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NO. 64327-4-I

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

LAKI MOIMOI,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF PETITIONER

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I. INTRODUCTION

The Superior Court's ruling that a certification from the Department of Labor and Industries attesting to the absence of a public/business record is admissible under *State v. Kirkpatrick*, 160 Wash.2d 873, 161 P.3d 990 (2007), directly conflicts with the United States Supreme Court's ruling in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 174 L.Ed.2d 314(2009). In this case, Mr. Moimoi was convicted of one count of unregistered contracting in violation of RCW 18.27.010 and 18.27.020. In order to prove that Mr. Moimoi was not a registered contractor at the time of the alleged violation, the State presented State's Exhibit No. 1 – a letter from the Department of Labor and Industries attesting that Mr. Moimoi was not registered as a contractor. The individual who authored the certification did not testify at trial.

The Superior Court found the holding in *State v. Kirkpatrick* to control in this case and distinguished *Melendez-Diaz*. However, *Melendez-Diaz* is dispositive and makes clear the admission of the record violated Mr. Moimoi's right to confrontation because it was testimonial. Without this inadmissible evidence, insufficient evidence exists to support the conviction. Therefore, it is respectfully requested that this court reverse Mr. Moimoi's conviction and dismiss with prejudice.

II. ASSIGNMENT OF ERROR

The admission of State's Exhibit No. 1 violated Mr. Moimoi's constitutional right to confront adverse witnesses as articulated in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

III. ISSUE PRESENTED

Is the Superior Court's decision affirming the admissibility of a certification by the Department of Labor and Industries sworn before a notary public attesting to the absence of any record that Mr. Moimoi was a registered contractor under *State v. Kirkpatrick*, 160 Wn.2d 873, 161 P.3d 990 (2007), in direct conflict with the United States Supreme Court decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)?

IV. STATEMENT OF THE CASE

Mr. Moimoi was charged in King County District Court No. Y0-SD0013 with unregistered contracting in violation of RCW 18.27.010 and

RCW 18.27.020 for a continuous course of conduct alleged to have occurred between April 24, 1999 and April 29, 1999.¹

During its case-in-chief, the prosecution called three witnesses. Matthew Jackson, a construction compliance inspector from the Department of Labor and Industries, was the first witness to testify. CP 45. Mr. Jackson testified that his duties included, *inter alia*, determining compliance under the contractor registration law. CP 45. A database of registered contractors maintained by the Department was used to determine whether or not someone was registered. CP 47-48; 50. According to Mr. Jackson, he received a complaint from Mr. and Mrs.

¹ Mr. Moimoi was prosecuted under the portion of RCW 18.27.020 making it a gross misdemeanor for individuals to “[a]dvertise, offer to do work, submit a bid, or perform any work as a contractor without being registered as required by this chapter[.]”

RCW 18.27.010(1) provides:

“Contractor” includes any person, firm, corporation, or other entity who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith, the installation or repair of roofing or siding, performing tree removal services, or cabinet or similar installation; or, who, to do similar work upon his or her own property, employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided in this chapter. “Contractor” also includes a consultant acting as a general contractor. “Contractor” also includes any person, firm, corporation, or other entity covered by this subsection, whether or not registered as required under this chapter or who are otherwise required to be registered or licensed by law, who offer to sell their property without occupying or using the structures, projects, developments, or improvements for more than one year from the date the structure, project, development, or improvement was substantially completed or abandoned.

Lamey over alleged contracting work. CP 48. The State was unable to elicit testimony as to whom the complaint referenced. CP 48-60. When the prosecution asked whether such a records search had been performed to determine Mr. Moimoi's status, the court sustained defense counsel's objection to the information as hearsay. When asked separately if the witness was able to determine whether Mr. Moimoi was a registered contractor, Mr. Jackson answered that he was able to. Defense counsel objected to any testimony regarding the contents of the database as Mr. Jackson failed to provide any independent evidence thereof.² CP 50-51. In considering the objection, the court inquired whether the database, as commonly relied upon, could constitute a business record. CP 51. Defense maintained its position, arguing that without presenting an actual record to the court and the jury, testimony about the contents of such record constituted inadmissible hearsay. *Id.* The court precluded an answer to the specific question but allowed the prosecutor to continue to try and lay a foundation for a record the government planned to offer into evidence. *Id.*

The prosecution proceeded to ask Mr. Jackson how he determined whether Mr. Moimoi was in fact a registered contractor. *Id.*

² Notably, while Mr. Jackson testified that he was able to determine Mr. Moimoi's status, he never testified as to what the database reflected that status to be.

