

66276-7

66276-7

No. 66276-7

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

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STATE OF WASHINGTON,

Respondent,

v.

BUD MICHAEL FRASER,

Appellant.

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FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

In Bud Fraser's murder trial, the trial court admitted the decedent's out-of-court statement to police, in which he claimed Mr. Fraser repeatedly threatened and harassed him and he feared for his life. Admission of the testimonial statement without an opportunity for cross-examination violated Mr. Fraser's constitutional right to confront the witnesses against him.

In addition, admission of reports of cellular telephone records and text messages violated Mr. Fraser's confrontation rights, where the reports were admitted through the testimony of a witness who did not actually prepare the reports.

Finally, the trial court abused its discretion in admitting a gruesome autopsy photograph that was cumulative and unnecessary.

## B. ASSIGNMENTS OF ERROR

1. Admission of Colin Cross's out-of-court statement to police violated Mr. Fraser's Sixth Amendment right to confront the witnesses against him.

2. Admission of cellular telephone and text message reports violated Mr. Fraser's Sixth Amendment right to confront the witnesses against him.

3. The trial court abused its discretion in admitting a gruesome autopsy photograph that was cumulative and unnecessary.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment requires that, when an out-of-court "testimonial" statement is admitted in a criminal trial, the defendant be given an opportunity to cross-examine the declarant. A witness's out-of-court accusatory statement made to police where there is no ongoing emergency is "testimonial" for purposes of the Confrontation Clause. Was Mr. Fraser's constitutional right to confrontation violated, where the decedent's out-of-court statement to police was admitted at trial but Mr. Fraser never had an opportunity to cross-examine him?

2. A report created specifically to prove some fact in a criminal trial is "testimonial" for purposes of the Confrontation Clause. The defendant has the right to confront the person who created the report. Was Mr. Fraser's constitutional right to confrontation violated where the court admitted cellular telephone and text message reports created specifically for trial but Mr. Fraser never had an opportunity to cross-examine the person who created the reports?

3. Did the trial court abuse its discretion in admitting a gruesome autopsy photograph that was cumulative and unnecessary?

D. STATEMENT OF THE CASE

1. Background. Bud Fraser is Danielle Sigmond's ex-boyfriend. RP 65. The two dated for about three years and had a rocky relationship. RP 65. They broke up in 2009. RP 65. At one point, Ms. Sigmond was charged with and convicted of assault for punching Mr. Fraser in the face; a restraining order was issued against her. RP 66. Another time, she threatened to blow up his car, prompting either him or his father to call the police. RP 123.

Ms. Sigmond started dating Colin Cross in Spring 2009 and moved into his apartment about two months later. RP 68-69. But throughout the time she dated Mr. Cross, Ms. Sigmond continued to have contact with Mr. Fraser. RP 70. Mr. Cross knew about her ongoing relationship with Mr. Fraser and was angry about it. RP 73-74. On one occasion, he became so angry that he punched a wall and broke his arm. RP 106-07. On another occasion, he appeared at the job site where Mr. Fraser worked with his father and angrily accused Mr. Fraser of breaking the windows of Ms.

Sigmond's car.<sup>1</sup> RP 97. On that occasion, he threatened Mr. Fraser and his family. RP 712. Mr. Fraser was not present but heard about the threats later and contacted police, providing a written statement. RP 712-13; Exhibit 78. The police told him they could not do anything about the threats. RP 712-13.

According to Ms. Sigmond, Mr. Fraser was also unhappy about her relationship with Mr. Cross. RP 70-71. He sent her frequent text messages and telephoned her often, and his attempts to contact her became more frequent as time went on. RP 71. She reciprocated his text messages and telephone calls. RP 100. On three occasions, Mr. Fraser told her he was going to kill Mr. Cross. RP 72-73. She did not take the threats seriously. RP 119.

One day in late Spring 2009, Mr. Cross and Mr. Fraser had a direct confrontation. RP 714. Mr. Fraser and his cousin went to Ms. Sigmond's apartment and found Mr. Cross there. RP 715. Mr. Fraser was surprised to see Mr. Cross. RP 715. Ms. Sigmond was not present. RP 715. Mr. Cross slammed the door closed on Mr. Fraser and Mr. Fraser kicked it. RP 176, 716. Then Mr. Cross opened the door and came toward Mr. Fraser with a kitchen knife,

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<sup>1</sup> Mr. Fraser had denied breaking the windows. RP 97.

threatening to kill him. RP 716. Mr. Fraser took Mr. Cross's threats seriously. RP 714.

Mr. Cross's friend, Samuel Wene, was waiting outside in the car at the time. RP 447-48. According to him, Mr. Fraser and his cousin ran toward Mr. Cross as soon as Mr. Cross arrived at the apartment, looking as though they intended to hurt him. RP 449. Mr. Cross ran inside and slammed the door and Mr. Fraser kicked it. RP 449, 716. Then Mr. Cross opened the door holding a kitchen knife and Mr. Fraser and his cousin ran away. RP 451.

Mr. Wene encountered Mr. Fraser a few weeks later outside the grocery store. RP 452-53. According to Mr. Wene, Mr. Fraser said, "Colin better watch his back because he's going to be blasted." RP 452-53. Mr. Fraser denied saying that. RP 719.

2. The shooting. Ms. Sigmond worked at an espresso stand in Everett. RP 77. Mr. Fraser would often visit her there in the morning before he went to work and the two would "chitchat." RP 78-79. She would give him free coffee. RP 616-17.

