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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS SCOTT JASPER,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

ORIGINAL

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A. ISSUES

1. May this Court preserve long-standing precedent allowing admission of certifications of public records that contain a summary of the records where the Supreme Court has not held that such certifications are improper?
2. May this Court adhere to its precedent allowing admission of certifications attesting to the absence of a record in a public agency's files where the Supreme Court has not held that such certifications are improper?
3. Did the Court of Appeals err by assuming facts not in the record to find that the trial court did not comply with CrR 6.15(f) instead of focusing on evidence in the record showing that the trial court did comply with the rule, especially where the defendant never raised any issue as to compliance with CrR 6.15(f) in the trial court?
4. Is answering a jury question a critical stage of the proceedings such that the defendant must be present?
5. Even if the defendant had a right to be present, was any error harmless where the court's response was appropriate and the defendant's presence at a hearing to discuss that response would not have changed the court's decision?

B. FACTS

Douglas Jasper caused a serious automobile collision on February 14, 2008 by crossing the centerline and striking a car with two elderly occupants. He left the scene and was arrested a short time later. He was charged with felony hit-and-run, driving while license suspended in the third degree (DWLS 3), and negligent driving. *See* Br. of Resp. at 2-8.

To prove that Jasper's license was suspended, the State submitted a three-page certified document from the department of licensing (DOL). Appendix C (Ex. 16 at trial); 3RP 57. The cover page was a letter from DOL generated post-charging which certified the authenticity of the second and third pages and said that Jasper's license status on February 14, 2005 was "suspended in the third degree." Appendix C-1. The second and third pages, both dated May 14, 2007, were letters taken from pre-existing DOL files, addressed to Jasper, informing him that his driving privilege would be suspended effective June 28, 2007. Appendix C-2, 3. These letters alerted Jasper that his license would be suspended because he had failed to respond to traffic infractions. Jasper admitted to officers upon arrest, and to the jury at trial, that he knew his license was suspended on February 14, 2008. 3RP 56; 4RP 29, 36.

Immediately after closing arguments the jury retired to the jury room. Counsel reviewed the trial exhibits before they were sent to the

jury. Then, just before deliberations were to begin, the trial court asked the lawyers to ensure that they could be contacted: "Counsel, do you have cell phones or other contact information that you'll leave with either Carole or Kelli?"¹ 5RP 28. There followed a discussion off the record. Id. The parties then argued on the record over whether the court should find Jasper guilty of negligent driving (jury had been waived as to that charge). After the court entered its verdict, and just before it was poised to adjourn, it again asked the lawyers to make sure they had left contact information with the clerk: "Okay, so have both of you left your number contacts? Kelli says no. Would you please do that." 5RP 33. The jury began deliberating at 10:15 a.m. CP 110.

After lunch, at 1:42 p.m., the jury asked for "the definition of the spirit of the law." CP 51. It also asked whether a person's obligations following an accident depended on his mental, emotional, or physical condition. CP 49. The trial court responded in writing with directions to re-read the jury instructions, to continue deliberating, and that no additional instructions would be provided. CP 50, 52, 110-11. At the top of the court's written response was the following language:

**COURT'S RESPONSE: (AFTER AFFORDING ALL
COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):**

¹ Carole Allen is Judge Fleck's bailiff and Kelli Northrop is the courtroom clerk. See CP 103.

CP 50, 52. Under this language appears the court's handwritten response to the jury and the judge's signature. Id.

On appeal, Jasper claimed that it was constitutional error to admit the cover page of the DOL exhibit, i.e., the letter of certification. He also argued that the trial court erred by not summoning him personally to court before answering the jury's inquiries. The Court of Appeals held that admission of the DOL exhibit was reversible error because the cover letter contained testimonial hearsay. State v. Jasper, 158 Wn. App. 518, 526-35, 245 P.3d 228 (2010).

Jasper also argued that the trial court had violated his rights to be present and his right to have input when the trial court answered a jury question. This claim was never raised in the trial court. The Court of Appeals held that Jasper did not have a right to be present because answering a jury inquiry is not a critical stage of the proceedings if the court is only advising the jury on legal matters. Jasper, at 538-40. The court then assumed, despite evidence to the contrary, that neither Jasper nor his lawyer was given the chance to comment on the court's response. Id. at 540 n.13. However, the court concluded that any error was harmless. Id. at 541-43.

