

64909-4

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No. 64909-4-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

KEITH RAWLINS, Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

BRIEF OF RESPONDENT

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INTRODUCTION

When police officers respond to a call, one of their first tasks is to identify who is at the scene. This appeal asks whether responding officers violate the Confrontation Clause and hearsay rules by testifying that a person at the scene told them her name and birthday.

On October 16, 2009, Lummi Police and Whatcom County Deputy Sheriffs responded to a landlord-tenant dispute on the Lummi Reservation. They asked the people at the scene to identify themselves, and Jan Sellers told the officers her name and birthday. Also present was Defendant Keith Rawlins, Ms. Sellers' husband. A valid no contact order prohibited defendant Rawlins from being within 100 feet of his wife. (No Contact Order; Trial Exhibit 1).

At trial, Ms. Sellers refused to appear, ignoring a subpoena. (Subpoenas; Sub No. 18; CP __)*. The State appropriately introduced testimony about her name and birthday – without calling Sellers as a witness – because the statements explained why the officers investigated further.

* The State has designated the Information in a supplemental designation of clerk's papers. A CP citation does not yet exist.

The statement was relevant to explain why the officers, who were by then aware of the protection order and its contents, then conducted further investigation. When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible...Thus, the court did not err in admitting the woman's self-identification for the limited purpose of showing that she did so and to help explain the officers' subsequent investigation.

State v. Iverson, 126 Wn. App. 329, 336-337, 108 P.3d 799 (2005).

Because Sellers' identifying statements were relevant, admissible evidence, and not hearsay, the trial court properly admitted the officers' testimony.

Furthermore, this evidence did not violate the Confrontation Clause. Officers may ask for identification without creating "testimonial" statements. Davis v. Washington, 547 U.S. 813, 832, 126 S.Ct. 2266, 2279, 165 L.Ed.2d 224 (2006) ("officers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim"). Only admission of testimonial hearsay violates the Confrontation Clause. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009) ("admission of testimonial statements of a witness who did not appear at trial").

Here, Sellers' self-identification was neither testimonial nor hearsay.

Finally, even without Sellers' limited statements, the evidence of defendant Rawlins' guilt was overwhelming. Any error from admitting the testimony was harmless. State v. Mason, 160 Wn.2d 910, 927, 162 P.3d 396 (2007) ("if the untainted evidence is overwhelming, the error is deemed harmless"). The State respectfully requests the Court to affirm defendant's conviction and dismiss his appeal.

I. RESTATEMENT OF ISSUES PRESENTED

Defendant's appeal presents three issues:

A. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006). Investigating officers asked Jan Sellers for her name and birthday to identify who she was at the crime scene. Were these limited statements nontestimonial?

B. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence

to prove the truth of the matter asserted.” ER801(c). The State offered evidence of Jan Sellers’ identity to show why officers investigated a violation of a protective order. Was Sellers’ brief identification of herself, as related by the officers, inadmissible hearsay?

C. Violation of the Confrontation Clause is harmless “if the untainted evidence [of defendant’s guilt] is overwhelming.” State v. Mason, 160 Wn.2d 910, 927, 162 P.3d 396 (2007). At trial, the investigating officers testified that Defendant Rawlins identified himself; no one objected to Rawlins’ arrest for violating the protective order; Sellers did not claim officers were making a mistake; Rawlins gave Sellers his belongings for safekeeping; and Rawlins and Sellers embraced before officers put him in the squad car. (1/05/10 VRP 24). Even without Sellers’ self-identification, was evidence of Rawlins’ violation of the no contact order overwhelming?

II. STATEMENT OF FACTS

A Whatcom County jury convicted defendant Rawlins on one count of violating a no contact order. (Verdict; CP 21). Defendant appeals, alleging that the trial court violated the Confrontation Clause by allowing investigating officers to testify to Jan Sellers’

self-identification. In his opening brief, defendant summarizes the events that led to his arrest and conviction.

