

NO. 64327-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LAKI MOIMOI,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
MS

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON
(ON APPEAL FROM COURT OF LIMITED JURISDICTION)

BRIEF OF RESPONDENT

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A. ISSUES

1. Did MoiMoi fail to preserve a Confrontation Clause claim where he did not object on that basis below, and where a live witness was available to testify about the Department of Labor and Industries database?

2. Is a letter from the Department of Labor and Industries “testimonial” evidence under Confrontation Clause analysis where the letter states that a search of the department’s database did not locate any record that the defendant was a registered contractor?

3. Is any error harmless where the defendant testified that his business was licensed with the City of Seattle but he admitted that he “had no idea” whether he was registered with the Department of Labor and Industries?

B. STATEMENT OF THE CASE

Laki MoiMoi was charged in King County District Court under cause number YD-SD0013 with the crime of unregistered contracting. Trial was held on February 14-15, 2007.¹ In

¹ The transcripts will be cited as 1RP and 2RP, respectively.

opening statement, the prosecutor asserted that MoiMoi had contracted to build a garage without a contractor's license, tried to demand additional money from the homeowner, and then failed to complete the work. 1RP 39-42. Defense counsel told the jury that MoiMoi was not guilty because he did not contract to build a garage, he contracted to perform simple landscaping. RP 42-43.

Three witnesses testified for the State. Dennis and Judy Lamey testified that they negotiated a verbal contract with MoiMoi under which MoiMoi was to build concrete footings and a slab for a garage on the Lamey property. 1RP 62-65. Lamey was to pay \$1,800 up front and \$700 upon completion of the job. 1RP 65. Lamey gave MoiMoi a check for \$1,800, wrote MoiMoi's driver's license number on the check, and MoiMoi began work on the concrete forms. 1RP 66-68, 90. MoiMoi later said, however, that he forgot to include the cost of labor in his bid, and told Lamey he would need an additional \$4,600 payment to pay for that labor. 1RP 75. Lamey asked that MoiMoi show him some business card or a company letterhead, but MoiMoi never provided that information. 1RP 65, 75. Lamey refused to pay MoiMoi the added labor cost, and ordered him off the property. 1RP 75. Lamey contacted the Washington State Department of Labor and

Industries. 1RP 74. He also took pictures showing the uncompleted work. 1RP 77-81; Ex. 5, 6, 7.

A construction compliance inspector with the Department of Labor and Industries, Mathew Jackson, also testified for the State. 1RP 44-60. He said that his job was to ensure that contractors are properly registered, licensed, and insured. 1RP 45-46. He has ready access to a database of contractors and can, at any time, immediately determine whether a contractor is licensed. 1RP 47-48. The database he relies upon is updated daily and is very accurate. 1RP 48. This database is publicly available on the internet. Id. See <https://fortress.wa.gov/lni/bbip/Search.aspx>.

Jackson was assigned to investigate a complaint from the Lameys. 1RP 48-49. He examined the work done on the property, checked to see whether MoiMoi was registered as a contractor, and then requested a certified letter from the Department of Licensing regarding MoiMoi's registration status. 1RP 49-52. He was sent a letter from the custodian of records, Pamela Bergman, confirming that MoiMoi was not licensed. 1RP 52-53; Appendix A. MoiMoi objected to this letter on the basis that the letter was not routinely kept in the course of the agency's business. 1RP 53. The court overruled the objection and admitted the letter, finding that it was a

business record. 1RP 54. MoiMoi did not make a Confrontation Clause objection to the letter.

MoiMoi did not ask Jackson any questions regarding the state contractor's database. In fact, he objected each time Jackson attempted to discuss the database and whether MoiMoi was included in that database. 1RP 51-52. He did, however, ask Jackson whether he had checked to see if MoiMoi had a business license with the City of Seattle. 1RP 60-61.