State: Again, Mr. Jackson, how – how did you determine whether or not Mr. Moimoi was a registered contractor?

Jackson: *Well, any time that we issue a civil infraction or a complaint with the King County Prosecutor's Office we obtain a search of the records letter, which is a sealed letter from the supervisor of the keeper of the records of – of the contractor file section. That person will type the letter out, basically stating the individual person's registration status and seal the letter as a – a authenticated document that's person's status as a registered contractor.*

State: Mr. Jackson, I'm handing you what's been marked as State's Exhibit No. 1, do you recognize that?

Jackson: Yes, I do.

State: How do you recognize that?

Jackson: This is the letter that I just explained to you about. It's from Pamela Bergman (phonetic) and Pamela is the keeper of the – the supervisor of the records – the files for the contractors in Olympia.

State: And do you recognize the signature at the bottom of that page?

Jackson: Yes, it's Pamela Bergman's signature. And it's notarized by Bobby Jo Saya (phonetic).

State: And who's Bobby Jo Saya?

Jackson: She's a – a person that works in the contractor file section of Olympia.

CP 51-52 (emphasis added). The prosecution then asked Mr. Jackson to identify the letter marked as State's Exhibit No. 1. *Id.*; Appendix A. Mr.

Jackson identified the exhibit as the type of records letter just described and stated that it had been created by Pamela Bergman, the supervisor of the records files. CP 52. Mr. Jackson testified that the letter was a fair and accurate copy of the document he had requested from records regarding Mr. Moimoi's status. CP 53. The State then offered the exhibit into evidence. *Id.*

The defense objected to the exhibit on the grounds that it was not a business record kept as a routine part of business, but rather a particular record developed for the purposes of litigation. *Id.* The prosecution responded that the document was self-authenticating and generated pursuant to standard procedures. CP 53-54. The court overruled the defense objection, finding the letter was a business record, and admitted it into evidence. CP 54. The document was both published to the jury and, also over defense objection, read by Mr. Jackson in open court. CP 54-55. The letter stated that Ms. Bergman was unable to locate a contractor registration for Mr. Moimoi. CP 55.

Mr. Jackson testified that he spoke with Mr. Moimoi on the phone regarding the Lameys' complaint and that Mr. Moimoi denied performing the work complained about. CP 57. On cross-examination, Mr. Jackson testified that he never witnessed any work being done at the Lamey residence and that he did not see a contract for the work. CP 60.

The prosecution next called Dennis Lamey to the stand. CP 63. Mr. Lamey testified that on April 24, 1999, he lived at 116 Third Avenue Northwest in the City of Pacific in King County. *Id.* Mr. Lamey stated that on that date, he met with Mr. Moimoi at his home and identified Mr. Moimoi for the record. CP 64. According to Mr. Lamey, Mr. Moimoi offered to complete footings and a floor for Mr. Lamey's would-be garage for \$2,500.00. CP 64-65. Mr. Lamey testified that he provided Mr. Moimoi with a check for 1,800.00 as a down payment for the work. CP 66. The prosecution presented Mr. Lamey with State's Exhibit No. 2, which Mr. Lamey identified as a copy of the check given to Mr. Moimoi. *Id.* The court admitted the exhibit into evidence. CP 67. Looking at the check, Mr. Lamey identified what appeared to be Mr. Moimoi's driver's license number written at the top. *Id.* Mr. Lamey testified that he had looked at Mr. Moimoi's driver's license and written the number on the check as a verification as to who he had hired to perform the work. CP 67-68. Mr. Lamey also identified State's Exhibit No. 3 as a copy of the driver's license he saw at the time he wrote the check. CP 68-69. After the exhibit was admitted into evidence, Mr. Lamey read the matching numbers from the check and the copy of the license.³ CP 69. Mr. Lamey could not recall whether he received a receipt from Mr. Moimoi. CP 71.