On September 14, 2009, Ms. Sigmond arrived at the espresso stand as usual around 4:45 a.m. RP 85. Mr. Cross drove her there. RP 85. He dropped her off and then went to park the car nearby. RP 86-87. A few seconds later, she heard a fire

cracker sound and went outside to find Mr. Cross lying on the asphalt next to the car, bleeding from his head. RP 88.

Mr. Cross died from a gunshot wound to the head. RP 423. The "stippling" on his face, which is caused by gunpowder and indicates the rough gunshot range, showed the muzzle of the gun was one to three feet away from Mr. Cross at the time of the shooting. RP 375, 381. Mr. Cross died almost instantly. RP 444. The location of his body next to the car was consistent with the theory that he was standing at the time he was shot and simply fell to the ground. RP 445-46.

The State's experts testified the bullet entered Mr. Cross's head above the lip and exited through the back of the neck. RP 394. The trajectory of the bullet was front to back, left to right, and slightly downward. RP 437. The firearms expert could not say whether the barrel of the gun was pointed up or down, which would depend on how Mr. Cross was positioned at the time. RP 407-08. There was no bullet hole in the car and no ricochet off the asphalt. RP 391-92. The expert could not discern from the evidence whether the shooting was accidental or intentional. RP 401.

3. The charge and the defense. The State charged Mr. Fraser with one count of first degree premeditated murder, RCW

9A.32.030(1)(a), while armed with a firearm, RCW 9.94A.510, 9.41.010, 9.94A.602. CP 141-42.

Mr. Fraser testified he went to the espresso stand on September 14, 2009, to see Ms. Sigmond as he often did. RP 616, 635. This time he was early, arriving at around 4:30 or 4:40 a.m., before the stand opened. RP 635. He decided to park in the McDonald's parking lot nearby and wait. RP 638, 643. He saw Ms. Sigmond's car arrive, with Mr. Cross driving. RP 650-51. He was surprised to see Mr. Cross, as Mr. Cross did not usually drive Ms. Sigmond to work. RP 85, 656. He was afraid and concerned for his safety, based on his prior altercations with Mr. Cross and the threats Mr. Cross had made against him. RP 656, 716, 735, 771-72. He thought Mr. Cross might have come that morning in order to confront him, as he thought Mr. Cross must know he would be meeting Ms. Sigmond at the espresso stand. RP 658, 663.

Mr. Fraser decided to find out why Mr. Cross was there and confront him in order to get it all out into the open. RP 656, 665, 771-72. He had a rifle in the car which he had put there on a previous occasion when he had planned to go shooting with his father. RP 759. Mr. Fraser and his father would often go hunting together. RP 129. Mr. Fraser grabbed the rifle, along with a

blanket lying next to it, in order to protect himself. RP 658, 773. He did not know whether the gun was loaded and thought the safety must be on, although he did not check. RP 660-61. He exited the car and walked toward the back of Mr. Cross's car, holding the rifle pointed downward at his side. RP 663-65.

As Mr. Fraser approached the car, he threw the blanket on the ground. RP 665. When he arrived, the driver's door swung open and Mr. Cross exited and stood facing him. RP 667. Mr. Fraser wanted Mr. Cross to see the gun so that he would not advance toward him, so Mr. Fraser turned slightly to show him the gun. RP 669. The two men looked eye to eye. RP 670. Then Mr. Cross suddenly lunged toward him and grabbed at the rifle. RP 670-71. Mr. Fraser was startled and jumped back. RP 673. As he did so, he raised his arms inadvertently, lifting the gun, and heard a loud bang. RP 673, 675-76. The gun had accidentally fired and Mr. Cross collapsed to the ground. RP 673, 720. The incident happened so quickly, there was no time for words between the two men. RP 671. Mr. Fraser did not intend to kill Mr. Cross. RP 720.

The defense firearms expert testified the physical evidence was consistent with both an intentional and an unintentional shooting. RP 582. Like the State's expert, the defense expert

noted there was no bullet hole in the car or ricochet mark on the pavement near the car. RP 583-84. This, combined with the trajectory of blood and other matter, suggested Mr. Cross was standing and the gun was in a horizontal position at the time of the shooting. RP 583-84.

When the gun went off, Mr. Fraser panicked and ran. RP 676-77, 795. He ran to his car and put the gun inside. RP 676-77. Then he called his father, who picked him up and drove him home. RP 680-81. He decided to hitchhike to Idaho to visit his grandfather, who had cancer. RP 681-82. Police arrested him in Ellensburg, Washington. RP 682-83. Police found his location by "pinging" his cell phone. RP 187-90.

4. Admission of Mr. Cross's testimonial statement. The State moved to admit an out-of-court written statement made by Mr. Cross to police, over defense objection. CP 133-40; RP 470. Mr. Cross made the statement to Everett Police Officer Brian Lydell on May 31, 2009, after Officer Lydell was dispatched to a harassment call. RP 484; Exhibit 56. Mr. Cross had called police after the confrontation he had with Mr. Fraser at Ms. Sigmond's apartment, when Mr. Cross had come at Mr. Fraser with a knife.