MoiMoi testified. He said that he contracted with Lamey to do simple landscaping work, not to build a garage. 2RP 15-17. He later testified, however, that he bought concrete reinforcing bar, wiring, and other supplies that could be used to build the concrete foundation for a garage. 2RP 17, 19, 22. He said that he bought these supplies at a local hardware store because Lamey asked him to, not because he was contracted to build a garage. Id. at 22.

MoiMoi testified that his business was "Seattle Landscape and Construction" and, when asked by defense counsel if he had "a business license to be in that occupation," he replied, "Yes." 2RP 15. When asked on cross-examination whether his business was registered with the Department of Labor and Industries, he replied, "I have no idea." 2RP 18.

The jury convicted MoiMoi and he appealed. On appeal, he alleged that the Confrontation Clause was violated by admission of exhibit 1. The Superior Court rejected that argument. CP 150. MoiMoi appeals from that ruling. CP 151-53.

C. ARGUMENT

1. MOIMOI FAILED TO PRESERVE A CONFRONTATION CLAUSE CLAIM.

Under RAP 2.5(a), an appellate court may refuse to review a claim of error that was not preserved below. The court has discretion, however, to review a claim of manifest constitutional error raised for the first time on appeal. RAP 2.5(a)(3). The constitutional right of confrontation may be waived by failure to object. Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 2534 n.3, 174 L. Ed. 2d 314 (2009) ("The right to confrontation may, of course, be waived, including by failure to object to the offending evidence"). Constitutional arguments not presented to the trial court may be deemed waived when raised for the first time on appeal, and the reviewing court may find a waiver even when the issue was not raised in a lower appellate court. State v. Kirkpatrick, 160 Wn.2d 873, 880 n.10, 161 P.3d 990

(2007). Objections must also be specific. Walker v. State, 121 Wn.2d 214, 218, 848 P.2d 721 (1993) (citing cases).

MoiMoi failed to preserve his Confrontation Clause objections in this case. When exhibit 1 was offered, MoiMoi objected on the basis that it was not kept in the ordinary course of the agency's business. RP 53. He never mentioned the Constitution or the Confrontation Clause. His objection was insufficient to preserve the issue.

Under RAP 2.5(a)(3), an issue may be raised for the first time on appeal if it is "a manifest error affecting a constitutional right." "Constitutional errors are treated specially because they often result in serious injustice to the accused." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). But "the exception actually is a narrow one, affording review only of certain constitutional questions." Scott, 110 Wn.2d at 682. This narrow exception is frequently misread; it may not be invoked merely because a defendant can identify a constitutional issue not litigated below. State v. Valladares, 31 Wn. App. 63, 75-76, 639 P.2d 813 (1982). Allowing "every possible constitutional error" to be raised for the first time on appeal undermines the trial process and wastes resources. State v. Lynn, 67 Wn. App. 339, 344, 835 P.2d 251

(1992); see also State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule is “also supported by considerations of fairness to the opposing party. . . . the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal.” State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

Considering a Confrontation Clause claim for the first time on appeal would be particularly inappropriate in this case because the error is clearly not manifest; a live witness testified and was prepared to address the issue of whether MoiMoi was registered as a contractor, just as MoiMoi now says the constitution demands. Mathew Jackson was a “witness against” MoiMoi, and he was prepared to testify that he had searched the contractor database and found no record of MoiMoi. He was intimately familiar with this database, as he used it routinely in his duties as a department investigator. As such, he was a witness with personal knowledge on a relevant point who was subject to cross-examination. However, MoiMoi objected to this live testimony on hearsay grounds. 1RP 51-52. Because the State had exhibit 1, which

appeared to be clearly admissible, it did not need to press the issue. MoiMoi never even attempted to cross-examine the live witness as to the adequacy of the database.

In short, MoiMoi's trial and appellate arguments, taken together, prove too much. He argues that Jackson could not testify about the database because that testimony would be hearsay, yet he argues on appeal that a certified document attesting to the public record is not sufficient, and that a live witness must testify about a records search. But if MoiMoi is correct on both points, then the State could never prove the absence of a public record.²

In any event, it is unclear how the use of exhibit 1 deprived MoiMoi of his opportunity to confront a witness against him. Because MoiMoi failed to object on Confrontation Clause grounds, and because a witness was available for cross-examination, MoiMoi cannot show manifest constitutional error that would warrant consideration of this claim for the first time on appeal.