³ There was a discrepancy with regards to one number/letter O, which Mr. Lamey

With regards to the work carried out, Mr. Lamey recalled that Mr. Moimoi began work digging the footings for the garage shortly after receiving the check. CP 72-73. He returned at different times with various workers but never completed the job. CP 73. Over defense objection, the court admitted into evidence photos taken by Ms. Lamey of the work completed by Mr. Moimoi. CP 77-83. According to Mr. Lamey, Mr. Moimoi ultimately asked for more money from him. He then called the Department of Labor and Industry to file a complaint. CP 74-75. On cross-examination, Mr. Lamey confirmed that no written bid or contract for the work existed. CP 83-84.

The prosecution's final witness was Judith Lamey. CP 85. Overall, Ms. Lamey's testimony was comparable to that of her husband. Ms. Lamey did, however, identify State's Exhibit No. 4 as a receipt provided to her husband by Mr. Moimoi. CP 86-87. Ms. Lamey identified one signature on the receipt as belonging to her husband. CP 87. The receipt reflected an anticipated total value of \$2,500.00 and a paid value of \$1,800.00. CP 89-90. Although Ms. Lamey testified that she did not see Mr. Moimoi perform any actual work, she did see him at the worksite. She confirmed that Mr. Moimoi had not been hired to perform

identified as a C. He latter explained that the symbol was not fully completed.

any tasks beyond the foundation for the garage. CP 86, 94-95. The State rested at the conclusion of Ms. Lamey's testimony.

Mr. Moimoi testified on his own behalf. CP 112. According to Mr. Moimoi, he was called to the Lameys' house in order to do landscaping work. CP 113. When he arrived, he agreed to perform such work for Mr. Lamey, including pulling weeds, cutting trees and bushes and digging holes. *Id.* Mr. Moimoi testified that at no time did he agree to or perform work on a foundation for a garage. CP 114-115. Instead, Mr. Moimoi was promised \$2,500.00 for landscaping, although a portion of that money was to be put towards materials he acquired on behalf of the Lameys. CP 115. Mr. Moimoi testified that he did not complete the work depicted in the photos offered by the State. *Id.*

On cross-examination, Mr. Moimoi testified that while he was registered with the City of Seattle, he did not know whether or not his business was registered with the Department of Labor and Industries. CP 116. Mr. Moimoi verified that his business was advertised. CP 116-117. He specified that the materials purchased for the Lameys included forms, rebar, wiring mesh and paneling. CP 117. According to Mr. Moimoi, Mr. Lamey asked him to lay the foundation for the garage but did not pay him for such work. CP 118. On redirect, Mr. Moimoi confirmed that he never made any type of agreement, performed any type of work or received any

money for the garage foundation. CP 119. He was not aware of which company did begin the foundation work. *Id.*

To establish Moimoi's contracting status, or lack thereof, the court admitted State's Exhibit No. 1 – a certification from the Department of Labor and Industries attesting that the Department's records did not include a contracting registration for him. The certification was authored by Pamela Bergman, the Clerical Supervisor for the Contractor Registration Section of the Department of Labor and Industries and addressed to the "King County Prosecutor" after the date of the alleged violation. Appendix B. In the document, Ms. Bergman – who did not testify at trial – declared that she was the Custodian of the records of registration for contractors within the State of Washington. She further certified that, after a diligent search of the Department's records, she was unable to locate a registration for Mr. Moimoi. The certification was subscribed and sworn before a notary public, Bobbie Jo Saya, on June 22, 1999.

At the conclusion of his jury trial, Mr. Moimoi was found guilty as charged. He appealed his conviction in King County Superior Court No. 08-1-07953-4 SEA and specifically challenged the admission of State's Exhibit No. 1. The Superior Court affirmed his conviction after finding that the trial court did not err in admitting State's Exhibit No. 1. "This

case, like *Kirkpatrick*, deals with records which are routinely maintained by a governmental agency, and is distinguishable from *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, which deals with results of a test which was performed specifically for that litigation. Mr. Moimoi filed a motion for discretionary review with this court. Review was granted on December 9, 2009.

