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THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

JULIO CESAR ALDANA GRACIANO, RESPONDENT

FILED
OCT 24 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Court of Appeals Cause No. 09-1-01836-9
Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann Van Doornick

No. 40289-1-II

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

Table of Contents

A. IDENTITY OF RESPONDENT 1

B. RELIEF REQUESTED 1

C. COURT OF APPEALS DECISION 1

D. ISSUES PRESENTED FOR REVIEW BY PETITIONER 1

1. Should the Court deny review where the Court of Appeals' holding that admission of a certified copy of defendant's Washington driver's license did not violate the confrontation clause is consistent with the holdings in ***State v. Mares***, 160 Wn. App. 558, 564, 248 P.3d 140 (2011), ***Melendez-Diaz v. Massachusetts***, 577 U.S. ___, 129 S. Ct. 2527, 2539-40, 174 L. Ed. 2d 314 (2009); and ***Crawford v. Washington***, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 117 (2004)? 1

2. Should this Court deny review where the Court of Appeals' holding that sufficient evidence was presented at trial for the jury to find that defendant and the victim were not married where it is consistent with long standing Washington case law in ***State v. May***, 59 Wash. 414, 109 P. 1026 (1910); ***State v. Shuck***, 34 Wn. App. 456, 458, 661 P.2d 1020 (1983); and ***State v. Bailey***, 52 Wn. App. 42, 50-1, 757 P.2d 541 (1988). 2

3. Should this Court accept review of this case where the Court of Appeals' decision to review the trial court's determination of same criminal conduct *de novo* conflicts with ***State v. French***, 157 Wn.2d 593, 613, 141 P.3d 54 (2006); and ***State v. Tili***, 139 Wn.2d 107, 122, 985 P.2d 365 (1999) which held the applicable standard of review is for abuse of discretion? 2

E. STATEMENT OF THE CASE 2

1. Procedure 2

2. Facts 4

F. ARGUMENT 8

1. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' HOLDING THAT A CERTIFIED COPY OF A STATE ISSUED DRIVER'S LICENSE IS NOT TESTIMONIAL 9

2. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' HOLDING THAT AN ESSENTIAL ELEMENT OF A CRIME MAY BE PROVED BY CIRCUMSTANTIAL EVIDENCE 11

3. THE COURT OF APPEALS' HOLDING THAT THE APPROPRIATE STANDARD OF REVIEW WAS *DE NOVO* CONFLICTS WITH THE CASE LAW OF THIS COURT AND OF THE COURT OF APPEALS 12

G. CONCLUSION 14-15

Table of Authorities

State Cases

State v. Bailey, 52 Wn. App. 42, 50-1, 757 P.2d 541 (1988) 2, 11, 12

State v. Collicott, 112 Wn.2d 399, 771 P.2d 1137 (1989) 13

State v. Davidson, 56 Wn. App. 554, 558, 784 P.2d 1268, *review denied*, 114 Wn.2d 1017 (1990) 12, 14

State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied* 498 U.S. 838, 111 S. Ct. 110, 112 L.Ed.2d. 80 (1990) 13

State v. French, 157 Wn.2d 593, 613, 141 P.3d 54 (2006) 2, 12, 13

State v. Gosby, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975) 12

State v. Julio Cesar Aldana Graciano, No. 40289-1-II (August 23, 2011) 1, 3, 4, 10, 11, 13

State v. Lubers State v. Lubers, 81 Wn. App 614, 915 P.2d 1157 (1996) 12

State v. Mares 160 Wn. App 558, 564, 248 P.3d 140 (2011) 1, 10

State v. May, 59 Wash. 414, 109 P. 1026 (1910) 2, 11, 12

State v. Nitche, 100 Wn. App. 512, 521, 997 P.2d 1000 (2000) 14

State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) 13

State v. Rhoads, 101 Wn.2d 529, 532, 681 P.2d 841 (1984) 11, 12

State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) 14

State v. Shuck, 34 Wn. App. 456, 458, 661 P.2d 1020 (1983) 2, 11, 12

State v. Soper, 135 Wn. App. 89, 104, 143 P.3d 335 (2006) 14

State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999) 2, 12, 13

State v. Torngren, 147 Wn. App 556, 562, 196 P.3d 742 (2008) 13

State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993) 14

Federal and Other Jurisdictions

Crawford v. Washington, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 117 (2004) 1, 9

Melendez-Diaz v. Massachusetts, 577 U.S. ___, 129 S. Ct. 2527, 2539-40, 174 L. Ed. 2d 314 (2009) 1, 9, 10

Rules and Regulations

RAP 13.4(b) 8, 11

RAP 13.4(b)(1)(2) 14

RAP 13.4(b)(1)-(4) 9

A. IDENTITY OF RESPONDENT.

The respondent is the State of Washington.