² In truth, Jackson's testimony should have been allowed; it was not hearsay. Jackson was simply an informed witness testifying to a search that he performed, just like a detective might testify to checking jail booking records, the white pages of the phone book, or department of social and health services records. The detective may be cross-examined as to the adequacy of his knowledge, or the sufficiency of his search, but his testimony is not hearsay.

2. A CERTIFIED LETTER FROM THE DEPARTMENT OF LABOR AND INDUSTRIES WAS PROPERLY ADMITTED.

The Department of Labor and Industries letter admitted as an exhibit in this case was not testimonial under recent United States Supreme Court authority. The document was simply a clerk's certification about the state of the public record; it contained only information derived directly from the department's records, without opinion, interpretation, or the exercise of judgment. The Confrontation Clause is not violated when such documents are admitted. Even if the cover letter was testimonial, any error was harmless because MoiMoi confirmed that he was not registered when he testified that he had "no idea" whether he was licensed as a contractor.

a. A Certified Copy Of A Department Of Labor And Industries Record Is A Public Record And Is Admissible As Evidence Under Washington Law.

The Washington Legislature has declared that contractors must register with the Department of Labor and Industries "to afford protection to the public . . . from unreliable, fraudulent, financially irresponsible, or incompetent contractors." RCW 18.27.020

(registration required); RCW 18.27.140 (purpose). A licensed contractor must be insured and bonded. RCW 18.27.040-.050. He must keep copies of his license available for inspection. RCW 18.27.060-.070. The department is required to update the list of registered contractors bimonthly and to make this list available to the public. RCW 18.27.120. Thus, these records are routinely kept regardless of whether a complaint is received or an investigation opened.

RCW 5.44.040 provides that copies of records and documents filed in state departments are admissible if certified under the official seals of the records custodian.³ A public record certified in this manner is self-authenticated. ER 902(d); State v. Monson, 113 Wn.2d 833, 836-37, 784 P.2d 485 (1989) (certified copy of a driver's record is a public record). To be admissible, certified public records must:

- (1) contain facts, rather than conclusions that involve the exercise of judgment or discretion or express an opinion,
- (2) relate to facts that are of a public nature,
- (3) [are] retained for the benefit of the public, and

³ "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." RCW 5.44.040.

(4) there [is] express statutory authority to compile the report.

State v. C.N.H., 90 Wn. App. 947, 949-50, 954 P.2d 1345 (1998).

Washington appellate courts have repeatedly held that similar records – like a certification from DOL indicating the status of a defendant’s driving privilege – is a public record and may be admitted into evidence. State v. Smith, 122 Wn. App. 699, 94 P.3d 1014 (2004), rev’d on other grounds, 155 Wn.2d 496 (2005).

Three years ago the Washington Supreme Court held that a document containing certified driving records (or the lack of such records) is not testimonial evidence that violates the Confrontation Clause. State v. Kronich, 160 Wn.2d 893, 903-04, 161 P.3d 982 (2007) (certification as to driving records); State v. Kirkpatrick, 160 Wn.2d at 886 (certification as to the absence of a driving record). Thus, under current Washington law, exhibit 1 was admissible.

b. Melendez-Diaz Does Require A Change In The Admissibility Standards For Public Records.

After Kronich and Kirkpatrick were decided, the United States Supreme Court decided Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). MoiMoi

argues that Melendez-Diaz abrogates the Washington Supreme Court's decisions in Kronich and Kirkpatrick, and precludes the use of a certified public record like the letter admitted against MoiMoi because it is a "testimonial" document. This argument should be rejected.

The analyst's laboratory report at issue in Melendez-Diaz is fundamentally different from the licensing record at issue here. A forensic analyst's report attests to actions taken wholly after commission of the defendant's crime, whereas the certification letter in this case simply attests to the state of the public record at the time of the offense. But-for the crime, the analyst's report would not exist, whereas the department records and MoiMoi's licensing status exist independent of the crime.