V. ARGUMENT AND AUTHORITIES

State's Exhibit No. 1 was admitted in violation of Mr. Moimoi's constitutional right to confrontation under *Crawford v. Washington* and *Melendez-Diaz v. Massachusetts*

The admission of State's Exhibit No. 1 violated Mr. Moimoi's constitutional right to confront witnesses as laid out in *Crawford v. Washington* and *Melendez-Diaz v. Massachusetts*. As no other valid evidence exists establishing Mr. Moimoi's registration status, this court should reverse his conviction and dismiss with prejudice.⁴

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend VI.

⁴ Where a violation of the Confrontation Clause has “practical and identifiable consequences in the trial of the case,” it is a “manifest error affecting a constitutional right” and may be raised for the first time on appeal. See RAP 2.5(3); *State v. Kronich*, 160 Wn.2d 893, 900, 161 P.3d 982 (2007). Alleged violations of the Confrontation Clause are reviewed de novo. *Kronich*, 160 Wn.2d at 901(citing *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)).

The scope and nature of protection afforded by this right was examined by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), in which the Court held that out-of-court testimonial statements are inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the witness. In so holding, the Court overruled *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), under which such statements were admissible provided that they carry a sufficient indicia of reliability. The Court articulated how using reliability to dispense of the requirement of confrontation is to beg the question as the underlying purpose of the Confrontation Clause is to *ensure the reliability* of the out-of-court statement:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

* * * *

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it

is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability.

* * * *

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Crawford, 541 U.S. at 61-62 (citations omitted).

While the *Crawford* Court identified certain contexts in which statements were squarely “testimonial,” it left open the general question of the term’s reach:

Various formulations of this core class of “testimonial” statements exist: “*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,” These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it.

Id. at 51-52 (citations omitted). One way in which Washington courts have attempted to determine whether a statement is “testimonial” is to look at whether the statement was made in the context of involvement by government officials, including police officers and magistrates, versus friends or family. *State v. Shafer*, 156 Wn.2d 381, 389, 128 P.3d 87

(2006). Another factor is whether the declarant is describing an ongoing event versus a past criminal act. *State v. Ohlsen*, 162 Wn.2d 1, 168 P.3d 1273 (2007). Finally, courts look at whether the declarant would reasonably expect that the out-of-court statement would be used against the accused in the investigation and prosecution of the offense. *Shafer*, 156 Wn.2d at 390, fn. 8. While the *Crawford* Court acknowledged business records to be non-testimonial, the Court specifically warned that,

Involvement of government officers in the *production of testimony with an eye toward trial presents unique potential for prosecutorial abuse*-a fact borne out time and again throughout a history with which the Framers were keenly familiar. *This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.*

Crawford, at 56, fn. 7 (emphasis added). *Crawford* clearly held that the rules of evidence do not determine whether or not an out-of-court statement is admissible.

Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.

Id. at 1364. When analyzing documentary evidence, the key question is whether the document was created in anticipation of litigation. It is on this point that *Melendez-Diaz* clarified the holding in *Crawford*.

Documents kept in the regular course 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, 129 S.Ct. at 2538 (internal citations omitted).

The Washington Supreme Court previously held that admission of certifications from governmental agencies as to the existence or absence of a public record did not violate the Confrontation Clause. *State v. Kronich*, 160 Wn.2d 893, 161 P.3d 982 (2007) (holding that a Department of Licensing certification describing the license status of the defendant was not testimonial for purposes of the Confrontation Clause); *State v. Kirkpatrick*, 160 Wn.2d 873, 161 P.3d 990 (2007) (holding that a Department of Licensing certification as the absence of a driver's record was not testimonial for purposes of the Confrontation Clause). In both decisions, the Court acknowledged that the United States Supreme Court had not provided a comprehensive definition of what is "testimonial" vs. "non-testimonial" for purposes of determining confrontation rights. *Kronich*, 160 Wn.2d at 902; *Kirkpatrick*, 160 Wn.2d at 882. The United States Supreme Court's June 25, 2009 decision in *Melendez-Diaz v. Massachusetts* resolved this issue and is binding on all Washington courts. *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008).