Two facts merit highlighting. First, the trial court allowed *limited* testimony from the officers on Ms. Sellers' statements. Second, evidence other than the statements establishes defendant's guilt.

A. The Limited Testimony Regarding Jan Sellers' Statements

At trial, two investigating officers testified: Whatcom County Deputy Sheriff Mark Jilk, and Lummi Police Officer Faustino Perez. Both offered carefully circumscribed testimony about how they identified Jan Sellers. The State subpoenaed Ms. Sellers to testify, but she did not answer the subpoena or appear at trial. (Subpoena; CP ____).

First, Deputy Jilk testified that the Lummi Officers at the scene pointed out defendant Rawlins and Ms. Sellers. Because Lummi Police are not cross-deputized as County deputies, they must call a deputy to arrest a non-tribal member on the Lummi Reservation. When Deputy Jilk arrived, the Lummi officers filled him in.

Q. And did they [Lummi Police] identify who this woman was?

MS. ANDERSON [Defense Counsel]:
Objection, Your Honor.

MR. SETTER [Deputy Prosecutor]: That can
be answered yes or no, and that's as far as I'm
pursuing.

THE COURT: I'll overrule the objection.

THE WITNESS: Yes.

Q. (By Mr. Setter) And did they indicate her
location?

A. Yes.

* * * *

Q. And the officers identified her to you?

A. Yes.

(1/5/10 VRP 9). Deputy Jilk ran the names of defendant Rawlins
and Ms. Sellers through his laptop and confirmed a valid no contact
order protected her from defendant. (1/5/10 VRP 9-10).

Deputy Jilk also spoke directly to Ms. Sellers to confirm her
identity. At trial, when the prosecutor asked Deputy Jilk "who did
she [Sellers] identify herself to be", defense counsel objected and
the trial judge heard argument outside the jury's presence. (1/5/10
VRP 13-14). The trial court concluded that Deputy Jilk could testify
about how he determined the woman at the scene was Ms. Sellers.

I think he [Deputy Jilk] has the right to ask, he has a
duty to ask people their names. When he asks the

name and the date of birth and gets that, he has then gotten an identification. If that identification turns out not to be accurate, there's evidence to show that, then he can be impeached with that, but he's gotten that information.

(1/5/10 VRP 14). The trial court granted defense counsel a continuing objection for introduction of any identification evidence.

(1/5/10 VRP 14).

The prosecutor then repeated his question to Deputy Jilk.

Q. You talked to this woman, and she identified herself to you to be who by name?

A. Jan Sellers.

Q. Jan Sellers?

A. Right.

Q. And did you get a date of birth from her as well?

A. Yes, I did.

(1/5/10 VRP 15). These were the only statements from Ms. Sellers that Deputy Jilk recounted. The remaining testimony concerned defendant Rawlins' statements and Jilk's description of the couple's demeanor.

Lummi Police Officer Perez also testified about how he identified Ms. Sellers. Lummi dispatch called Officer Perez and another officer, Brandon Gates, to investigate a landlord tenant

dispute on the Lummi Reservation. (1/5/10 VRP 37). When they arrived, Perez and Gates found a trailer full of people. (1/5/10 VRP 38). Perez immediately recognized defendant Rawlins. (1/5/10 VRP 38) (“I recognized Mr. Rawlins from previous contact that I had with him on Cagey Road”).

Gates and Perez then asked the other people to identify themselves.

Q. Was there a woman there by the name of Jan Sellers?

A. Yes, sir.

Q. And how did she identify you to – how did she identify herself to you or to Officer Gates?

A. She said her name was Jan Sellers.

Q. Okay. Did she present any identification that you, that you recall?

A. Not to me, I believe to Officer Gates.

(1/5/10 VRP 40). Officer Gates ran a records check on defendant Rawlins and Ms. Sellers and discovered the pending no contact order. (1/5/10 VRP 42). Both Perez and Gates saw defendant Rawlins with Ms. Sellers at the trailer, in violation of the order. (1/5/10 VRP 44).