Melendez-Diaz is the latest effort in the Supreme Court's attempts to explain what it means under the Confrontation Clause to be a witness "who bear[s] testimony" against a defendant. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In Crawford, the Court held that a witness's "testimonial" assertions are admissible only if the witness appears at trial or the defendant has some other opportunity to cross-examine the witness. Crawford, 541 U.S. at 54. The Court

coined the term “testimonial” to describe the class of statements covered by the Confrontation Clause. Testimonial evidence was said to include:

. . . 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.

Id. at 51-52 (citations omitted).

Not all out-of-court statements are testimonial. For instance, the Supreme Court suggested that neither business records nor public records are testimonial. Crawford, 541 U.S. at 56 (business records); at 76 (Rehnquist, C.J., concurring) (stating that the majority would find “official records” nontestimonial). Statements made to resolve an ongoing emergency are not testimonial. Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Statements in “medical reports created for treatment purposes” are not testimonial. Melendez-Diaz, at 2533 n.2. And,

dying declarations and statements made as part of an ongoing conspiracy are not testimonial. Crawford, 541 U.S. at 55.

In Melendez-Diaz, the issue was whether an analyst's report of a laboratory drug test was testimonial. A white powdery substance had been found in Melendez-Diaz's possession when he was arrested. Police requested that the substance be tested, it was, and a laboratory analyst found that the substance contained cocaine. The analyst prepared a report that was admitted at trial. Based on this evidence, Melendez-Diaz was convicted of drug possession. Melendez-Diaz, at 2530-31.

The Supreme Court concluded there was "little doubt" that the laboratory report was testimonial because it was an affidavit attesting to the results of an analysis that had been conducted after the defendant's arrest, and that "the sole purpose of the affidavit... was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance." Melendez-Diaz, at 2532. The Court noted that it had previously held that similar evidence offended the confrontation clause. Id. at 2538 (citing Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943) (trial court reversed for admitting an accident report

prepared by a railroad company employee describing the accident from the railroad employee's perspective)).

The government argued that the report was a business record, but the Court rejected that argument. 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." Id. at 2539 (emphasis in original). The Court also rejected an argument that cross-examination of the drug analyst would be fruitless; cross-examination could expose or deter incompetent or fraudulent analysts. Id. at 2536-38.

Although the Court found the laboratory report *not* to be a business record, it confirmed its earlier indications that true business or public records are not testimonial: "documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status." Id. at 2538. The Court had observed in Crawford that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy." Crawford, 541 U.S. at 56. Thus, the question was whether a

particular record is similar to records historically admitted into evidence without live testimony.

The Court observed that early cases permitted the use of “records prepared for the administration of an entity's affairs, and not for use in litigation.” Id. at 2538 n.7 (citing King v. Rhodes, 1 Leach 24, 168 Eng. Rep. 115 (1742) (ship's muster-book was admissible to prove death of a crewman in a will forgery case); King v. Martin, 2 Camp. 100, 101, 170 Eng. Rep. 1094, 1095 (1809) (a vestry book was admissible in a libel case to prove that a person was a duly elected town treasurer); and King v. Aickles, 1 Leach 390, 391-92, 168 Eng. Rep. 297, 298 (1785) (a prison logbook was properly admitted as to the date of a prisoner's release from custody)).

In reconfirming the admissibility of clerk's certificates, the Court observed that “a clerk's certificate authenticating an official record – or a copy thereof – was traditionally” admissible. Id. at 2538-39. The clerk was “permitted to certify to the correctness of a copy of a record kept in his office but had no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.” Id. at 2539 (internal quotation marks and citations omitted). The

Court also observed that “documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.” Id. at 2532 n.1. And, the Court noted that a clerk or judge historically could certify to the conduct of a defendant’s prior trial and such certification would not be considered testimonial. Id. at 2539 n.8 (citing Dowdell v. United States, 221 U.S. 325, 31 S. Ct. 590, 55 L. Ed. 753 (1911)).