The Washington Supreme Court's decision in *Kirkpatrick* is in direct conflict with the United States Supreme Court decisions in

Crawford v. Washington and *Melendez-Diaz v. Massachusetts*. Thus, the Superior Court's holding in Mr. Moimoi's case that State's Exhibit No. 1 was admissible under *Kirkpatrick* is contrary to governing case law. Admission of such evidence violates Mr. Moimoi's rights under the confrontation clause.

A. *Melendez-Diaz* prohibits certifications as to the absence of a public record.

The United States Supreme Court's June 25, 2009 decision in *Melendez-Diaz v. Massachusetts* is dispositive in Mr. Moimoi's case. In *Melendez-Diaz*, the Court expounded on its holding in *Crawford*, clarifying what constitutes a testimonial document and reaffirming that, even where documents fall within a well-established exception to the hearsay rule, such evidence remains subject to the confrontation clause.

Melendez-Diaz was convicted of distributing and trafficking cocaine. At trial, the State introduced three "certificates of analysis" reporting that forensic analysis revealed "[t]he substance [possessed by *Melendez-Diaz*] was found to contain: Cocaine." *Melendez-Diaz*, 129 S.Ct. at 2531. The certificates were issued by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health and were sworn in front of a notary public. *Id.* Defense counsel's objection to the admission of the certificates under the confrontation

clause was overruled by the trial court as Massachusetts law specifically provides that such certificates constitute prima facie evidence of the nature of the narcotic tested. *Id.* (citing Mass. Gen. Laws ch. 111, §13).⁵ The Massachusetts Court of Appeals affirmed the conviction. *Id.*

The United States Supreme Court reversed, finding that the certificates fell within the “core class of testimonial statements” identified in *Crawford*:

The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits: “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” They are incontrovertibly a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”

Id. at 2532 (citations omitted) (alteration in original). In so holding the Court emphasized not only the form of the certificates, but also their content and the purpose for which they were created:

⁵ Ma. Gen. Laws. ch. 111, §13 provides,

[T]he analyst or an assistant analyst of the department [of public health] . . . upon request furnish a signed certificate, on oath, of the result of the analysis provided for in the preceding section to any police officer or any agent of such incorporated charitable organization, and the presentation of such certificate to the court by any police officer or agent of any such organization shall be prima facie evidence that all the requirements and provisions of the preceding section have been complied with. This certificate shall be sworn to before a justice of the peace or notary public, and the jurat shall contain a statement that the subscriber is the analyst or an assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he is such.

The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The “certificates” are functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.”

Here, moreover, not only were the affidavits “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” but under Massachusetts law the *sole purpose* of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance.

Id. (citations omitted).

Importantly, the Court explicitly rejected the argument that the affidavits were admissible as public and/or business records and found that the certificates were created solely for the purpose of litigation. The Court went even further, however, in reiterating that, assuming *arguendo* the certificates were public records, the confrontation clause remained applicable.

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 under the Sixth Amendment.***

Id. at 2540 (emphasis added). The Court emphasized the difference between simply authenticating a copy of a record and creating a record solely to be introduced as evidence at trial. In Melendez-Diaz’s case, the need for confrontation was apparent in the “bare-bones” nature of the certificates. *Id.* at 2537. By simply asserting the substance was cocaine, Melendez-Diaz was precluded from inquiring as to the methodology of the testing, the risk of error, the extent to which the process allowed for individual discretion and even the analysts’ skill and honesty.⁶

Decisive to the case at hand, *Melendez-Diaz* addressed a clerk’s certification of an *absence* of a record head on:

Far more probative here are those cases in which the prosecution sought to admit into evidence ***a clerk’s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it.*** 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.*** Although the clerk’s certificate would qualify as an official record under respondent’s definition—it was prepared by a public officer in the regular course of his official duties—and although the clerk was certainly not a “conventional witness” under the dissent’s approach, the clerk was nonetheless subject to confrontation.

⁶ The Court reasoned that allowing for cross-examination would not only allow a defendant to assess the honesty of the affiant, but would also ensure more accurate forensic analysis as it would deter the fraudulent analyst from “drylabbing.” *Id.* at 2536-37. The benefit of such precautions has been exemplified in Washington subsequent the discovery of widespread fraud the State toxicology lab’s verification of breath test solutions. *See also State v. Roche*, 114 Wn.App 424, 59 P.3d 682 (2002) (defendant’s conviction reversed due to newly discovered evidence of “drylabbing” and drug use by testifying toxicologist).