Finally, Officer Perez testified that Ms. Sellers “requested if she could give her husband a kiss before he was taken to jail.” (1/5/10 VRP 51). Because the couple had cooperated with them, the investigating officers allowed the couple to kiss and say goodbye. (1/5/10 VRP 51-52).

The trial court admitted limited testimony about Jan Sellers’ statements. It amounted to investigating officers stating that Sellers told them her name and birthday.

B. The Evidence Of Defendant’s Guilt

At trial and on appeal, defendant Rawlins challenges only the evidence of Jan Sellers’ identity. He does not dispute the other elements of a Felony violation of a no contact order: (1) a valid order existed; (2) defendant knew about the order; (3) defendant had two prior convictions for violating the order; and (4) the violation occurred in Washington State. (Jury Instruction No. 7; CP 31).

Three facts other than Sellers’ self-identification established that she was defendant Rawlins’ wife, the subject of the protective order. First, defendant Rawlins asked the officers to give his belongings to Sellers before taking him to jail. As Deputy Jilk testified,

I asked, which is typical when we take somebody in custody, if they have property that doesn't, isn't necessary to go to jail with them. I asked if [defendant Rawlins] wanted to leave any of that at the residence, and it was agreed that yes, he did, and he wanted to leave that with Ms. Sellers.

(1/5/10 VRP 21-22). Officer Perez confirmed this.

A. Mr. Rawlins had asked if his wife could take custody of his backpack and other belongings.

Q. Let's stop there. Did the transfer occur?

A. Yes, sir.

Q. So you physically saw items that you had taken from Mr. Rawlins being taken up by Mrs. Sellers?

A. Yes, sir.

Q. Did anybody object?

A. No, sir.

(1/5/10 VRP 53).

Second, defendant Rawlins and Ms. Sellers embraced before the officers took him to jail. Deputy Jilk described the scene.

Q. But there was enough light that [defendant Rawlins] would be able to see [Ms. Sellers] based on their distance?

A. Yes.

Q. How close did they get?

A. They, they actually gave each other a hug.

Q. Okay, and was that with your permission?

A. Yes, it was.

* * * *

Q. Okay, and then what happened?

A. Then I placed Mr. Rawlins in the back seat of my patrol vehicle, read him his Miranda rights, and he and the other subject were transported to the county jail.

(1/5/10 VRP 24-25).

Third, neither defendant Rawlins nor Ms. Sellers protested when the investigating officers told them about the protective order. Instead, the couple was saddened that once again, defendant Rawlins was being arrested. As Deputy Jilk observed,

Q. ...how would you describe Mr. Rawlins' emotional state just before, during, and after the hug?

A. He was very cooperative with me. You know, neither party, neither one of them wanted him to go to jail, but he was cooperative.

Q. And how would you describe her emotional state just before, during, and after the hug?

A. Same. I would describe it as the same as Mr. Rawlins, cooperative, you know. Nobody wanted anyone to be taken.

Q. How would you describe her emotional state at that time, angry, sad, mad?

A. I think they were both a bit sad.

(1/5/10 VRP 25).

If the woman was not Ms. Sellers, she would have done something to announce this was a big mistake. The couple's resignation was consistent with having been through this before, twice.

ARGUMENT

III. STANDARD OF REVIEW

The Court reviews the trial court's admission of evidence for an abuse of discretion and ruling on the Confrontation Clause de novo.

We review the admission of hearsay for an abuse of discretion. Discretion is abused only if the trial court's decision is manifestly unreasonable or is based on untenable reasons or grounds. A confrontation clause challenge is, on the other hand, reviewed de novo.

State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

IV. TESTIMONY ABOUT JAN SELLERS' SELF-IDENTIFICATION DID NOT VIOLATE THE CONFRONTATION CLAUSE

This appeal presents another consequence from the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In Crawford, the

Supreme Court identified the original intent of the Confrontation Clause.