B. RELIEF REQUESTED

The State respectfully requests that this Court deny review of the issues presented by the petitioner, and grant review of the issue presented by the State.

C. COURT OF APPEALS DECISION.

Petitioner and State seek review of the unpublished Court of Appeals decision in ***State v. Julio Cesar Aldana Graciano***, No. 40289-1-II (August 23, 2011).

D. ISSUES PRESENTED FOR REVIEW BY PETITIONER.

1. Should the Court deny review where the Court of Appeals' holding that admission of a certified copy of defendant's Washington driver's license did not violate the confrontation clause is consistent with the holdings in ***State v. Mares***, 160 Wn. App. 558, 564, 248 P.3d 140 (2011), ***Melendez-Diaz v. Massachusetts***, 577 U.S. ___, 129 S. Ct. 2527, 2539-40, 174 L. Ed. 2d 314 (2009); and ***Crawford v. Washington***, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 117 (2004)?

2. Should this Court deny review where the Court of Appeals' holding that sufficient evidence was presented at trial for the jury to find that defendant and the victim were not married where it is consistent with long standing Washington case law in ***State v. May***, 59 Wash. 414, 109 P. 1026 (1910); ***State v. Shuck***, 34 Wn. App. 456, 458, 661 P.2d 1020 (1983); and ***State v. Bailey***, 52 Wn. App. 42, 50-1, 757 P.2d 541 (1988).

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E. STATEMENT OF THE CASE.

1. Procedure

On April 6, 2009, the State filed an information with the Pierce County Superior court charging defendant, Julio Cesar Aldana Graciano with four counts of rape of a child in the first degree, and two counts of child molestation in the first degree involving E.R.[1] CP 1-4. In the same information defendant was also charged with one count of child

[1] Because B.R., E.R. and J.R. are minors, the State will use their initials rather than their full names.

molestation involving J.R. *Id.* The State later filed an amended information changing the charging period of each count to be between June 1, 2007, and March 30, 2009. CP 62-65.

Trial began before the Honorable Kitty-Ann van Doorninck on November 24, 2009. The jury found defendant guilty on all four counts of rape of a child in the first degree involving E.R., and both counts of child molestation in the first degree involving E.R. CP 93-98. The jury found defendant not-guilty of child molestation in the first degree involving J.R. CP 99.

At the sentencing hearing held on January 22, 2010, the trial court ruled that each of the counts had been shown to be separate and distinct, and calculated defendant's offender score as fifteen accordingly. RP-sentencing 6. Defendant was sentenced to 318 months to life for each count of rape of a child, and 198 months to life for each count of child molestation. CP 115-131. Each of these sentences was within the standard range. RP- sentencing 6-7.

Defendant timely appealed. CP 132. The Court of Appeals held that sufficient evidence had been presented to support defendant's convictions, and the admission of the certified copy of defendant's driver's license did not violate defendant's right to confrontation. ***Aldana Graciano***, No. 40289-1-II, Slip Op. at 5, 7. The Court of Appeals also

held after a *de novo* review of the trial court's determination that both of defendant's convictions for child molestation should be considered the same criminal conduct as the related child rape convictions. *Id.* at 10.

2. Facts

Sergio Robles and his wife, Martha Robles, lived with their three children, B.R., who was thirteen years old at the time of the trial, E.R., who was nine, and J.R., who was seven, in Tacoma, Washington. RP 176, 177. The house was two-stories tall, and had a living room on each floor, a kitchen and three bathrooms. RP 176. The house also had three bedrooms; one that Mr. Robles and Mrs. Robles shared, one that B.R. and J.R. shared, and one that E.R. slept in. RP 178.

In the summer of 2007, defendant, Mr. Robles's cousin, lived with the family for a few months before moving out for approximately eight months. RP 181, 281-82. While living with the family, he stayed in the upstairs living room. RP 282.