In the statement, Mr. Cross accused Mr. Fraser of harassing and threatening him and said he feared for his life. Exhibit 56. The statement reads in full:

I started receiving text messages that were threatening on May 29, 2009, in regards to my girlfriend. I started dating Danielle Sigmond around April 20, 2009. Ever since I've started dating her I have been harassed by her ex-boyfriend Bud Frasier [sic]. He has continually called and text message [sic] me threats and putdowns. There is a no contact order on my girlfriend and Bud Frasier. My window has been smashed out in my truck also [sic] in my girlfriend's car. I am constantly being harassed and fear for my and my girlfriend's life. Have many threatening messages and phone calls and just want it to stop. Have also filled [sic] two reports with Marysville Police Dept.

Exhibit 56. The police took no formal action in regard to the allegations at the time. RP 487.

The trial court ruled the statement was admissible because Mr. Fraser had forfeited his confrontation rights by killing Mr. Cross. RP 479-80. The court also ruled the Confrontation Clause did not apply, because the statement was not offered for the truth of the matter but to prove Mr. Cross's "state of mind."<sup>2</sup> Id.

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<sup>2</sup> Under ER 803(3), an out-of-court statement may be admitted to prove the declarant's "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." Although ordinarily a victim's state of mind is not at issue in a murder trial, it may be at issue if the defendant asserts a defense of accident. See State v. Parr, 93 Wn.2d 95, 103, 606 P.2d 263 (1980).

At the time the statement was admitted into evidence, the trial court provided the following oral instruction to the jury:

[T]his evidence, is being allowed for Mr. Cross's state of mind that he made a statement to the police officer. And you would consider it for what his state of mind was, but not for the truth of the matter.

RP 486.

Officer Lydell testified about the circumstances of Mr. Cross's statement. RP 484-87.

5. Cell phone and text message reports. The State's theory was that Mr. Fraser killed Mr. Cross intentionally out of jealousy over his relationship with Ms. Sigmond. See, e.g., RP 821-27 (prosecutor's closing argument). To prove its theory, the State offered exhibit 1, a report containing the content of text messages sent to and from Mr. Fraser's cell phone between September 6 and September 15, 2009; and exhibit 45, a report of call records for Mr. Fraser's cell phone, showing the phone numbers of incoming and outgoing calls, and the dates and durations of the calls. RP 498-99, 501-02.

At trial, Thomas Koch, a records custodian for Sprint, testified about the exhibits. RP 494. He works in a group at Sprint whose purpose is to comply with legal demands for customer records and testify if necessary. RP 494-95. He is a manager in

the group. RP 495. He explained that when phone calls are made and text messages are sent, the system captures and stores them near the time that they are made or sent. RP 495-96. In September 2009, Sprint kept a record of all incoming and outgoing calls and text messages<sup>3</sup> and relied on those records in the ordinary course of business. RP 497.

Exhibits 1 and 45 are reports created specifically for trial. Mr. Koch explained that when his group receives a legal demand for records, they produce a special report containing the information requested. RP 496. They create the reports by querying an automatic system, defining the date range, phone numbers, and other information relevant to the records for which they are searching. RP 495-96. Mr. Koch did not personally prepare the reports contained in exhibits 1 and 45. RP 505.

6. Gruesome autopsy photograph. The State moved to admit several photographs taken during the autopsy of Mr. Cross. Specifically, the State offered exhibits 62 and 63 to show the damage inside Mr. Cross's mouth. RP 404. Defense counsel objected to admission of those two exhibits as being particularly gruesome and unnecessary. RP 405, 428. The trial court agreed

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<sup>3</sup> Apparently, Sprint no longer keeps text messages due to the large number of messages its customers send and receive, but at the time of the incident here, Sprint stored text messages for about 12 days. RP 497.

exhibit 63 was "troublesome" and excluded it from evidence, but the court admitted exhibit 62, finding it was relevant to show the damage inside Mr. Cross's mouth. RP 405, 428.

Exhibit 62 is a close-up photograph of the injuries inside Mr. Cross's mouth with a metal rod that shows the trajectory of the bullet. RP 428. But exhibit 61 contains the same information, showing the trajectory of the bullet with a metal rod piercing the cheek. RP 426; Exhibit 61.

7. Verdict. The jury found Mr. Fraser guilty of premeditated first degree murder while armed with a firearm as charged. CP 54, 58, 76.

#### E. ARGUMENT

1. MR. FRASER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE TRIAL COURT ADMITTED MR. CROSS'S TESTIMONIAL STATEMENT BUT MR. FRASER HAD NO OPPORTUNITY TO CROSS-EXAMINE HIM

The trial court admitted Mr. Cross's May 31, 2009, written statement to police accusing Mr. Fraser of threatening and harassing him even though Mr. Fraser never had an opportunity to cross-examine Mr. Cross about the statement. RP 479-80. The court ruled Mr. Cross had forfeited his confrontation rights by killing Mr. Cross. Id. But in Giles v. California, 554 U.S. 353, 377, 128 S.

Ct. 2678, 171 L. Ed. 2d 488 (2008), the United States Supreme Court unequivocally held a criminal defendant does not forfeit his confrontation rights unless the State proves he deliberately procured the witness's absence in order to prevent him from testifying. There is no such showing here.

