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CRIMINAL DIVISION
KING COUNTY PROSECUTORS OFFICE

NO. 64327-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

LAKI MOIMOI,

Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

A. State's Exhibit No. 1 was admitted in violation of Moimoi's constitutional right to confrontation.

The admission of State's Exhibit No. 1 violated Moimoi's constitutional right to confront witnesses as laid out in *Crawford v. Washington* and *Melendez-Diaz v. Massachusetts*. Testimonial statements must be subject to cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). State's Exhibit No. 1 was an affidavit attesting to the absence of any record that Moimoi had registered as a contractor with the State of Washington. This evidence was clearly testimonial as it was created for the specific purpose of proving an element of a crime in a criminal prosecution. The admission of this testimonial statement without testimony from the affiant herself deprived Moimoi of the ability to cross-examine the person who actually performed the data search and violated his constitutional right to confrontation. The State's arguments against Moimoi's claim of error ignore both the record before this Court and the scope and nature of protection afforded by the Sixth Amendment. The State's assertions of waiver, distinctions and dicta cannot dispel the confrontation issue presented in this case. *Melendez-Diaz* is controlling here and conclusively resolves any doubts as to the admissibility of State's Exhibit No. 1.

a. Moimoi properly preserved his claim that State's Exhibit No. 1 violated his right to confrontation.

The State incorrectly asserts that Moimoi failed to preserve his confrontation clause objection in this case and argued:

When exhibit 1 was offered, Moimoi objected on the basis that it was not kept in the ordinary course of the agency's business. He never mentioned the Constitution or the Confrontation Clause. His objection was insufficient to preserve the issue.

Brief of Respondent, p. 6 (internal citations omitted). However, the State mischaracterizes Moimoi's objection and inexplicably ignores the record before this Court. Moimoi's counsel objected to admission of the document because "[i]t appears that this was made. . . this particular record was made for litigation not as a – any routine part of any business operation from Labor and Industries." (VRP, p. 53). A record created in anticipation of litigation is *testimonial*. Testimonial statements must be subject to cross-examination. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford v. Washington*, 541 U.S. 36, 69, 124 S.Ct. 1354 (2004). Moimoi properly preserved his claim.¹

¹ Even if defense counsel had not objected to the admission of this evidence, Moimoi's claim could be raised for the first time on appeal because it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Kronich*, 160 Wn.2d 893, 161 P.3d 982 (2007) (A manifest error is an error having practical and identifiable consequences in the trial of the case.). The trial court's erroneous admission of State's Exhibit No. 1 violated

b. The State’s argument that a live witness testified who routinely used the contractor database does not resolve the confrontation issue presented in this case.

The State argues that Moimoi’s constitutional right to confrontation was not violated because “a witness was available for cross-examination.” Brief of Respondent, p. 8. However, Matthew Jackson, the witness who testified from the Department of Labor and Industries, was not the witness who conducted the search of the records or authored the affidavit admitted into evidence. In short, this was not the witness who bore testimony against Moimoi in State’s Exhibit No. 1. In order to satisfy the requirements of the Sixth Amendment, the State was required to call the affiant of State’s Exhibit No. 1.

The US Supreme Court has clearly held that “affidavits are inadmissible unless the *affiant* testifies at trial, or is unavailable at trial but had earlier been available for cross-examination.” *Melendez-Diaz v. Massachusetts*, 129 S.Ct. at 2531 (quoting *Crawford v. Washington*, 541

Moimoi’s constitutional right to confrontation and had clear practical and identifiable consequences in the trial as *Melendez-Diaz* would have required live testimony from the affiant of the exhibit and, without such testimony, exhibit would be inadmissible. *Melendez-Diaz* had not yet been decided when Moimoi was brought to trial. At the time of his trial, the law in the State of Washington provided for the admissibility of an affidavit establishing the absence of a public record without the requirement of live testimony from the affiant. See *State v. Kirkpatrick*, 160 Wn.2d 873, 161 P.3d 990 (2007) (“[C]ertification that a license has not been issued to a particular defendant is not an accusatory statement or testimony; it is not testimonial evidence.”) The *Kirkpatrick* court appears to have based its holding on the premise that public records, like business records, are *per se* non-testimonial. *Id.* at 882. *Melendez-Diaz* made clear that this premise was incorrect and overrules this holding.