The records in this case fit within this historical exception for business records or public records. As discussed above, Washington Courts have repeatedly held that driving records are classic public records because they are maintained for a public benefit and purpose. Kirkpatrick, 160 Wn.2d at 886. So, too, does the Department of Labor and Industries maintain records on contractors in Washington State. The records are prepared and kept to assist the department in protecting the public from unskilled, uninsured contractors operating without protection of a bond. A letter stating that a contractor is not listed in the State’s database simply attests to the contents of the database – which is simply a collection of records – at a given time. The certification offers neither opinion nor the exercise of discretion or judgment. Id. The letter meets the criteria of Melendez-Diaz: “a clerk . . . by affidavit

authenticate[d] [and] provide[d] a copy of an otherwise admissible record.” Melendez-Diaz, at 2539.

Still, MoiMoi argues that exhibit 1 was testimonial because it was prepared *after* the event in question, for the purposes of litigation. This focus on simple timing and purpose is misplaced, and it confuses the creation of the *certificate* with the creation of the *record*. Any certification authenticating a public record will be created after the fact of the event; there is no need to “certify” a record but for some special event, like a trial. Yet, the Supreme Court has clearly held that certifications of clerks attesting to the authenticity of a record are admissible without confrontation.⁴ The important point, for purposes of determining whether the document is testimonial, is that the certification does not authenticate a *record* that was prepared in preparation for litigation, and that the certification contain no opinions or the exercise of judgment. In other words, the certification must simply be a reflection of the “administration of an entity’s affairs” before or on the date of the crime. Melendez-Diaz, at 2538 n.7.

⁴ “[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, at 2539.

The document admitted in MoiMoi's trial is fundamentally different from the laboratory report in Melendez-Diaz or the railroad accident report in Palmer v. Hoffman. A laboratory report involves the exercise of scientific expertise, judgment and discretion. It is the product of a scientific testing process where an analyst examines a substance, performs steps to test that substance, and reports his or her results. Similarly, an accident report documents the event in question, not pre-existing records. Both a laboratory report and an accident report are the creation of new evidence rather than the simple reporting of events or records that existed before the request from law enforcement. In contrast, the fact that MoiMoi was unregistered was a fact that existed regardless of whether the Lameys hired him and regardless of whether Mr. Jackson ever opened an investigation.

Finally, contracting licensing records are different from laboratory reports in another way, to-wit: defendants can see for themselves whether the State considers them licensed.⁵ Thus, the defendant charged with unregistered contracting is not simply at the mercy of the prosecution, as would be the case for a report

⁵ RCW 18.27.120; <https://fortress.wa.gov/lni/bbip/Search.aspx>.

commissioned by police or the prosecution. A defendant can check the contracting records himself and can dispute information contained in a certification, he can attack the completeness of the custodian's records search, and he can offer evidence that he actually registered, despite the absence of a record. A defendant facing an affidavit attesting to the chemical content of a seized substance is unable to mount such defense. Thus, unlike Melendez-Diaz, cross-examination of the custodian of contracting license records would truly be "an empty formalism." Id. at 2537 n.6.

Courts from other jurisdictions are split on whether public records are admissible after Melendez-Diaz.⁶ The Supreme Court of Maine has held that licensing certificates are public records and, thus, *not* testimonial. State v. Murphy, ___ M.E. ___, 991 A.2d 35 (2010) (certificate attesting to authenticity of attached records and to license suspension, notice, and failure to reinstate driving privilege held not testimonial); State v. Gilman, ___ M.E. ___, 993 A.2d 14, 24 (2010). Massachusetts appellate courts have reached similar conclusions. Commonwealth v. Martinez-Guzman,

⁶ Because this is a federal constitutional issue, decisions of the Supreme Court are binding on this court but decisions of federal appellate courts are not.