Also, the court ruled the out-of-court statement did not implicate the Confrontation Clause because the statement was offered to prove Mr. Cross's "state of mind" and not for the truth of the matters asserted in the statement. RP 479-80. But the statement was functionally equivalent to hearsay, in that it was offered to prove the truth of Mr. Cross's assertion that he feared Mr. Fraser. In addition, the jury was likely to view the statement as evidence that Mr. Fraser threatened Mr. Cross, despite the court's limiting instruction. Therefore, the statement was "testimonial" for purposes of the Confrontation Clause and Mr. Fraser had a right to cross-examine Mr. Cross, which was violated.

a. The Sixth Amendment provides a defendant an unqualified right to cross-examine the declarant of any "testimonial" out-of-court statement offered against him in a criminal trial. The Confrontation Clause 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. In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held the Confrontation Clause "guarantees a defendant's right to confront those 'who bear testimony' against him." Melendez-Diaz v. Massachusetts, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2527, 2531, 174 L. Ed. 2d 314 (2009) (quoting Crawford, 541 U.S. at 51). Under Crawford, out-of-court "testimonial" statements may be admitted against a defendant only if either the declarant of the statements testifies at trial or the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him. Crawford, 541 U.S. at 54.

A Confrontation Clause challenge is reviewed de novo. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

b. Mr. Fraser did not forfeit his federal confrontation right because the State did not show he killed Mr. Cross in order to prevent him from testifying. In Giles, 554 U.S. 353, the United States Supreme Court addressed whether the doctrine of "forfeiture by wrongdoing" applied in an ordinary murder trial where the State offered the decedent's out-of-court "testimonial" statements against the accused. The Court reviewed the history of the common-law doctrine and concluded that historically, the doctrine allowed

admission of an absent witness's out-of-court statements only when the defendant engaged in conduct *designed* to prevent the witness from testifying. Id. at 359. "The manner in which the rule was applied makes plain that unopposed testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying." Id. at 361; see also id. at 366 (noting American courts prior to 1985 never invoked forfeiture by wrongdoing outside the context of deliberate witness tampering). In light of the common law history, the Court refused to approve the doctrine of forfeiture by wrongdoing outside the context of deliberate conduct intended to prevent the witness from testifying. Id. at 377.

The State must prove by "clear, cogent and convincing" evidence that the forfeiture by wrongdoing doctrine applies. Mason, 160 Wn.2d 926-27; State v. Fallentine, 149 Wn. App. 614, 620, 215 P.3d 945, rev. denied, 166 Wn.2d 1028, 217 P.3d 337 (2009).

Because the State presented no evidence to show that Mr. Fraser killed Mr. Cross deliberately in order to prevent him from testifying, the doctrine of forfeiture by wrongdoing does not apply in this case.

c. Mr. Cross's out-of-court statement to police was "testimonial" for purposes of the Confrontation Clause and therefore Mr. Fraser had a right to cross-examine him.

i. A witness's accusatory statement to police during the course of a police investigation is "testimonial" if not made to seek help from an ongoing emergency. The United States Supreme Court in Crawford, 541 U.S. 36, did not offer a comprehensive definition of what constitutes a "testimonial" statement. But quoting from one of the briefs in the case, the Court said the general rule is that a testimonial statement is one that the declarant "would reasonably expect to be used prosecutorially." Id. at 51 (quoting Br. for Pet. 23). That is, the relevant question is whether the statement was made under "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52 (quoting Br. for Nat'l Ass'n of Criminal Defense Lawyers et al. as Amici Curiae at 3). "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." Crawford, 541 U.S. at 52.

An exception exists for out-of-court statements made in response to police interrogation if the primary purpose of the

interrogation is to address an ongoing emergency rather than to establish past events. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Michigan v. Bryant, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1143, 1155, 179 L. Ed. 2d 93 (2011). "When, as in Davis, the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." Bryant, 131 S. Ct. at 1155. The question is whether the parties' actions, the statements made, and the circumstances of the interrogation, objectively viewed, indicate the primary purpose of the interrogation was to resolve an ongoing emergency. Id. at 1160-62.

The Washington Supreme Court has adopted the above standards for determining whether an out-of-court statement was "testimonial" for Sixth Amendment purposes. See Mason, 160 Wn.2d at 923-24 (evaluating whether statements were made under circumstances that would lead objective witness reasonably to believe the statements would be available for use at a later trial, or whether statements were made for purpose of resolving a present emergency); State v. Shaffer, 156 Wn.2d 381, 390, 128 P.3d 87

(2006) (question is whether declarant had reason to expect that her statements would be used at a later trial).

Here, there should be no question Mr. Cross's out-of-court statement was "testimonial" under Crawford. Mr. Cross submitted a written statement to police accusing Mr. Fraser of threatening and harassing him after police responded to a harassment call. RP 484; Exhibit 56. Mr. Cross was not seeking help from an ongoing emergency at the time. Because a reasonable person in Mr. Cross's position would anticipate that the statement would be available for use at a later trial, the statement was "testimonial" for purposes of the Confrontation Clause.

ii. Offering an out-of-court statement for an ostensibly nonhearsay purpose does not shield the statement from Confrontation Clause protection. In Mason, the Supreme Court asserted that courts must "guard against any 'backdoor' admission of inadmissible hearsay statements" under a purported theory that the evidence is not offered for the truth of the matter asserted. Mason, 160 Wn.2d at 921. The court acknowledged a footnote in Crawford which states: "The Clause also does not bar the use of testimonial statements for purposes other than establishing the

truth of the matter asserted."<sup>4</sup> Id. (quoting Crawford, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985))). But Mason concluded that whether or not a statement is offered for a nonhearsay purpose is not determinative of whether it is subject to Confrontation Clause protection. Mason, 160 Wn.2d at 921-22. The court was "not convinced a trial court's ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis. To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge." Id. Mason did not determine whether the statements at issue, which were admitted for a purported nonhearsay purpose, were "testimonial," however, as the court concluded Mason forfeited any confrontation right. Id. at 922, 927.