U.S. at 54)(emphasis added)². Here, the State’s decision to admit State’s Exhibit No. 1 in lieu of live testimony impermissibly circumvented Moimoi’s constitutional right to confrontation. Pamela Bergman – not Matthew Jackson – was the witness who conducted the search of the contractor database and executed an affidavit documenting the results of her search. Because the affidavit was used as substantive evidence against Moimoi at trial, Pamela Bergman should have been presented at trial for examination. The Confrontation Clause requires that a criminal defendant be given the opportunity confront those who bear testimony against him. The State’s failure to call Ms. Bergman deprived Moimoi of his right to confrontation.

c. State’s exhibit No. 1 was testimonial and not admissible in lieu of live testimony from the affiant.

The State argues that State’s Exhibit No. 1 was admissible as a public record and therefore not testimonial. However, the US Supreme Court rejected the conclusion that affidavits admissible as a public or business record are non-testimonial.

[A]ffidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless. Documents kept in the regular course

² See also *United States v. Norwood*, 603 F.3d 1063 (2010) (the prosecution conceded that the affidavit prepared “for use at Norwood’s trial to prove the absence of any record of Norwood having legitimate employment, should not have been admitted without [the affiant] presenting herself at trial for examination.”).

of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2538 (internal citations omitted). The court further clarified:

Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but 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. Whether or not they qualify as business or official records, the analyst’s statements here – ***prepared specifically for use at petitioner’s trial*** – were testimony against petitioner, and the analysts were subject to confrontation.

Id. at 2539-40 (emphasis added). The key to determining whether a statement is testimonial is the purpose for which the statement was created. Documents created in anticipation of litigation are always testimonial.

In furtherance of its argument, the State attempts to distinguish Moimoi’s case from *Melendez-Diaz*.

The analyst’s laboratory report at issue in Melendez-Diaz is fundamentally different from the licensing record at issue here. A forensic analyst’s report attests to actions taken wholly after commission of the defendant’s crime, whereas the certification letter in this case simply attests to the state of the public record at the time of the offense.

Brief of Respondent, p. 12. In so arguing, however, the State mischaracterizes State’s Exhibit No. 1. The exhibit was not merely a

certification letter authenticating a record. State's exhibit No. 1 was an affidavit attesting as to the results of a records search was done *after the date of the alleged offense* and as part of a criminal investigation. State's Exhibit No. 1 was created for the sole purpose of providing evidence against Moimoi.

A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could . . . *create* a record for the sole purpose of providing evidence against a defendant.

Id. at 2539. The State incorrectly characterizes the exhibit as simply attesting to the contents of the database. Brief of Respondent, p. 17.

Contrary to the State's argument, State's exhibit No. 1 attests to action taken after the date of the alleged offense – a search of the Department of Labor and Industries record. Like the affidavit of the analyst in *Melendez-Diaz*, State's Exhibit No. 1 was created not only with the reasonable belief that it would be available at trial, but for the specific purpose of proving an element of a crime in a criminal trial. Further, this affidavit was not a record kept in the regular course of business. The affidavit did not exist independently of the prosecution. The exhibit was prepared specifically for the King County Prosecuting Attorney's office – the agency responsible for charging Moimoi with the criminal offense.

The State further attempts to distinguish the exhibit in this case from *Melendez-Diaz* by arguing that State's Exhibit No. 1 contained “no

opinions or exercise of judgment”. Brief of Respondents, p. 19.

However, the State provides no authority for its assertion that a certification is not testimonial unless it contains opinions or the exercise of judgment. Such an assertion is contrary to the court’s conclusion in *Melendez-Diaz*.

Like the testimony of the analysts in this case, the clerk’s statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched.

Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2539³. The focus must be on the purpose for which the document was created. Affidavits created for the purpose of establishing or proving the existence (or non-existence) of some fact are testimonial.