The text of the Confrontation Clause...applies to “witnesses” against the accused—in other words, those who “bear testimony.” 2 N. Webster, *An American Dictionary of the English Language* (1828). “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Crawford, 541 U.S. at 51, 124 S.Ct. at 1364.

The question is not whether an out-of-court statement is admissible, but rather whether it is “testimonial”.

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

Crawford, 541 U.S. at 51, 124 S.Ct. at 1364.

Two years after Crawford, the Supreme Court in Davis v. Washington further defined testimonial statements.

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273 – 2274, 165 L.Ed.2d 224 (2006).

The Washington Supreme Court distilled Davis into a four-point test. State v. Koslowski, 166 Wn.2d 409, 418-419, 209 P.3d 479 (2009). Applying the test to the facts here, Jan Sellers' self-identification was not testimonial.

A. Sellers' Identity Was A Current Event

1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant.

State v. Koslowski, 166 Wn.2d at 418-419. When the officers asked Ms. Sellers her name, they were investigating a landlord-tenant dispute and assessing the scene. This was not asking Sellers to recount past events, but rather the officers' first step in providing assistance.

B. Although No Emergency Existed, The Police Asked For Identification To Offer Assistance

(2) Would a “reasonable listener” conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency.

Koslowski, 166 Wn.2d at 419. No emergency existed at the trailer when Officers Perez and Gates arrived. But this does not automatically make any statements testimonial.

In Davis, the Supreme Court reviewed the admissibility of a 911 call from Michelle McCottry and compared it to an officer’s interview with Amy Hammon after the crime had occurred.

The statements in Davis were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry’s present-tense statements showed immediacy; Amy’s narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officer’s questions, he had her execute an affidavit, in order, he testified, “[t]o establish events that have occurred previously.” App. in No. 05-5705, at 18.

Davis v. Washington, 547 U.S. 813, 831-832, 126 S.Ct. 2266, 2279, 165 L.Ed.2d 224 (2006).

Although the facts in defendant Rawlins' case fit neither category neatly, they closely resemble the "initial inquiries" in Davis.

Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, see 829 N.E.2d, at 453, 457, we do not hold the opposite—that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Hiibel, 542 U.S., at 186, 124 S.Ct. 2451. Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements. But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial.

Davis, 547 U.S. at 832, 126 S.Ct. at 2279. When Officers Perez and Gates arrived at the scene, they needed to identify everyone to assess the threat present. That initial identification yielded nontestimonial answers.

C. The Nature of The Question Was Nontestimonial

(3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a

violent felon would indicate the elicited statements were nontestimonial.

Koslowski, 166 Wn.2d at 419. This factor heavily favors admitting the identification and should be conclusive in the Court's analysis.

Asking for a person's identification precedes nearly all law enforcement actions. As the Supreme Court recognized in Davis, officers "need to know who they are dealing with..." Davis, 547 U.S. at 832, 126 S.Ct. at 2279. The case Davis cites, Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004), explains in detail why identification is a fundamental first question.

Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment. Interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.

Hiibel, 542 U.S. at 185, 124 S.Ct. at 2458.

The Supreme Court underscored the multiple reasons why police may ask for identification.

Obtaining a suspect's name in the course of a Terry stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand,

knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.

Hiibel, 542 U.S. at 186, 124 S.Ct. at 2458. The investigating officers asked for Jan Sellers' name and birthday as a routine, critical step in assessing the danger posed. By answering the question, Ms. Sellers did not bear witness against defendant Rawlins. She simply told the officers who she was.

D. The Brief Questioning Was Informal And Preliminary

(4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 419. The investigating officers asked Jan Sellers a brief set of questions, at the scene, similar to those given to the other people present. None of this was recorded and none took place in custody or at the police station.

This factor reveals the unpredictable reach of defendant's argument. If an officer asking for identification creates a testimonial statement, *any* police stop requires all present to testify. An officer

no longer has the ability to quickly identify who was at the scene of an investigation. Because every police inquiry at some point requires identification, defendant's argument would conceivably raise Confrontation Clause issues in every case.