Id. at 2539 (quotations and citations omitted) (emphasis added). *Melendez-Diaz* conclusively resolves any doubts as to the admissibility of State's Exhibit No. 1 in Mr. Moimoi's case. The exhibit is plainly testimonial. It is a sworn and notarized statement addressed to the prosecuting attorney's office after the date of the alleged violation attesting to the absence of a record, executed by a government officer pursuant to law. The testimony at trial established that the document was created in anticipation of litigation. According the State's own witness:

Well, ***any time that we issue a civil infraction or a complaint with the King County Prosecutor's Office we obtain a search of the records letter***, which is a sealed letter from the supervisor of the keeper of the records of – of the contractor file section. That person will type the letter out, basically stating the individual person's registration status and seal the letter as a – a authenticated document that's person's status as a registered contractor.

CP 52 (emphasis added). The witness confirmed that State's Exhibit No. 1 was this type of letter. *Id.* The exhibit was made not only with reasonable belief that it would be available at trial or with an eye towards trial, but for the specific purpose of proving an element of a crime in a criminal trial. It prevents the exact type of cross-examination anticipated in *Melendez-Diaz*, leaving Mr. Moimoi with no means to ensure the reliability or accuracy of its contents. It was admitted in violation Mr. Moimoi's constitutional right to confrontation.

B. *Kirkpatrick* conflicts with *Melendez-Diaz*

To the extent that *Kirkpatrick* provides for the admissibility of a certification establishing the absence of a public record, it is overruled by *Melendez-Diaz*. *Melendez-Diaz* did not create new law, instead, it clarified the holding of *Crawford* and is controlling. See *State v. Radcliff*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008) (“When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings.”).

In *Kirkpatrick*, the Washington Supreme Court found that a Department of Licensing certification as to the absence of a driver's license was non-testimonial for the purposes of the *Crawford* analysis.⁷ *Kirkpatrick*, 160 Wn.2d at 884-86. The Court held that the document was non-testimonial and its admission, therefore, did not violate *Kirkpatrick*'s right to confrontation. 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 (citing *Crawford*, 541 U.S. at 53-54). *Melendez-Diaz* makes clear that this premise is incorrect.

The United States Supreme Court has emphasized repeatedly that whether a document violates the confrontation clause is a distinct inquiry

⁷ *Kirkpatrick* was convicted of reckless driving and No Valid Operator's Permit (NVOP). The trial court admitted, over defense objection, a Department of Licensing certification that *Kirkpatrick* did not have a license on September 8, 2003. *Kirkpatrick*, 160 Wn.2d at 878.

from its admissibility under the hearsay rule. *See, e.g., Melendez-Diaz*, 129 S.Ct. at 2538. Thus, the simple fact that a document qualifies as a business or public record, while instructive on the issue, is not conclusive.

Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(b). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because although kept in the regular course of the railroad's operations, it was "calculated for use essentially in the court, not in the business."

Melendez-Diaz, 129 S.Ct. at 2538. In determining whether or not an out-of-court statement is testimonial, the key inquiry is whether the document was created in anticipation of litigation.

The *Kirkpatrick* Court did acknowledge the substantive differences between the Department of Licensing certification sought to be admitted and a Department of Licensing record:

In *Crawford*, the Court suggested that business records are nontestimonial in part because they are not prepared with an eye toward trial. In contrast, the public record here, at least the certification, was literally prepared for purposes of litigation and was intended to be relied upon by the State. Likewise, the DOL certification here was probably not kept in the normal course of DOL business.

160 Wn.2d at 884-85 (citations omitted). Despite these noted differences, the court reasoned that the records remained non-testimonial. Namely, the

certification referred to part of a class of documents not prepared for litigation and which existed prior to the litigation. It is on this point that *Melendez-Diaz* serves to clarify *Crawford*: A sworn certification prepared for litigation is always testimonial. See *Melendez-Diaz*, 129 S.Ct. at 2532. Whether the certification describes the content of an existing record or the absence of a record does not change the fundamental nature of the document. Its purpose is to provide substantive evidence against the defendant whose guilt depends on the existence or nonexistence of the record searched. *Id.* at 2539. Such a document is testimonial and its admission, without live testimony from the person who created the document, violates the right to confrontation.