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<sup>4</sup> The United States Supreme Court recently granted certiorari in a case that may require it to squarely confront footnote 9 from Crawford. In People v. Williams, 238 Ill.2d 125, 939 N.E.2d 268, 345 Ill. Dec. 425 (2010), cert. granted, \_\_\_ S. Ct. \_\_\_, 2011 WL 2535081 (No. 10-8505, June 28, 2011), the trial court admitted a forensic scientist's analysis of a DNA sample through the testimony of a different forensic scientist who had matched the DNA profile to the defendant's profile taken from a police database. The Illinois court held the Confrontation Clause was not implicated because the first scientist's report was not "hearsay" and was instead admitted to show the underlying facts and data relied upon by the second expert in rendering her opinion. Id. at 145. The Supreme Court's webpage frames the issue as: "Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause." <http://www.supremecourt.gov/qp/10-08505qp.pdf>.

As Mason observed, when a testimonial out-of-court statement is offered for an ostensibly nonhearsay purpose, such as to show the declarant's state of mind, to explain the course of law enforcement's investigation, or to explain the basis of an expert witness's in-court opinion, and the statement discloses to the jury incriminating facts about the defendant, there is a heightened danger of infringement of the constitutional right to confrontation. Mason, 160 Wn.2d at 921-22; John C. O'Brien, The Hearsay Within Confrontation, 29 St. Louis U. Pub. L. Rev. 501, 528-29 (2010). Courts should exclude such a statement if it *functions* as testimonial hearsay, that is, if its principal relevance is to prove the matters asserted, or if the jury is likely to view the statement as evidence of the matters asserted. When the statement functions as testimonial hearsay, the defendant should have the same right to confront the declarant as he would for any other testimonial out-of-court statement.

Consistent with Mason, in the wake of Crawford, several courts in other jurisdictions have held that a defendant has a constitutional right to cross-examine the declarant of an out-of-court testimonial statement, even if the statement is offered for a nonhearsay purpose, if the principal relevance of the statement is

to prove the matters asserted. Where statements are offered to prove the basis of an expert's opinion, for example, many courts recognize the very reason the prosecution wants to introduce such hearsay is to invite the jury to credit the expert's opinion on the ground the hearsay statements are reliable.

For example, in People v. Goldstein, 6 N.Y.3d 119, 123, 810 N.Y.S.2d 100, 843 N.E.2d 727 (2005), a murder prosecution where the defense was insanity, the State's expert testified relying in part on statements obtained in interviews with third parties. The New York court held, "[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context." Id. at 128 (citing Kaye et al., The New Wigmore: Expert Evidence § 3.7, at 19 [Supp 2005] ("[T]he factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition.")). The court concluded the statements of the interviewees functioned as testimonial hearsay and therefore the defendant had a constitutional right to cross-examine them. Id. at 127-29.

Several other courts agree the Confrontation Clause generally does not permit out-of-court testimonial statements to be presented through expert testimony without an opportunity for cross-examination. See, e.g., United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) (gang expert could not transmit testimonial statements directly to jury); Commonwealth v. Avila, 912 N.E.2d 1014 (Mass. 2009) (medical examiner could not testify to underlying factual findings of non-testifying examiner who performed autopsy); People v. Dungo, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009) (medical examiner's testimony regarding non-testifying examiner's autopsy report violated Confrontation Clause because jury necessarily had to evaluate truth and accuracy of the report in order to evaluate the testifying examiner's opinion), rev. granted 220 P.3d 240, 102 Cal. Rptr. 3d 282 (2009); People v. Dendel, 289 Mich. App. 445, 797 N.W.2d 645 (2010) (expert's testimony regarding results of analysis of decedent's blood glucose level performed by non-testifying analysts upon which expert based his opinion as to cause of death violated Confrontation Clause).

Where out-of-court statements are offered for the nonhearsay purpose of explaining the reasons for police conduct, courts have similarly required the evidence be truly necessary for

that purpose, and that its use at trial be carefully limited to that purpose. Where those requirements were not met, courts have found constitutional error even where the trial court provided a limiting instruction. See, e.g., United States v. Hearn, 500 F.3d 479, 483-84 (6th Cir. 2007) (confidential informants' statements to police that defendant was a drug dealer were erroneously admitted, despite trial court's limiting instructions, where statements were not necessary to assuage juror concerns about the reasons for police conduct, and where much of the statements' content was not relevant to purported nonhearsay purpose); United States v. Maher, 454 F.3d 13, 22-23 (1st Cir. 2006) (confidential informant's statement to agent that defendant was a drug dealer not admissible to set context of police investigation, despite judge's limiting instruction); United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004) (confidential informant's statement that defendant was a drug dealer not admissible to explain officers' actions, despite judge's limiting instruction). As the court in Silva explained,

[a]llowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule.

Silva, 380 F.3d at 1020.