Jasper filed a petition for review on the jury inquiry question. The State answered that petition and also cross-petitioned on the Confrontation Clause issue. This Court granted review on all issues.

C. ARGUMENT

These consolidated cases of Jasper, Cienfuegos and MoiMoi ask this Court to determine whether Melendez-Diaz v. Massachusetts² requires changes to Washington's long-standing rules allowing the use of public record certifications as evidence. The focal points of disagreement are: 1) whether a records certification may contain anything beyond a statement that the attached records are true and correct copies of the agency's records; and 2) whether a certification may attest to the *absence* of a record. Just three years ago, this Court answered both questions with a "yes." Jasper argues, however, that recent Supreme Court authority requires this Court to repudiate its precedent.

The State disagrees. The United States Supreme Court has cautioned lower courts not to anticipate changes in Supreme Court doctrine before those changes are announced by the Court itself. The Supreme Court in Melendez-Diaz did not address the scope of the

² ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

traditional public records exception to the hearsay rule, except in the context of a report of a drug analysis commissioned and wholly carried out after a defendant was charged. Such reports are distinct from a custodian's certification of preexisting records. Given the continuously evolving nature of the Supreme Court's "testimonial" analysis and the uncertainty that surrounds even some core notions about that analysis, it would be prudent for this Court to await a direct holding from the Supreme Court as to the allowable scope of a certification of official records before it discards long-standing and sensible Washington rules.

1. USE OF CERTIFIED PUBLIC RECORDS DID NOT VIOLATE THE CONFRONTATION CLAUSE.
 - a. Washington Law And Precedent On Certified Documents As Evidence.
 - i. Public records.

The admissibility of public records in Washington is governed by both statute and court rule. RCW 5.44.040 is entitled "Certified copies of public records as evidence" and it provides as follows:

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

ER 803(a)(8), entitled "Public Records and Reports," specifically defers to the statute, RCW 5.44.040. Documents offered under this statute are self-authenticating and may be admitted without foundational testimony. ER 902. The statute creates an exception to the rule against hearsay; it is not simply a statute about authentication of records. State v. Monson, 113 Wn.2d 833, 837-39, 784 P.2d 485 (1989). The origins of this statute are found in Washington's earliest territorial laws.³

The rationale for admitting copies of public records is rooted in the fact that the custodian possesses the original record so the existence and genuineness of the copy can readily be verified either before or after a defendant is charged with a crime. 5 J.H. Wigmore, Evidence in Trials at Common Law, § 1677 at 858-60 (Chadbourne rev. 1974). This concept runs through Washington's long history of decisions affirming the use of public records as evidence. The very nature of public records reduces the need for cross-examination.

A number of reasons underlie the business or public records exception to the hearsay rule. Many public or business records and documents are the products of daily routine government and business transactions. Cross-examination, therefore, serves little or no purpose. It is

³ Laws 1854, p. 195, § 336 provided: "Copies of all papers, on file in the offices of the surveyor generals of Oregon and Washington territories, secretary of Washington territory, territorial treasurer, territorial auditor, and any county treasurer, or any matter recorded in either of said offices, duly certified by the respective officers, with the respective seals of office annexed, shall be evidence in all the courts of this territory."

also unrealistic to expect that those who generate these records, or record custodians, would recall the details of a particular transaction or event. And, frequently, the mere fact that they are kept is an indication of their genuineness.

State v. Hines, 87 Wn. App. 98, 101, 941 P.2d 9 (1997). Because records custodians are unlikely to recall the details of the transaction or event, "cross-examination would not serve to enhance truth-finding," and is of little value in insuring the reliability of the document. State v. Chapman, 98 Wn. App. 888, 891-92, 991 P.2d 126 (2000).

Moreover, cases and statutes long ago departed from the old English common law rule that certifications must simply authenticate a copy.

But here the rigid logic of the courts was inconsistent with good sense and practical needs. In a vast number of cases, the tenor of a record or an entry is quickly ascertainable, is open to no difference of opinion, and can be summarily stated without a literal transcription; the possibilities of harm are further diminished by the publicity of the record and its easy access for the detection of error. Accordingly, by statute, the use of certificates of the *effect or substance* of a document has been widely sanctioned.

