature in that they are foundational, rather than substantive or accusatory"); Napier, 827 N.E.2d at 569 ("operator certifications in circumstances such as these should be considered a function that is ministerial in nature" and "have no bearing on guilt or innocence"); Verde, 827 N.E.2d at 705 ("Certificates of chemical analysis are neither discretionary nor based on opinion; rather; they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance"); Godshalk, 885 A.2d at 973 (breathalyzer certifications are reliable and trustworthy");

Luginbyhl, 618 S.E.2d at 355 (breath test instrument certifications are "neutral in character, relating only to the operation of the machine and the qualifications of the officer administering the test" and "do not accuse [the defendant] of any wrongdoing").

These various rationales circumvent Crawford's impact on Ohio v. Roberts,<sup>7</sup> where the Court abandoned the test of reliability. Crawford, 541 U.S. at 61; see also People v. Walker, 697 N.W.2d 159, 170 (Mich. App. 2005) ("it is merely a reliability analysis in disguise"). Indeed, the Crawford Court held that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . [the Sixth Amendment] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Id.

Moreover, the Confrontation Clause "applies to 'witnesses' against the accused -- in other words, those who 'bear testimony.'" Crawford, 541 U.S. at 51. Confrontation Clause protections are not based upon the nature of the witness's testimony, but upon a witness's "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. (emphasis added). Whether a hearsay statement is non-accusatorial,

---

<sup>7</sup> 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled by, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

neutral or foundational, is of no consequence to the testimonial determination. In any event, the certification here was accusatorial because it asserted N.M.K. had no license -- an essential element of the crime. See, e.g., Pacer, 6 N.Y.3d at 50

Finally, it is not a foregone conclusion that little would be gained by requiring DOL witnesses such as Boling to appear at trial. See, e.g., Kronich, 131 Wn. App. at 547 (opining that allowing confrontation under circumstances such as this would "require numerous additional witnesses without any apparent gain in the truth-seeking process").<sup>8</sup> For instance, N.M.K. could have asked Boling what he meant by "a diligent search." N.M.K. may have determined through cross-examination that Boling's computer skills are lacking. N.M.K. could have inquired as to how records are kept in the Department of Licensing computer files. N.M.K. may have determined through cross-examination that they are not always up-to-date. Or, he may have determined that there are frequent instances when a person was issued a license but it was not recorded due to human error. The trial court's ruling admitting Boling's letter in the absence of affording N.M.K.

---

<sup>8</sup> The feared impact of requiring authenticating witnesses to testify at trial is likely lessened by a defendant's ability to stipulate to prior conviction records, and the like. See, Old Chief v. United States, 519 U.S. 172, 175 (1997). The parties are free to determine whether a stipulation is appropriate or whether problems exist with a certification.

the opportunity to ask such pertinent questions violated his right of confrontation.

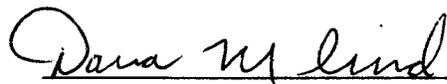
B. CONCLUSION

N.M.K.'s confession was illegally obtained and should have been suppressed. Assuming this Court disagrees, however, the confession cannot be considered unless independent prima facie evidence of the corpus delicti of the crime exists in the record. See State v. Ray, 130 Wn.2d 673, 679, 926 P.2d 904 (1996). The only independent prima facie evidence of N.M.K.'s driving status on the record is Boling's letter, which was admitted over defense counsel's objection and in violation of N.M.K.'s right to confront. Once properly excluded, the evidence is insufficient to support N.M.K.'s conviction for driving without a license. This Court should reverse and dismiss the conviction.

DATED this 28<sup>th</sup> day of July, 2006.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



\_\_\_\_\_  
DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Petitioner