76 Mass.App.Ct. 167, 920 N.E.2d 322, 325 n.3 (2010) (certificate of authenticity of records and copies of records from Registrar of Motor Vehicles); Commonwealth v. Weeks, 77 Mass.App.Ct. 1, 927 N.E.2d 1023 (2010) (court docket sheets are not testimonial); Commonwealth v. McMullin, 76 Mass.App.Ct. 904, 904-05, 923 N.E.2d 1062 (2010) (admission of court records and record of Registry of Motor Vehicles records did not right of confrontation). See also U.S. v. Norwood, 603 F.3d 1063 (9th Cir. 2010) (affidavit prepared by an employee at the Washington Department of Employment Security, which certified that "a diligent search of the department's files failed to disclose any record of wages reported for [Norwood] from January 1, 2004 through March 31, 2007" was testimonial); U.S. v. Villavicencio-Burrue, ___ F.3d ___, 2010 WL 2352045 (9th Cir. 2010) (warrants of removal are not testimonial); U.S. v. Mallory, ___ F.Supp.2d ___, 2010 WL 1286038 (E.D.Va., 2010) (tracking record for Federal Express package is not testimonial).

One federal court has held that "Melendez-Diaz did not decide the issue of whether data compiled by a government agency during routine, [matters] conducted pursuant to its duty under the law presented a Confrontation Clause concern." U.S. v. Huete-

Sandoval, 681 F.Supp.2d 136, 139 (D.Puerto Rico, 2010). The court ruled that

Despite his assertions to the contrary, Defendant is actually inviting the Court to extend the Supreme Court's holding in Melendez-Diaz to encompass data compiled as part of a routine exercise by a government agency which was later presented at evidence at a criminal trial. The Court expressly declines this invitation.

Sandoval, 681 F.Supp.2d at 139-40.

Other courts have determined, however, that licensing records are testimonial. Washington v. State, 18 So.3d 1221 (Fla.App. 4 Dist., 2009) (certificate regarding absence of construction license is testimonial); Tabaka v. District of Columbia, 976 A.2d 173 (2009) (document attesting to absence of driver's license is testimonial).⁷ These two contrary cases are based on a cryptic paragraph in Melendez-Diaz wherein the Supreme Court opined that certificates of the non-existence of a record are testimonial. Melendez-Diaz, at 2539. No such certificate was at issue in Melendez-Diaz, so any comments on that topic should be considered non-binding dicta. State v. Murphy, 991 A.2d at 42.

⁷ Two federal circuit courts have held that a certificate of non-existence of record (CNR) is testimonial. U.S. v. Norwood, 595 F.3d 1025 (9th Cir. 2010), *Opinion Amended and Superseded on Denial of Rehearing by U.S. v. Norwood*, 603 F.3d 1063 (9th Cir. 2010); U.S. v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010). However, the federal prosecutor conceded the point in each case so the issue was not litigated.

See also Pierre N. Leval, Judging Under The Constitution: Dicta About Dicta, 81 N.Y.U.L.Rev 1249 (2006).

Moreover, this dictum makes the same mistake as *MoiMoi*; it confuses the creation of a *certification* as to a public record with the creation of the *record* itself. A clerk can certify a pre-existing public record after the fact that is being litigated. But the clerk cannot, under the holding of Melendez-Diaz, create and then certify a record that exists solely as a construct of the state's attempt to prosecute.

And the dictum in Melendez-Diaz that seems to single out certifications as to the *absence* of a public record makes little sense. An affiant can certify and authenticate records. Melendez-Diaz, at 2538-39. Such a certification says that the attached document is part of the public record. The certification is, essentially, an attestation about the state of the database of public records at the time of the event. But if the database of public records is devoid of a particular record, it seems logical that the affiant can attest to this fact, too. It seems illogical that a certification would become "testimonial" simply because a database *lacks* a record as opposed to *containing* a record. No Supreme Court holding has been made on this issue.

For the reasons set forth above, the better-reasoned authority – including binding Washington Supreme Court caselaw – holds that a certificate from a records custodian attesting to the contents of a pre-existing record is not testimonial. Such certificates are fundamentally different from a laboratory report created and issued by a forensic analyst after the crime in question. This Court should hold that exhibit 1 was nontestimonial, and properly admitted.

c. Even If Exhibit 1 Was Testimonial, Any Error Was Harmless.