Wigmore, supra, § 1678 at 865 (italics added). See also RCW 4.04.01 and RCW 9A.04.060 (common law was to be applied only if it was not repugnant to, or inconsistent with, a statute enacted by the legislature).

Washington cases illustrate this sensible evolution of the law. For instance, in State v. Polk, 66 Wash. 411, 119 P. 846 (1911), a prosecution

for the sale of illegal liquor, a certification from an elections commissioner was admitted into evidence to prove the results of an election banning the sale of certain alcoholic drinks. No single document established those results, but the commissioner's summary did. This Court affirmed use of the certification because it was an accurate summary of the election records. Polk, 66 Wash. at 413-14.

Likewise, in Garneau v. Port Blakeley Mill Co., 8 Wash. 467, 36 P. 463 (1894), this Court affirmed admission of a records certification that included a fact apparently not in the record itself, i.e., that the record had been duly filed. The broader certification was allowed because the custodian's recitation of facts was distilled from the entirety of the actual records.⁴ In State v. Bolen, 142 Wash. 653, 245 P. 445 (1927), this Court affirmed admission of fingerprint records from the U.S. War Department to prove the identity of a headless homicide victim found floating in the Columbia River. Numerous cases were discussed with approval.⁵ To the

⁴ "Appellant objects that the auditor cannot certify to his version of the contents of a record, but must certify a copy of the record itself. . . . But in certifying a copy, if he includes therewith the fact of filing, the name of the person presenting the instrument, the date, and the book and page of record, he is just so far stating facts which are not a part of the record, strictly, but are gathered from memoranda noted in the book, and from the book itself. These facts, it is conceded, may be certified by the auditor in connection with his copy, and we are unable to see why they may not be equally as well certified upon the original instrument as upon the copy." 8 Wash. at 473-74 (internal citations omitted).

⁵ Ward v. Moorey, 1 Wash. Terr. 104 (1858) (records from U.S. local land officer); Cherry Point Fish Co. v. Nelson, 25 Wash. 558, 564, 66 P. 55 (1901) (tide tables); Anderson v. Hilker, 38 Wash. 632, 80 P. 848 (1905).

claim that such evidence "violated section 22 of article I of our Constitution," this Court replied:

Similar provisions are in the Constitutions of many of the states, and it has often been held that they have no application to proof of facts in their nature documentary, and which can be proved only by the original or authenticated copy. This question has been so thoroughly discussed and reviewed by eminent authorities that we do not feel justified in again undertaking to cover the field.

Bolen, at 449-50. *See also Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 P. 729 (1893) (original lien notices were properly admitted with certification of custodian "that they were 'as the same appear of record,' etc.").

More recent cases decided by this Court under RCW 5.44.040 confirm that a certification can summarize the record; it need not attest only to the authenticity of an attached copy. State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007); State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007); State v. Monson, 113 Wn.2d 835-36. *See also State v. Smith*, 122 Wn. App. 699, 94 P.3d 1014 (2004), rev'd on other grounds, 155 Wn.2d 496 (2005).

Washington law also requires, however, that to be admissible the "document prepared by a public official must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion,. . . . [t]he subject matter must relate to facts which

are of a public nature, it must be retained for the benefit of the public and there must be express statutory authority to compile the report.” Steel v. Johnson, 9 Wn.2d 347, 358, 115 P.2d 145 (1941).

These holdings demonstrate a long tradition in Washington of admitting certifications that both summarize and authenticate a set of records, as long as the summary is factual.

ii. Absence of records.

Washington's evidence rules and appellate court decisions also permit a certificate to attest to the absence of a court record.

ER 803(a)(10) provides:

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

(10) *Absence of Public Record or Entry.*

To prove the absence of a record, report, statement, or data compilation, in any form, . . . was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that a diligent search failed to disclose the record, report, statement, or data compilation, or entry....

(bold and italics in original). 5C Karl B. Tegland, Washington Practice: Evidence Law & Practice § 803.52, at 40 (4th ed.1999) (reliability is high because records are open to public so errors will be apparent). Although the English common law rule required live testimony in court where the

non-existence of records was to be proven, this rule was largely abandoned in the various states, including Washington. The old rule was criticized as an empty formalism.