Applying the four factors in Koslowski, Jan Sellers' brief statement identifying herself is not testimonial. "Initial inquiries at the scene of a crime might yield nontestimonial statements when officers need to determine with whom they are dealing in order to assess the situation and the threat to the safety of the victim and themselves." Koslowski, 166 Wn.2d at 426. Because the statements were nontestimonial, their admission did not violate the Confrontation Clause.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE STATEMENTS

Defendant Rawlins also challenges the statements as inadmissible hearsay. As quoted above, this Court has upheld admission to explain why police officers investigated further rather than turning to other issues. State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005) ("statement...offered to show why an officer conducted an investigation").

At trial, the court admitted the statements on a related but different ground – identification under ER 801(d)(1)(iii). A statement is not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ...(iii) one of identification of a person made after perceiving the person.

ER 801(d)(1). This rule would apply if Officer Perez or Deputy Jilk repeated a statement *he* made identifying Ms. Sellers at the scene. But because the declarant, Ms. Sellers, did not testify at trial, a third party cannot introduce the statement. See State v. Grover, 55 Wn. App. 923, 932, 780 P.2d 901 (1989) (when identifying witness testifies, prior statement of witness “may be admitted through testimony of another person who heard or saw the identification”).

This does not require reversal, however. “If the improperly admitted hearsay statements...were admissible on alternative grounds, then no actual and substantial prejudice resulted.” In re Personal Restraint of Grasso, 151 Wn.2d 1, 19, 84 P.3d 859 (2004). “We may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds that the record supports.” State v. Kennealy 151 Wn. App. 861, 879, 214

P.3d 200 (2009). Here, the evidence was otherwise admissible under Iverson.

VI. ANY ERROR WAS HARMLESS

The evidence of Ms. Sellers' identity, and defendant Rawlins' guilt, was overwhelming. First, no dispute exists that Defendant Rawlins was at the trailer on October 16, 2009. Both Officer Perez and Deputy Jilk saw him there and questioned him. (1/5/10 VRP 43). Second, both officers saw defendant Rawlins and the woman identified as Jan Sellers together at the trailer.

Q. Mr. Rawlins, the man that identified himself as Mr. Rawlins?

A. Yes.

Q. The woman identified herself as Sellers. I just want to focus on them. Were they close to each other at the time that you were there?

A. Yes.

Q. So the Defendant would know that Ms. [Sellers] was there?

A. Yes, sir.

(1/5/10 VRP 43).

Third, defendant Rawlins and the woman identified as Sellers acted as husband and wife – to the detriment of both. Had Ms. Sellers refused to identify herself, the officers (and a

reasonable jury) could conclude by the couple's actions that she was defendant Rawlins' wife. As described above in the statement of facts, neither Rawlins nor the woman denied the existence of the protective order, nor did they claim it did not apply. All their actions were consistent with a couple who knew that defendant Rawlins' presence violated the protective order, and was a crime. Even without Ms. Sellers' self-identification, no reasonable doubt exists that they were together and that defendant violated the no contact order.

Because of this, any error from admitting Ms. Sellers' statements was harmless.

Confrontation clause error may be harmless. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005). In Davis, we adopted the "overwhelming untainted evidence" test: if the untainted evidence is overwhelming, the error is deemed harmless. *Id.* at 305, 111 P.3d 844 (citing State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). If there is no "reasonable probability that the outcome of the trial would have been different had the error not occurred," the error is harmless. State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

State v. Mason, 160 Wn.2d 910, 927, 162 P.3d 396 (2007).

CONCLUSION

At the beginning of any inquiry, police officers ask for the identification of those present. Because answering this question is

a preliminary, nontestimentary act, the trial court did not err by allowing investigating officers to testify that Jan Sellers told them her name and birthday. The State of Washington respectfully requests this Court to affirm defendant Keith Rawlins conviction and dismiss this appeal.

DATED this 21st day of December, 2010.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Brief of Respondent** to:

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DATED this 21ST day of December 2010.



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