In November of 2008, defendant moved back into the house with the Robles family. RP 181. Defendant was only going to stay with the family for a couple of days, but ended up staying until March of 2009. RP 181-2, 282-3. When defendant did not leave the house after a couple of days in November of 2008, E.R. began to persistently ask her mother when he was leaving. RP 212. E.R. wanted her "uncle" out of the house,

and told her mother so. *Id.* However, E.R. did not tell her mother why she wanted to know when defendant would leave. *Id.*

One Saturday in March of 2009, E.R. told her mother that she wanted defendant to move out. *Id.* When Mrs. Robles asked E.R. why, she kept insisting that defendant move out E.R. said, "Because I don't want him here. He's scary. He's evil, and I just want him to move out and I hope he goes and he dies." RP 188. Mrs. Robles asked why E.R. would say something like that, and E.R. told Mrs. Robles that she didn't want to tell. *Id.* Finally, E.R. told her mother, "He did things, bad things, to me." RP 190. E.R. elaborated that defendant had touched her "privates." *Id.* Mrs. Robles testified that E.R. appeared to be afraid to say anything else. RP 191-2.

Mrs. Robles talked to Mr. Robles about what E.R. had told her. RP 289. That night Mr. Robles confronted defendant and asked him to leave, and defendant left right away. RP 291. On the following Monday, after defendant had left and E.R. had calmed down, she told her mother that defendant had put his fingers inside of her and "put things inside of her" while the two of them were in the downstairs living room. RP 193-4. When Mrs. Robles asked E.R. where defendant had put things, she said, "In my butt." RP 194. E.R. indicated that defendant had anal intercourse

with her. *Id.* E.R. also told her mother that this was not the first time he had touched her. RP 195-6.

Mrs. Robles called the police, who referred her to the Child Advocacy Center. RP 198. Cornelia Thomas, a social worker at the Child Advocacy Center in Pierce County and a child forensic interviewer, conducted an interview with E.R. RP 349. A DVD was made of this interview, and was shown to the jury, with some omissions, during trial. RP 350-1; Exhibit 6.

At trial E.R. testified that she was nine years old and in the fourth grade. She also testified that her "Uncle Julio" had come to live in the house during her summer vacation after second grade and stayed for a couple of months. RP 226, 228. She identified defendant as Uncle Julio. RP 227. While defendant lived with the family he stayed in the living room "on top with the TV." *Id.* Defendant moved out after a couple months, and then moved back in again. RP 228.

E.R. remembered that during the first time defendant lived in the house, the two of them had gone downstairs while her father and brothers were upstairs and her mother was at work. RP 229. While they were between the living room and the kitchen downstairs, defendant pulled down her pants, and then pulled down his own pants. Defendant was behind E.R. and he took "his penis out." RP 231. E.R. heard the zipper

on defendant's jeans, and felt defendant's penis inside her anus, and then felt something wet. RP 231- 33. Then she heard her father's footsteps coming down the stairs, and ran into the bathroom. RP 233-4. E.R. cleaned herself off with toilet paper and saw that she was bleeding from her anus. RP 234. She put her pants back on and left the bathroom. RP 235. Her father told her to go upstairs, so she did. RP 235.

E.R. testified that defendant had also touched her in the upstairs living room on the couch while there was a blanket on top of them. On that occasion, defendant "grabbed [her] hand" and "put [her] hand on his penis, with his pants on." RP 236. Defendant squeezed her hand hard, and then removed his penis from his pants and underwear. RP 236. "[T]hen he grabbed [E.R.'s] hand and he started squeezing it again." RP 236-7. E.R. said she knew she was feeling the skin on defendant's penis because "it was all wet and it was kind of hairy." RP 237. E.R. testified that defendant had touched her on the couch "more than just a couple times." RP 258-9. On at least one occasion while sitting on the couch, defendant touched E.R.'s anus, causing it to hurt when she went to the bathroom for a couple of days. RP 321-2.

E.R. recalled that defendant also touched her in her bedroom. E.R. testified that he pulled her pants and underwear down, and he touched her "with his hands and his penis" and a "couple of [her] toys and [her]

mirror." *Id.* With the toys defendant touched her "on the front part." E.R. testified that defendant "put it in my butt" and went on to describe anal penetration with the objects; telling the jury that defendant put these things inside her body "in the back." RP 237-8. E.R. also described defendant penetrating her anus with his penis in her bedroom. *Id.*

On another occasion, defendant and E.R. were in the kitchen, and E.R.'s pants were down. RP 239. Everyone else was upstairs in the house at the time. *Id.* Defendant took a fork and touched E.R. with it. E.R. explained that defendant "put it on [her] butt and [her] front part." *Id.* E.R. indicated that defendant penetrated her anus with the fork causing her to bleed. RP 250-1.