[the common law rule was] that the custodian's certificate of due search and inability to find was not receivable.... It will someday be reckoned as one of the stupidest instances of legal pedantry in our annals. The certificate of a custodian that he has diligently searched ... and been unable to find ... ought to be usually as satisfactory for evidencing its nonexistence in his office as his testimony on the stand to this effect would be....

Wigmore, § 1678 at 867-68. Washington and federal courts have traditionally rejected Confrontation Clause challenges to the rule. Kirkpatrick, 160 Wn.2d at 885-86 (listing cases); Monson, at 835 (certificate attested to fact that no record showed license had been reinstated).

- b. Melendez-Diaz Does Not Demand That States Ignore Improvements In Their Own Evidentiary Analysis And That They Regress To English Common Law Evidentiary Rules.

The above discussion illustrates that Washington's approval of certifications that summarize the effect of records, and certifications as to missing records, are rooted in logic, common sense, and in our jurisprudence. Washington long ago abandoned the senseless formalism of the old English common law rules. This Court should not revert to

those wooden rules unless absolutely required to do so by Supreme Court precedent.⁶

- i. Courts should not try to anticipate changes to Supreme Court doctrine.

The Supreme Court has warned trial courts and appellate courts not to anticipate the overruling of precedent but rather to apply the Supreme Court's settled decisions unless, or until, the Supreme Court overturns its own precedent.

We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing Wilko. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989); Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997); Randell v. Johnson, 227 F.3d 300 (5th Cir. 2000) ("[W]e decline to announce for the Supreme Court that it has overruled one of its decisions").

⁶ It is interesting to note that many English common law rules regarding copies of legal documents stemmed from archaic practices and "professional selfishness" from a time when copies were made by quill pen. *See* Wigmore, § 1677 at 855.

The danger of attempting to predict the direction of a newly-minted Supreme Court analysis is apparent in Jasper. The Court of Appeals said:

. . .the United States Supreme Court has explicitly rejected . . . a reliability-based approach: “[r]eliability is an amorphous, if not entirely subjective, concept” and, thus, “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”

Jasper, 158 Wn. App. at 532 n.6 (quoting Crawford). Yet, in Michigan v. Bryant, ___ U.S. ___, 131 S. Ct. 1143, ___ L. Ed. 2d ___ (2011), the Supreme Court observed said:

Implicit in Davis is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving [an] emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.

This logic is not unlike that justifying the excited utterance exception in the hearsay law.

Bryant, 131 S. Ct. at 1157. The Court then referred to other traditional hearsay exceptions -- including the business records exception -- suggesting that there were parallels between reliability-based hearsay analysis and Confrontation Clause analysis. Id. at 1157 n.9. And, the fact that a declarant was severely injured "would undoubtedly also weigh on the credibility and *reliability* that the trier of fact would afford to the

statements." Id. at 1162 n.12 (italics added).⁷ These passages illustrate that the Jasper court prematurely announced the death of reliability as a factor in Confrontation Clause analysis.

This mistake is important when analyzing whether Melendez-Diaz requires a fundamental shift in the way this Court analyzes public records under the Confrontation Clause. Just as reliability is inherent in the admissibility of excited utterance-type statements, so too is it important as to the admissibility of public records.

This Court has encountered a similar situation before. In State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), the defendants argued that they were entitled to a jury determination on the existence of prior convictions. Binding Supreme Court precedent held that the fact of prior convictions need not be submitted to a jury. Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). Still, because certain Supreme Court justices had expressed reservations about that rule, Apprendi v. New Jersey, 530 U.S. 466, 521, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (Thomas, J, concurring), Wheeler urged this Court to anticipate the overruling of Almendarez-Torres. This Court

⁷ The Court also indicated that use of wholly unreliable evidence might be a Due Process violation instead of a Confrontation Clause violation. Bryant, 131 S. Ct. at 1162 n.13 (citing Montana v. Egelhoff, 518 U.S. 37, 53, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) and Dutton v. Evans, 400 U.S. 74, 96-97, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (HARLAN, J., concurring in result)).

refused. Wheeler, 145 Wn.2d at 123. Ten years later, Almendarez-Torres is still binding precedent.