Finally, the State attempts to distinguish this case from *Melendez-Diaz* by arguing that laboratory reports are different from contracting licensing records because “defendants can see for themselves whether the State considers them licensed.” Brief of Respondents, p. 19. In support of this argument, the State asserts that Moimoi was not at the “mercy of the prosecution” because he could check the contracting records himself in

³ The State argues that the court’s conclusion that an affidavit as to the non-existence of a record is testimonial should be considered “non-binding dicta”. Brief of Respondent, p. 22. However, the analysis characterized by the State as “dicta” is central to the Supreme Court’s holding that under the Sixth Amendment, a clerk cannot by affidavit “create a record for the sole purpose of providing evidence against a defendant.” *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2539.

order to dispute information contained in the certification, attack the completeness of the custodian's records search and offer evidence himself that he actually registered. *Id.* at 20. The State concludes its argument by asserting that "unlike Melendez-Diaz, cross-examination of the custodian of contracting license records would truly be 'an empty formalism'". *Id.* However, the *Melendez-Diaz* court examined similar arguments and rejected them.

[T]he Confrontation Clause imposes a burden on the prosecution to present its witness[.] It's value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiant if he chooses.

Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2540.⁴ The confrontation clause requires the prosecution, not the defense, to present the testimony of adverse witness.

State's Exhibit No. 1 was clearly testimonial. Admission of the exhibit in lieu of live testimony from the affiant violated Moimoi's constitutional right to confrontation.

B. Admission of State's Exhibit No. 1 cannot be deemed harmless.

The State argues that even if State's Exhibit No. 1 was testimonial, any error was harmless. Brief of Respondent, p. 24. However, the State

⁴ See also *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010) (vacating the judgment of the Supreme Court of Virginia holding that the defendant's right to confrontation was not violated because the defendants could have called the affiants to testify at trial and remanding the case for further proceedings consistent with *Melendez-Diaz*).

fails to meet its burden of proving the constitutional error did not affect the verdict. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (“The State bears the burden of showing a constitutional error was harmless.”). “We find a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error.” *Id.* (citing *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995)).

The State argues that Moimoi’s testimony that he had “no idea” whether he had a contractor’s license with the Department of Labor and Industries was “a concession that he never applied for or received licensing from the department.” However, the record does not support such an argument. At trial, Moimoi was never asked whether he had a contractor’s license. During cross-examination by the prosecution, the following exchange took place:

Q: Mr. Moimoi, your business is called Seattle Landscaping and Construction, is that right?

A: Yes.

Q: And your business is not registered with the Department of Labor and Industries?

A: I don’t know.

Q: You don’t know? But it is your business?

A: My business was registered here in the City of Seattle.

Q: But it was not registered with the Washington State Department of Labor and Industries?

A: I have no idea.

Q: No idea. You had a business license, is that right?

A: Yes.

(VRP, p. 116). This line of questioning focused on Moimoi's business license and never addressed whether he was registered as a contractor. Moreover, even assuming the prosecutor had asked Moimoi whether he had a contractor's license, a response of "I have no idea" could not be considered a concession that he had never applied for or received such a license. "I have no idea" is simply not an admission.

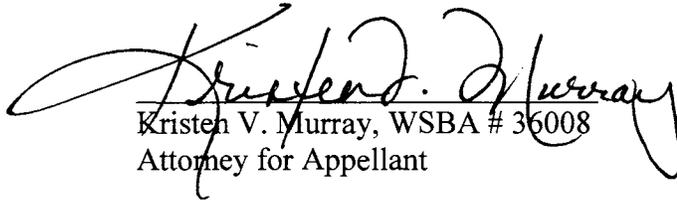
The State further argues that the other evidence presented at trial including the testimony of Mr. Jackson and the "evidence of Moimoi's deceptive business practices and refusal to provide basic business information to Mr. Lamey, established that he was not a registered contractor." Brief of Respondent, p. 26. However, without the improperly admitted exhibit, the other evidence proves nothing. State's exhibit No. 1 was the *only* evidence presented by the prosecution that Moimoi was not registered as a contractor – an essential element of the charged offense. Because this error involves a violation of a constitutional right, the prosecution must prove the error did not "contribute" to the verdict. It has

not, and cannot do so. Moimoi's conviction must be vacated because it cannot be found to be harmless beyond a reasonable doubt.

CONCLUSION

The admission of State's Exhibit No. 1 violated Moimoi's constitutional right to confront adverse witnesses as articulated in *Crawford v. Washington* and *Melendez-Diaz v. Massachusetts*. For the foregoing reasons, Moimoi's conviction should be vacated.

Respectfully submitted this 16th day of September, 2010.



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