At the close of the State's case, the prosecutor moved for the admission of a certified copy of defendant's State issued identification card under ER 902. RP 342. The court admitted the document over defendant's Confrontation Clause objection, finding that the document was not testimonial. RP 358-9, 361.

F. ARGUMENT.

RAP 13.4(b) sets out the criteria which a petition for review must meet for this Court to accept review. The decision of the Court of Appeals must conflict with a decision of this Court or with another decision of the Court of Appeals, or the petition must present a significant question of

Constitutional law, or an issue of substantial public interest. RAP 13.4(b)(1)-(4).

1. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' HOLDING THAT A CERTIFIED COPY OF A STATE ISSUED DRIVER'S LICENSE IS NOT TESTIMONIAL.

The United States Supreme Court has ruled that a laboratory technician's certification of test results is testimonial. ***Melendez-Diaz v. Massachusetts***, 577 U.S. ____, 129 S. Ct. 2527, 2537-40, 174 L.Ed.2d 314 (2009). Whether a certified copy of a public document is testimonial is not a significant question of law under the constitution of Washington or the United States. ***Melendez-Diaz*** does not alter the question of whether a certified copy of a non-testimonial document is testimonial. 129 S. Ct. at 2539. By their nature, most business and public records are not testimonial and therefore do not raise Confrontation Clause concerns:

> Business and public records are generally admissible absent confrontation... 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.

Melendez-Diaz, 129 S. Ct. at 2539-40; *see also* ***Crawford v. Washington,*** 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 117 (2004) ("Most of the hearsay exceptions covered statements that by their nature were not testimonial--for example, business records or statements in furtherance of a conspiracy").

The court in ***Melendez-Diaz*** noted that,

> A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

Melendez-Diaz, 129 S. Ct. at 2539 (italics in original). In the case at hand, the clerk was not *creating* a record, but was *authenticating* a copy of a pre-existing public record, namely a copy of a State issued identification card. This identification card was not issued by the State in order to prove any element of any crime; it was issued as an official documentation of identity for general purposes. Thus the holding in this case does not present a significant question of constitutional law as it is consistent with the holdings of this Court, the Court of Appeals, and the United States Supreme Court.

The holding in this case is consistent with, and indeed adopts the reasoning of, the Court of Appeals' decision in ***State v. Mares*** 160 Wn. App 558, 564, 248 P.3d 140 (2011); ***Aldana Graciano***, No. 40289-1-II, Slip Op. at 6. There, with an identical issue, the Court of Appeals held that the custodian's certification of a public document did nothing more than authenticate the record, and was therefore not testimonial. *Id.*

The Court of Appeals' holding that the mere authentication of a public record by certification does not turn a non-testimonial document into a testimonial one is consistent with the holdings of this Court and the Court of Appeals, and does not present a significant question of

constitutional law. This Court should not grant review of this issue as it does not meet any of the criteria set out in RAP 13.4(b).

2. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' HOLDING THAT AN ESSENTIAL ELEMENT OF A CRIME MAY BE PROVED BY CIRCUMSTANTIAL EVIDENCE.

The Court of Appeals held that adequate circumstantial evidence that defendant was not married to E.R. was presented to support the jury's verdict. ***Aldana Graciano***, No. 40289-1-II, Slip Op. at 4-5. There is no significant question of law under the Constitutions of either Washington or the United States where this issue has been well settled by this Court. The holding of the Court of Appeals in this case is consistent with the holdings of this Court and of the Court of Appeals. This Court should deny review of this issue because it does not meet any of the criteria of RAP 13.4(b).

This Court and the Court of Appeals have repeatedly held that the non-marriage of a defendant and the victim may be proved by circumstantial evidence where non-marriage is an essential element of the crime. *See* ***State v. May***, 59 Wash. 414, 415, 109 P. 1026 (1910); ***State v. Rhoads***, 101 Wn.2d 529, 532, 681 P.2d 841 (1984); ***State v. Shuck***, 34 Wn. App. 456, 458, 661 P.2d 1020 (1983). "A conviction may be based wholly on circumstantial evidence even if the evidence is not inconsistent with the hypothesis of innocence." ***State v. Bailey***, 52 Wn. App. 42, 51, 757 P.2d 541 (1988) *citing* ***State v. Gosby***, 85 Wn.2d 758, 766-67, 539

P.2d 680 (1975). *See also* ***State v. Lubers***, 81 Wn. App 614, 619, 915 P.2d 1157 (1996)(holding that circumstantial evidence is no less reliable than direct evidence. The Court of Appeals' holding that defendant's non-marriage to E.R. in this case may be proved through circumstantial evidence is neither inconsistent with the holdings of this Court or of the Court of Appeals, nor does it raise a question of law under the Constitutions of Washington or of the United States. ***May***, 59 Wash. at 415; ***Rhoads***, 101 Wn.2d at 532; ***Shuck***, 34 Wn. App. at 458; ***Bailey***, 52 Wn. App. at 51.