Just as it would have been a mistake to abandon settled precedent in Wheeler so too would it be a mistake to abandon settled precedent in this case absent a clear holding directly on point by the Supreme Court.

- ii. Melendez-Diaz held that use of drug reports without live testimony violates the Confrontation Clause; the case did not establish the scope of admissibility of true public records.

The Supreme Court has never held that the Confrontation Clause is violated if a certification of public records summarizes the available record or attests to the absence of a record. In fact, there are precious few Supreme Court decisions on public records and the Confrontation Clause. See Palmer v. Hoffman, 318 U.S. 109, 114, 63 S. Ct. 477, 87 L. Ed. 645 (1943) (accident report prepared by a railroad employee after accident not a business record because it was “calculated for use essentially in the court, not in the business”); Dowdell v. United States, 221 U.S. 325, 31 S. Ct. 590, 55 L. Ed. 753 (1911) (certification of court clerk and judge as to events of previous trial were admissible). Most development in this area of the law occurred in the various state supreme courts and in state statutes. Wigmore, supra, § 1678 at 865-67 n.2.

For many years, the Supreme Court followed a rule of admissibility for public records that was similar to the rule applied by this Court. Under that rule, as noted in Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980):

The Court has applied [an] indicia of reliability requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection. This reflects the truism that hearsay rules and the Confrontation Clause are generally designed to protect similar values, . . . and stem from the same roots. . . . It also responds to the need for certainty in the workaday world of conducting criminal trials.

448 U.S. at 66 (internal quotation marks and citations omitted). Among the hearsay exceptions listed as admissible under the Confrontation Clause were dying declarations, prior testimony, and business and public records. Id. at 66 n.8. As for public records, the Supreme Court quoted a law review article that said, "Properly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions." Id. Washington law unquestionably comports with this traditional analysis.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), appeared to usher in a new "testimonial" analysis. However, because the Court left for another day a full definition of this new analysis, it has not been clear whether a majority of the Court

is of the same mind on how the analysis should be conducted, and a great deal of uncertainty has reigned. Defendants have argued that many previously accepted forms of evidence were prohibited absent testimony from the declarant. For instance, defendants argued that all 911 tapes were now inadmissible absent a testifying declarant; the Supreme Court disagreed. Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Defendants argued that statements made by a shooting victim to police officers were inadmissible under the new analysis; the Supreme Court rejected that argument, too. Michigan v. Bryant, 131 S. Ct. at 1152-58. In fact, the Court in Bryant specifically noted that the Michigan Supreme Court had too broadly applied the holding in Davis.⁸

Now, the question is whether language in Melendez-Diaz requires a change in Washington's public records law. The State respectfully submits that it does not.

Melendez-Diaz rejected the admissibility of a laboratory report concerning an analysis of seized drugs. The laboratory analysis was conducted after the defendant was charged. A report submitted in evidence detailed the results of that post-charging analysis. The Supreme

⁸ "[T]he [Michigan] court construed Davis to have decided more than it did and thus employed an unduly narrow understanding of 'ongoing emergency' that Davis does not require. Michigan v. Bryant, 131 S. Ct. 1158.

Court rejected the claim that the report was a simple business record it contrasted true business records with this situation by saying, “a clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but [a clerk] could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant.” Melendez-Diaz, 1129 S. Ct. at 2539.

The facts in Melendez-Diaz are fundamentally and materially different from the facts presented in these consolidated cases.⁹ In these cases, a state agency created a certification about *preexisting* records. All events and information referred to in the certification dealt with events that pre-dated the defendant's charge. The agency did not create a record about an event — testing — that post-dated the defendant's charging, as was done in Melendez-Diaz.

Put another way, everything attested to in the certification about Jasper's driving record could be verified by simply checking the public records that existed before Jasper was charged. The records were created for reasons independent of the criminal prosecution. RCW 46.52.130. Public records were traditionally exempted from Confrontation Clause analysis because the ease of verification made fabrication unlikely; the

⁹ Appendix A (summary of certifications and records in three cases).

certification and the records were trustworthy. Wigmore, supra, § 1678 at 865. The same ease of verification exists in Washington; the defendant may obtain a copy of his own driving record. RCW 46.52.130(2)(a).