These cases are consistent with courts' long-standing recognition that the background exception to the hearsay rule is not an excuse for permitting police officers to repeat details of out-of-court accusations. See Maher, 454 F.3d at 20 (quoting 2 Broun, et al., McCormick on Evidence § 249, at 103 (5th ed. 1999));<sup>5</sup> James J. Duane, Arresting Officers and Treating Physicians: When May a Witness Testify to What Others Told Him for the Purpose of Explaining His Conduct?, 18 Regent U. L. Rev. 229, 231 n.6 & 7 (2005) (listing cases where courts have "held time and time again" that it is error to admit details of incriminating complaints about the accused for purported need to explain police conduct).

The cases are also consistent with well-established case law recognizing that even when the court tells the jury that evidence is

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<sup>5</sup> According to McCormick:

One area where abuse may be a particular problem involves statements by arresting or investigating officers regarding the reason for their presence at the scene of a crime. The officers should not be put in the misleading position of appearing to have happened upon the scene and therefore should be entitled to provide some explanation for their presence and conduct. They should not, however, be allowed to relate historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay. Such statements are sometimes erroneously admitted under the argument that the officers are entitled to give the information upon which they acted. The need for this evidence is slight, and the likelihood of misuse great. Instead, a statement that an officer acted "upon information received," or words to that effect, should be sufficient.

McCormick on Evidence, *supra*, § 249 (emphasis added).

admitted for a limited purpose, this does not necessarily erase a Confrontation Clause violation. If the jury is likely to rely on the evidence as proof of the matters asserted, or if the prosecution undermines the limiting instruction by urging the jury to consider the evidence for that purpose, a limiting instruction may have little curative effect. See Bruton v. United States, 391 U.S. 123, 129-30, 129 n.4, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (agreeing it is "impossible realistically" to believe the jury did not succumb to "the high irresistible temptation" to refer to the information provided for a limited purpose when assessing the accused's guilt) (citation omitted); Richardson v. Marsh, 481 U.S. 200, 208, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 78 L. Ed. 196 (1933) (rejecting notion jury could properly apply limiting instruction to evidence accusing defendant of criminal conduct as, "[d]iscrimination so subtle is a feat beyond the compass of ordinary minds."); State v. Parr, 93 Wn.2d 95, 107, 606 P.2d 263 (1980) (limiting instruction did not alleviate prejudice from statement accusing defendant of prior violent acts and threats improperly admitted for complainant's state of mind).

Thus, even where out-of-court testimonial statements are relevant for a nonhearsay purpose, courts should not admit such

evidence absent an opportunity for cross-examination, unless: (1) the court finds the prosecution has a real and genuine need for the evidence for the nonhearsay purpose; and (2) the evidence is limited or redacted to blunt the risk of improper use while still accommodating the prosecution's legitimate need. See Jeffrey L. Fisher, The Truth About the "Not for Truth" Exception to Crawford, 32 Feb Champ 18 (Jan./Feb. 2008) (offering analytical framework for evaluating admissibility of testimonial statements offered for nonhearsay purpose of explaining officers' conduct).

Like the exceptions for out-of-court statements offered to explain an expert's opinion or police officers' conduct, the "state of mind" exception to the hearsay rule is not a license to undermine the rights guaranteed by the Confrontation Clause or a mechanism for introducing incriminating evidence that is not subject to cross-examination. The Washington Supreme Court recognized such a danger in Parr when it reversed a murder conviction based on the State's introduction of evidence from the victim's brother that the victim said she feared the defendant and he had threatened her on another occasion. Parr, 93 Wn.2d at 107. The court held the testimony that the victim told witnesses she feared the defendant was admissible under this exception, provided it was relevant to

rebut the defense claim that the killing was accidental. But the testimony concerning a threat and other conduct of the defendant was not admissible under the rule and was highly prejudicial. Id. at 99-101 ("to hold admissible evidence of threats to a victim preceding a crime not witnessed by others would in effect permit the introduction of such declarations to prove their truth").

iii. Mr. Fraser's constitutional right to confront the witness was violated. The trial court admitted the entirety of Mr. Cross's testimonial statement in which he accused Mr. Fraser of threatening and harassing him and stated he was in fear for his life. RP 479-80, 484-87; Exhibit 56. Like out-of-court statements offered to explain the basis of an expert's opinion, the statement was not admissible absent an opportunity for cross-examination, because the statement was relevant only for the truth of the matters asserted and therefore functioned as testimonial hearsay. Goldstein, 6 N.Y.3d at 127-29; Mejia, 545 F.3d 179; Avila, 912 N.E.2d 1014; Dendel, 289 Mich. App. 445. The statement was relevant to rebut the defense of accident only if it was true that Mr. Cross actually feared for his life.

Even if Mr. Cross's statement that he feared for his life was admissible to rebut the defense of accident, his allegations that Mr.

Fraser threatened and harassed him were not relevant to show his state of mind. Parr, 93 Wn.2d at 99-101. Mr. Fraser therefore had a constitutional right to confront Mr. Cross about the statement, which was violated. Hearn, 500 F.3d at 483-84; Maher, 454 F.3d at 22-23; Silva, 380 F.3d 1018. Admission of the statement for a purported nonhearsay purpose was merely a "backdoor" means of violating the Confrontation Clause. See Mason, 160 Wn.2d at 921-22.

d. The error in admitting the evidence was not harmless. Error in admitting evidence in violation of the Confrontation Clause is subject to a constitutional harmless error analysis. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Where the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. Id.

at 426. But a conviction should be reversed "where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." Id.