3. THE COURT OF APPEALS' HOLDING THAT THE APPROPRIATE STANDARD OF REVIEW WAS *DE NOVO* CONFLICTS WITH THE CASE LAW OF THIS COURT AND OF THE COURT OF APPEALS.

Long standing case law of this Court holds that a trial court's determination of whether or not a defendant's crimes constituted the same criminal conduct for the purposes of calculating his offender score is to be reviewed under the abuse of discretion standard. *See* ***State v. French***, 157 Wn.2d 593, 613, 141 P.3d 54 (2006); ***State v. Tili***, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); ***State v. Davidson***, 56 Wn. App. 554, 558, 784 P.2d 1268, *review denied*, 114 Wn.2d 1017 (1990). The Court of Appeals recognized the conflicting authority, but nevertheless reviewed the trial

court's determination that defendant's crimes did not constitute same criminal conduct *de novo*. ***Aldana Graciano***, No. 40289-1-II, Slip Op. at 8, n 3.

In determining that the standard of review was *de novo* the Court of Appeals relied on ***State v. Torngren***, 147 Wn. App 556, 562, 196 P.3d 742 (2008). In ***Torngren***, the Court of Appeals held that it "was in as good a position as the sentencing court to apply these objective standards to uncontroverted facts," and found that a *de novo* standard of review was applicable to questions of same criminal conduct. *Id.* at 562-63. In relying on ***Torngren***, the Court of Appeals' holding conflicts with the long history of cases from this Court's holding that the sentencing court's determination will be reversed only for an abuse of discretion. *See* ***French***, 157 Wn.2d at 613; ***Tili***, 139 Wn.2d at 122; ***State v. Porter***, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); ***State v. Elliott***, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied* 498 U.S. 838, 111 S. Ct. 110, 112 L.Ed.2d. 80 (1990); ***State v. Collicott***, 112 Wn.2d 399, 771 P.2d 1137 (1989). The Court of Appeals has also repeatedly held that the proper standard of review for determinations of same criminal conduct is for abuse of

discretion. *See* ***State v. Davidson***, 56 Wn. App. 554, 558, 784 P.2d 1268, *review denied*, 114 Wn.2d 1017 (1990); ***State v. Walden***, 69 Wn. App. 183, 188, 847 P.2d 956 (1993); ***State v. Roche***, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); ***State v. Nitche***, 100 Wn. App. 512, 521, 997 P.2d 1000 (2000); ***State v. Soper***, 135 Wn. App. 89, 104, 143 P.3d 335 (2006). By holding that the standard of review for the sentencing court's determination of same criminal conduct is *de novo*, the Court of Appeals' decision is in conflict with the holdings of this Court and with other decisions of the Court of Appeals.

This Court should accept review of this case under RAP 13.4(b)(1)(2) because it is in conflict with the holdings of cases in this Court and of the Court of Appeals.

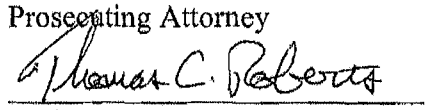
G. CONCLUSION.

For the reasons stated above, the State respectfully requests that the review be denied on the issues of whether a certified copy of a public record is testimonial and whether an essential element of a crime may be

proved by circumstantial evidence. The State requests that review be granted on the issue of what standard of review is applied to a sentencing court's determination on same criminal conduct.

DATED: October 24, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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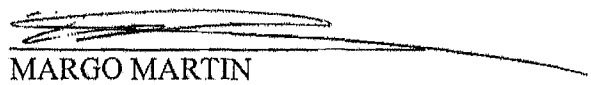

MARGO MARTIN
Rule 9 Intern

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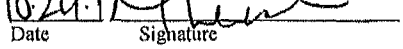
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



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Please see attached the State's Answer to Petition for Review in the below stated matter:

St. v. Graciano
No. 86530-2
Submitted by: T. Roberts
WSB # 17442

Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to T. Roberts