In contrast, the abilities or motivations of a drug analyst conducting a test and producing a report post-charging are not as easily verified. Thus, a certificate as to preexisting records is fundamentally different from a certificate concerning a process that occurred post-charging. It simply does not follow from Melendez-Diaz that a certification about a preexisting record cannot be admitted into evidence.

Moreover, it is quite possible that a majority of Supreme Court justices will hold that a records custodian is not a "witness against" the accused for Confrontation Clause purposes. Several justices expressed this view in a dissenting opinion filed in Melendez-Diaz. Melendez-Diaz, at 2250-51 (Kennedy, J. dissenting).¹⁰ Justices Stevens and Souter, who were in the Melendez-Diaz majority, have retired. Thus, it is possible that

¹⁰ "The Court's fundamental mistake is to read the Confrontation Clause as referring to a kind of out-of-court statement—namely, a testimonial statement—that must be excluded from evidence. The Clause does not refer to kinds of statements. Nor does the Clause contain the word "testimonial." The text, instead, refers to kinds of persons, namely, to "witnesses against" the defendant. Laboratory analysts are not "witnesses against" the defendant as those words would have been understood at the framing. There is simply no authority for this proposition. . . . Instead, the Clause refers to a conventional "witness"—meaning one who witnesses (that is, perceives) an event that gives him or her personal knowledge of some aspect of the defendant's guilt. Both Crawford and Davis concerned just this kind of ordinary witness—and nothing in the Confrontation Clause's text, history, or precedent justifies the Court's decision to expand those cases."

the Court will recognize that the term "witnesses against" the accused, as used in the Confrontation Clause, was meant to refer to witnesses in the more traditional sense, and does not include custodians of records who merely report on the contents of their database, a set of information that is readily available for public inspection. This Court has previously made similar observations. See State v. Kelly, 52 Wn.2d 676, 682, 328 P.2d 362 (1958); State v. Johnson, 194 Wash. 438, 448, 78 P.2d 561 (1938).

Other indications suggest that justices harbor reservations not simply about Melendez-Diaz but about the scope and wisdom of the entire Crawford doctrine. For instance, in oral argument in Michigan v. Bryant, Justice Breyer was openly skeptical about Crawford. He said:

Of course, what I'm looking for now because I'm -- is whether there's any sense to that. What is the constitutional rationale? *I joined Crawford, but I have to admit to you I've had many second thoughts when I've seen how far it has extended . . .*

See Michigan v. Bryant, No. 09-150 Official Transcript of Oral Argument, Oct. 5, 2010, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-150.pdf, p. 35, lines 14-19 (italics added). Later, Justice Breyer commented as follows:

. . . And I will admit that *I did not foresee the scope of Crawford*. So I'm really asking about that scope and, in particular, whether, looking to the past or to reason or to whatever you want, there is a good reason for keeping out the testimony of, say, a co-confederate, a co-conspirator,

where it was elicited, not with intent to introduce it into the courtroom, but it was elicited in the course of an ordinary investigation of a crime.

Id. at p. 54, lines 1-9 (italics added). These passages suggest that Justice Breyer has significant lingering doubts that Crawford correctly interpreted the Confrontation Clause.

Moreover, appellate courts are divided over how to interpret the Supreme Court's decision. In State v. Murphy, 991 A.2d 35, 2010 ME 28 (Me. 2010), cert. denied, 131 S. Ct. 515 (2010), the court considered a certification containing a detailed summary of licensing records. 991 A.2d at 36 n.2. The court held that the summary was admissible under Maine law. Id. at 37-40. The court also concluded that language in Melendez-Diaz regarding missing records was dicta, and need not be followed. Id. at 40-44.¹¹ See also State v. Gilman, 993 A.2d 14, 24, 1010 ME 35 (2010) (following Murphy); Commonwealth v. Martinez-Guzman, 76 Mass.App.Ct. 167, 920 N.E.2d 322, 325 n.3 (2010) (licensing records properly admitted; rejects Melendez-Diaz argument); State v. Tryon, ___ P.3d ___, 2011 WL 1262267 (Or.App., 2011) (return of service admissible to show service of a restraining order); Commonwealth v. Shangkuan, 78 Mass.App.Ct. 827, 943 N.E.2d 466 (2011) (return of service admissible).