Other aspects of *Kirkpatrick* are troubling under *Crawford* and *Melendez-Diaz*. Namely, *Kirkpatrick* appeared to be based, in part, on the premise that “Washington courts have long recognized the inherent reliability and admissibility of driving records from DOL.” Finding that a document satisfies the Confrontation Clause due to its determined reliability, however, is exactly the reasoning rejected in *Crawford*: As discussed, *supra*, *Crawford* overruled *Ohio v. Roberts* which held that out-of-court statements were admissible provided that they carry sufficient indicia of reliability. “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant

is obviously guilty. This is not what the Sixth Amendment prescribes.”
Crawford, 541 U.S. at 62.

Similarly, *Melendez-Diaz* rejected the more practical concerns raised in the *Kirkpatrick* decision. In *Kirkpatrick* the court minimized the need for confrontation given that the government witnesses were unlikely to testify to anything different from the bare fact certified. 160 Wn.2d at 888. By comparison, *Melendez-Diaz* viewed the similarity between the certification and the anticipated testimony as exemplifying the testimonial nature of the documents. 129 S.Ct. at 2532. In *Kirkpatrick* the court noted, but did not rely upon, the burden of ensuring live testimony each time the government sought to introduce a certification. 160 Wn.2d at 887-88. This concern, also raised by the dissenters in *Melendez-Diaz* was deemed essentially irrelevant to the issue of confrontation:

Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the “ ‘necessities of trial and the adversary process.’ ” It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause-like those other constitutional provisions-is binding, and we may not disregard it at our convenience.

129 S.Ct. at 2540.

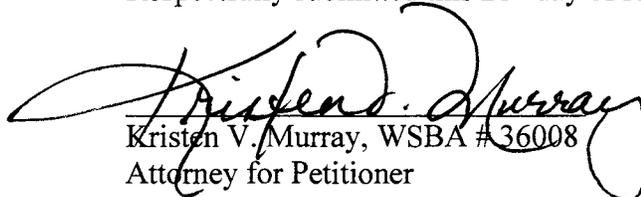
Ultimately, *Kirkpatrick*, like the Ma. Gen. Laws. ch. 111, § 13, is no longer consistent with the *Crawford* proposition that business/public

records are “by their nature” non-testimonial. *Crawford*, 541 U.S. at 56. The clarification of *Crawford* through *Melendez-Diaz* is in direct conflict with the holding in *Kirkpatrick*. The holding of *Melendez-Diaz* controls in this case. As such, the admission of State’s Exhibit No. 1 violated Mr. Moimoi’s right to confrontation and should have been excluded. Because the remaining evidence is insufficient to support the conviction, Mr. Moimoi’s conviction must be reversed and dismissed with prejudice. *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982) (An accused whose conviction had been reversed due to insufficient evidence cannot be retried.)

VI. CONCLUSION

The admission of State’s Exhibit No. 1 violated Mr. Moimoi’s constitutional right to confront adverse witnesses as articulated in *Crawford v. Washington* and *Melendez-Diaz v. Massachusetts*. Without this inadmissible evidence, there is insufficient evidence to support Mr. Moimoi’s conviction for unregistered contracting. For these reasons, Mr. Moimoi’s conviction should be reversed and dismissed with prejudice.

Respectfully submitted this 21st day of April, 2010.


Kristen V. Murray, WSBA # 36008
Attorney for Petitioner

APPENDIX A



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

P.O. BOX 44450, OLYMPIA, WA 98504-4450
June 22, 1999

King County Prosecutor
1002 Bank of California
900 4th Ave
Seattle WA 98164

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.

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.

Sincerely,

Pamela R. Bergman
Clerical Supervisor
Consultation and Compliance
Contractor Registration

Subscribed and sworn as to before on the 22 day of June 1999.

NOTARY PUBLIC in and for the State of Washington, residing in Thurston County. My commission expires on January 1, 2000.