Mr. Cross's allegations that Mr. Fraser threatened and harassed him left the jury with the impression that Mr. Fraser was a dangerous individual. The statement was highly prejudicial and the jury likely viewed it as direct evidence of guilt, notwithstanding the court's limiting instruction. See Parr, 93 Wn.2d at 99-101.

Although other witnesses testified they heard Mr. Fraser threaten Mr. Cross, this was the only statement directly from Mr. Cross that was admitted. The jury was likely to give great weight to Mr. Cross's statement because he called police, and because the statement was admitted through the testimony of a police officer. The other witnesses, Ms. Sigmond and Mr. Wene, did not call police. Ms. Sigmond testified specifically she did not take Mr. Fraser's threats seriously. RP 119.

Mr. Fraser's defense was that the shooting was accidental, that he confronted Mr. Cross because he was afraid of him, and that Mr. Cross had threatened him and he took the threats seriously. There is a reasonable possibility the jury relied on Mr. Cross's testimonial statement to tip the balance in favor of finding

Mr. Fraser was the aggressor. Guloy, 104 Wn.2d at 426.

Therefore, the error was not harmless beyond a reasonable doubt and the conviction must be reversed. Id.

2. ADMISSION OF CELLULAR TELEPHONE  
AND TEXT MESSAGE REPORTS VIOLATED  
MR. FRASER'S FEDERAL CONSTITUTIONAL  
RIGHT TO CONFRONTATION

Through the testimony of a Sprint records custodian, the State presented reports containing information about calls sent and received from Mr. Fraser's cellular telephone, and the contents of text messages sent and received from his phone. RP 494-97; Exhibits 1 and 45. But Mr. Koch, the records custodian, did not personally prepare the reports. RP 505. Because Mr. Fraser did not have an opportunity to cross-examine the person who prepared the reports, his constitutional right to confrontation was violated.

a. Mr. Fraser may raise the issue for the first time on appeal. Although Mr. Fraser did not object below to admission of the cellular telephone and text message reports, he may do so now. In State v. Lee, 159 Wn. App. 795, 813, 247 P.3d 470 (2011), the defendant challenged the admission of cell phone records that were admitted through affidavits attesting to their authenticity. The Court addressed the issue although not raised below, concluding it was a manifest error affecting a constitutional right. Id. at 813-14

(citing RAP 2.5(a)(3); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). As in Lee, the asserted error is one of manifest constitutional magnitude and may be raised for the first time on appeal.

b. The relevant question in determining whether a business record is testimonial is whether it was created for the purpose of establishing or proving some fact at trial. Even if the cellular telephone and text message reports in exhibits 1 and 45 were admissible as business records under the business records exception to the hearsay rule, the reports' admission may violate the Sixth Amendment requirement of confrontation if they constitute "testimonial" hearsay. Crawford, 541 U.S. at 61-62; Melendez-Diaz, 129 S. Ct. at 2533. In Crawford, the Court suggested that business records are, by nature, not testimonial, and therefore not subject to the Confrontation Clause. See Crawford, 541 U.S. at 56 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."). In Melendez-Diaz, the Court clarified that "[b]usiness . . . 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." Melendez-Diaz, 129 S.Ct. at 2539-40.

As stated, a "testimonial" statement is a statement made under "circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52 (citation omitted); Mason, 160 Wn.2d at 923-24; Shaffer, 156 Wn.2d at 390. Under Melendez-Diaz, a relevant question in determining whether a business record is testimonial is whether the record was created for the administration of an entity's affairs or for the purpose of establishing or proving some fact at trial. Melendez-Diaz, 129 S. Ct. at 2539-40.

If the record was created for the purpose of proving some fact at trial and is therefore "testimonial," it "may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." Bullcoming v. New Mexico, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2705, 2713, \_\_\_ L. Ed. 2d \_\_\_ (2011). The defendant must be able to cross-examine the person who created

the record, in order to test the procedures and methodologies employed. Id. at 2715.

c. Mr. Fraser's constitutional right to confrontation was violated, where cellular telephone and text message reports created specifically for use at trial were admitted but he did not have an opportunity to cross-examine the person who created the reports. Mr. Koch, the Sprint records custodian, testified the reports contained in exhibits 1 and 45 were created specifically for use at trial. He explained that, when phone calls are made and text messages are sent, the system routinely captures and stores them near the time that they are made or sent. RP 495-97. Thus, that raw data is created and stored primarily for the administration of the entity's affairs and is not "testimonial." See Melendez-Diaz, 129 S. Ct. at 2539-40. But when Sprint receives a legal demand for records, they produce a special report containing the information requested. RP 496. The reports are created when a person enters specific queries into the automated system, defining the date range, phone numbers, and other information relevant to the records he or she is searching for. RP 495-96. This process was used to create the reports contained in exhibits 1 and 45. Id.