¹¹ Supreme Court dicta on constitutional matters is particularly problematic for lower courts. See Pierre N. Leval, Judging Under The Constitution: Dicta About Dicta, 81 N.Y.U.L.Rev. 1249 (2006). The dicta in Melendez-Diaz is an apt illustration.

At the same time, two federal circuit courts that formerly admitted certificates of no record (CNRs) under Crawford, have decided that CNRs should not be admitted after Melendez-Diaz. United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010); United States v. Orozco-Acosta, 607 F.3d 1156 (9th Cir. 2010).

Given the depth of uncertainty over the scope of Crawford, the State respectfully urges this Court to await a clear decision from the Supreme Court before abandoning its long-standing and well-reasoned precedents. Melendez-Diaz, at 2250-51. A records custodian who simply certifies the contents of the existing record should not be considered a "witness against" the accused.

For these reasons, the State respectfully asks this Court to adhere to its existing precedent, reject Jasper's argument that the records in this case were testimonial, and reverse the decision of the Court of Appeals.¹²

2. THERE WAS NO REVERSIBLE ERROR IN ANSWERING JURY INQUIRIES.

For the most part, the State relies on the briefing below and the decision of the Court of Appeals as to whether or not responding to a legal

¹² The State has not abandoned its original arguments that any error was harmless. Br. of Resp. at 23-25. Jasper admitted to police and to the jury that his license was suspended. And, the documents attached to the certification showed the reason for his suspension.

inquiry from the jury constitutes a critical stage of the proceedings that a defendant has an absolute right to attend. There is no federal or state constitutional basis to conclude that a jury inquiry presents a critical stage. However, the State offers some additional observations on the flawed factual basis for the Court of Appeals decision, in light of the unwarranted assumptions the Court of Appeals made about the trial court record.

Jasper claimed that the trial court answered a jury inquiry outside his presence and without seeking his input, violating CrR 6.15(f). The Court of Appeals said that "we *assume* the facts as urged by Jasper in resolving this issue." Jasper, 158 Wn. App. at 540 (italics added). The Court of Appeals was mistaken to assume facts not supported by the record, and to find error.

The defendant bears the burden of establishing the facts necessary to prevail on his legal claim. To the extent the record is incomplete, his claim must fail.

On a partial or incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.

Barker v. Weeks, 182 Wash. 384, 47 P.2d 1 (1935) (quoting 4 C.J. 736).

See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a

defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.”).

In this case, Jasper claimed that the trial court violated his rights by, *inter alia*, answering a jury inquiry without first checking with him or his lawyer as to the substance of the response. The only "evidence" he cites to support his claim is the fact that eight minutes elapsed between receipt of the question and the court's response to the jury. Br. of App. at 21-22.

The bald reference to the time period does not prove that Jasper and his lawyer were not contacted. It was clear that the judge pressed the lawyers *twice* to provide their telephone contact information, 5RP 28, 33, it is thus reasonable to conclude that the lawyers followed the judge's directive, and that the judge attempted to reach them when the jury inquired. It would be strange, indeed, if the judge would insist on contact numbers for the lawyers and then not avail herself of those numbers when contact was needed. These facts alone show the appellate court's assumption was unwarranted.

In addition, the written response itself clearly shows that the judge contacted the parties before responding. CP 50, 52 (response made "after

affording all counsel/parties opportunity to be heard"). The written response was signed by the judge. The Honorable Deborah Fleck is an experienced superior court judge. One can reasonably conclude that Judge Fleck knew that by signing the jury response form she was attesting to that which comes above her signature. The judge is also entitled to expect that others will interpret her signature in this manner. In fact, it is difficult to imagine the purpose of the signature line except as an attestation of what is printed and written on the page. Thus, it was error for the Court of Appeals to assume – especially when the burden was on the defendant to establish a factual basis for his claim – that Judge Fleck failed to do what the written response said she did.