A violation of the confrontation clause may be harmless error. State v. Hieb, 107 Wn.2d 97, 109, 727 P.2d 239, 246 (1986); Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (whether the limitation of cross-examination in a particular case was harmless error is determined by analyzing five factors). In determining whether the error was harmless, courts look to factors such as “the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-

examination otherwise permitted, and ... the overall strength of the prosecution's case." Van Arsdall, 475 U.S. at 684.

MoiMoi testified that, although he apparently applied for and received a business license from the City of Seattle, he "had no idea" whether he had a contractor's license with the Department of Labor and Industries. 2RP 18. A contractor must apply in order to become licensed. RCW 18.27.030.⁸ Contractors are presumed to know the law; half-steps or good intentions are not an excuse. RCW 18.27.005.⁹ Obtaining a local license does not satisfy the state registration requirement. RCW 18.27.130. MoiMoi's admission that he had no idea whether he is licensed by the Department of Labor and Industries is a concession that he never applied for or received licensing from the department.

Moreover, the thrust of MoiMoi's defense was the claim that he was doing landscaping, not contracting, for the Lameys. 1RP 42 (opening statement); 2RP 38-41 (closing argument). He also appeared to argue that, although he bought construction supplies to

⁸ <http://www.lni.wa.gov/TradesLicensing/Contractors/HowReg/default.asp>.

⁹ "This chapter shall be strictly enforced. Therefore, the doctrine of substantial compliance shall not be used by the department in the application and construction of this chapter. Anyone engaged in the activities of a contractor is presumed to know the requirements of this chapter."

build concrete footings for a garage, he did not intend to fabricate those footings. 2RP 38. Although this would be a defense to the charge, the jury evidently was not persuaded.¹⁰

This evidence, together with the testimony of Mr. Jackson, and the evidence of MoiMoi's deceptive business practices and refusal to provide basic business information to Mr. Lamey, established that he was not a registered contractor. Any error in admitting the letter was harmless.

Lastly, even if this court determines that the error was not harmless, the remedy is remand for retrial without the offending document. A live witness was not necessary since the trial court admitted exhibit 1 but, if that exhibit was admitted in error, the State should be permitted to call a live witness to prove the obvious fact that MoiMoi never registered with the Department of Labor and Industries, as required by law.

¹⁰ See RCW 18.27.090(8) ("Any person who only furnished materials, supplies, or equipment without fabricating them into, or consuming them in the performance of, the work of the contractor").

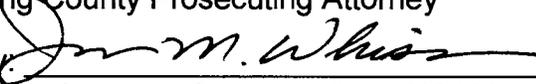
D. CONCLUSION

For the foregoing reasons, the State requests that the appellate decision of the superior court be affirmed, and that MoiMoi's convictions be affirmed.

DATED this 9th day of July, 2010.

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



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.

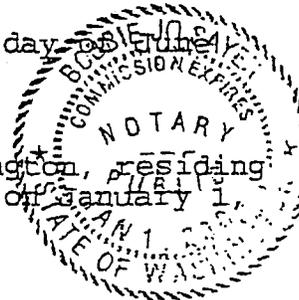
I further certify that we have searched our records from January 1980, to the present and are unable to locate a previous or current registration for Laki Moi Moi under that specific name located at 10118 Des Moines Memorial Drive, Seattle WA 98168 doing business as L & L Concrete, Seattle Concrete and 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.

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



Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christine Jackson, the attorney for the appellant, at The Public Defender, 810 3rd Avenue, Floor 8, Seattle, WA 98104-1655, and to Kristen Murray, The Defender Association, 810 3rd Avenue, Suite 800, Seattle, WA 98104-1695, containing a copy of the Brief of Respondent, in STATE V. LAKI MOIMOI, Cause No. 64327-4-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame

Name

Done in Seattle, Washington

7/12/10
Date 7/12/10