Moreover, Jasper never objected at trial to the method or manner of answering the jury inquiries, so there is no more detailed record as to what transpired. RAP 2.5(a) permits this court to refuse consideration of a claim bereft of facts, as this one is. If Jasper has a factual basis to support his claim, he can bring the claim in a personal restraint petition supported by an affidavit from this trial lawyer saying that he was never contacted by the trial court regarding the jury's question. McFarland, 127 Wn.2d at 335.

For these reasons, and for the reasons argued in the State's brief in the Court of Appeals, Jasper's claim that he is entitled to a new trial because of the way the jury inquiry was handled should be rejected.

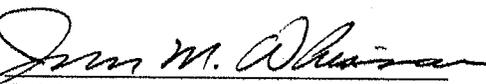
D. CONCLUSION

The State respectfully requests that this Court reverse the decision of the Court of Appeals on the Confrontation Clause issue, affirm the Court of Appeals on the jury inquiry issue, and affirm Jasper's convictions.

DATED this 11th day of April, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

Summary of Certifications and Records in Consolidated Cases

	Contents of Certificate	Documents Admitted
<p><u>Jasper</u></p>	<p><u>General Information:</u></p> <p>Name, birth date, physical description, address, date license issued, date license expired</p> <p><u>Summary of records:</u></p> <p>"After a diligent search, our official record indicates that the status on February 14, 2005 was: Personal Driver License Status: Suspended in the third degree"</p> <p><u>Attestation of custodian + official seal:</u> "Having been appointed by the Director of the Department of Licensing as a legal custodian of driving records of the State of Washington I certify under penalty of perjury that such records are official, and are maintained within the Department of Licensing" CP</p>	<p>Letter: Notice of Suspension, dated 6/28/07</p>
<p><u>Cienfuegos</u></p>	<p><u>General Information:</u></p> <p>Name, birth date, physical description, address, date license issued, date license expired</p> <p><u>Summary of records:</u></p> <p>"After a diligent search of the computer files, the official record indicates on April 15, 2005, the following statements apply to the status of the above named person:</p> <p>Had not reinstated his/her driving privilege. Was suspended /revoked in the first degree. Subject was not eligible to reinstate his/her driving privilege on the above date of arrest.</p> <p>Had not been issued a valid Washington license.</p> <p>A notation has been placed on the driving record under RCW 46.20.720 stating that the person may operate only a motor vehicle equipped with an ignition interlock or other biological or technical device from 10/20/2002 to 10/20/2005."</p>	<p>- Order of revocation hearing request and return receipt, dated March 30, 2003 CP 459</p> <p>- Abstract of Driving Record (ADR) CP 461-62</p>
<p><u>MoiMoi</u></p>	<p><u>Attestation of custodian + official seal (same as in Jasper) CP 460</u></p> <p>"I, Pamela R. Bergman, certify that I am the Clerical Supervisor, for the Contractor Registration Section, Specialty Compliance Services Division, a division of Department of Labor and Industries for the State of Washington. I state it is my lawful duty to see that records of registration are kept for contractors within the State of Washington. I certify that I am Custodian of the records of registration for contractors within the State of Washington.</p> <p>I further certify that we have searched our records from January, 1980, to the present and are unable to locate a previous or current registration for Laki Moi Moi under that specific name located at 10118 Des Moines Memorial Drive, Seattle, WA 98168 doing business as L&L Concrete, Seattle Concrete and Landscape as being registered with this section as a specialty or general contractor."</p>	

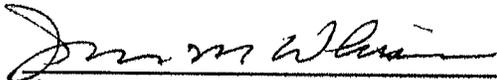
/s/ and sworn June, 22, 1999 + official seal (Ex. #1)

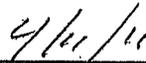
Certificate of Service by E-Mail

Today I sent an electronic mail message to all counsel in the cases consolidated in STATE V. DOUGLAS JASPER, Cause No. 85227-8 in the Supreme Court, for the State of Washington, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT. Service was provided to the following counsel:

- Nancy Collins, counsel for the Mr. Jasper (nancy@washapp.org)
- Eric Broman, counsel for Mr. Cienfuegos (bromane@nwattorney.net)
- Kristin V. Murray, counsel for Mr. MoiMoi (murrayk@defender.org)
- Christine Jackson, counsel for Mr. MoiMoi (jacksonc@defender.org)

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name James M. Whisman
Done in Washington


Date 4/11/11