Because the reports contained in exhibits 1 and 45 were created specifically to prove some fact at trial, they were "testimonial" for purposes of the Confrontation Clause. Melendez-Diaz, 129 S. Ct. at 2539-40; cf. Lee, 159 Wn. App. at 817 (cell phone records admitted at trial not "testimonial" because they were created for phone companies' administration and not as evidence against defendants). The reports were created specifically to prove that Mr. Fraser made and received those calls and sent and received those text messages on the dates and at the times asserted. Mr. Fraser therefore had a right to cross-examine the person who created the reports, in order to test the reliability of the procedures and methodologies employed. But the witness who testified, Mr. Koch, had no personal knowledge of the procedures used. Therefore, Mr. Fraser's constitutional right to confrontation was violated. Bullcoming, 131 S. Ct. at 2713.

d. The error in admitting the evidence was not harmless. The State relied heavily on the cell phone and text message reports to support its theory that Mr. Fraser intentionally killed Mr. Cross because he was jealous and increasingly desperate over Mr. Cross's relationship with Ms. Sigmond. Referring to exhibits 1 and 45, Everett Police Detective Phillip

Erickson testified as to the number of cell phone calls made and text messages sent between Mr. Fraser and Ms. Sigmond in the days leading up to the incident. RP 530-47. The reports showed Mr. Fraser's phone calls and text messages to Ms. Sigmond became more frequent and hers to him became less so during the week preceding the incident. RP 534-42.

Detective Erickson also read several of the text messages for the jury verbatim. RP 530-47. Many of them were highly prejudicial and inflammatory. For example, in many of the messages, Mr. Fraser repeatedly pleaded with Ms. Sigmond to answer his messages and calls and to meet with him. RP 537-44; Exhibit 1. He asked if she was "wit[h] another boy" and if she had "ch[osen] Colin over me." RP 539, 544. He said, "I will not sleep or eat until you talk to me," and "I can't handle anymore [sic] and won't live without you." RP 542-43.

In addition, in closing argument, the deputy prosecutor highlighted the cell phone records and text messages. The prosecutor emphasized that Mr. Fraser tried to contact Ms. Sigmond more and more frequently leading up to the incident. RP 821. The prosecutor argued the text messages became more and

more pleading and frantic over time, therefore demonstrating Mr. Fraser's motive. RP 822-27.

Due to the highly prejudicial nature of the cell phone and text message reports, and the prosecutor's heavy reliance on them, the jury must have used the evidence to find Mr. Fraser intended to kill Mr. Cross and did not fire the gun accidentally. Guloy, 104 Wn.2d at 426. Therefore, the error in admitting the evidence was not harmless beyond a reasonable doubt and the conviction must be reversed. Id.

3. THE COURT ABUSED ITS DISCRETION IN  
ADMITTING A PARTICULARLY GRUESOME  
AUTOPSY PHOTOGRAPH THAT WAS  
CUMULATIVE AND UNNECESSARY

The trial court admitted, over defense objection, exhibit 62, which is a close-up photograph of the injuries inside Mr. Cross's mouth and shows a metal rod piercing the cheek. RP 405, 428; Exhibit 62. Because the photograph was minimally relevant but gruesome and therefore potentially unfairly prejudicial, the court abused its discretion in admitting the photograph.

ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"Accurate, though gruesome, photographic representations are admissible if their probative value outweighs their prejudicial effect." State v. Kendrick, 47 Wn. App. 620, 624, 736 P.2d 1079 (1987) (citing State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983)). The determination of whether a photograph's probative value is outweighed by its prejudicial effect is left to the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. Kendrick, 47 Wn. App. 620, 624. In determining whether to admit a gruesome photograph, the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction.

Id. at 628 (citation omitted).

When the basis upon which a gruesome photograph is offered is tenuous, or when there is equally relevant nonprejudicial evidence available with respect to the same issue, the photograph should be excluded. State v. Sargent, 40 Wn. App. 340, 347, 698

P.2d 598 (1985). In Sargent, the Court held admission of autopsy photographs was reversible error where they had no discernable relevance and were prejudicial. Id. at 348-49. Also, admission of a photograph showing the victim's body on the waterbed was overly prejudicial, where testimony from the firefighters who discovered the body revealed the same information gleaned from the photographs. Id. at 349. In addition, the State in that case could have used diagrams to reveal the same information as the photographs in a non-prejudicial manner. Id. Thus, because the prejudicial effect of the photographs outweighed any probative value, admission of the photographs was error. Id.

Similarly, in Jones v. State, 1987 OK CR 103, 738 P.2d 525, 528 (Okla. Crim. 1987), the court admitted exhibits containing a close-up view of the decedent's chest, neck and a portion of his face, and the back of his head. The State sought admission of the photographs to establish venue, the death of the victim, and the location of the wounds on the body. However, those facts were established through other competent evidence, and were not disputed by the defendant. Due to the minimal relevance of the photographs, their cumulative nature, and the substantial danger of unfair prejudice, admission of the photographs was error. Id.

Here, as in Sargent and Jones, exhibit 62, a close-up photograph of Mr. Cross's mouth, was minimally relevant and ultimately unnecessary. The State offered the photograph to show the damage inside Mr. Cross's mouth. RP 404. But the nature of the damage in Mr. Cross's mouth was not relevant to any material fact at trial. Also, exhibit 61, which was admitted without objection, showed the trajectory of the bullet in Mr. Cross's head with a metal rod. RP 426. Therefore, exhibit 62 was unnecessary to show that same information and was cumulative. Finally, the photograph was gruesome and highly prejudicial. Therefore, the court abused its discretion in admitting the photograph. Sargent, 40 Wn. App. at 348-49; Jones, 738 P.2d at 528.

#### F. CONCLUSION

Mr. Fraser's Sixth Amendment right to confront his accusers was violated when the trial court admitted Mr. Cross's testimonial statement made to police accusing him of threatening and harassing him but Mr. Fraser never had an opportunity to cross-examine Mr. Cross. Mr. Fraser's Sixth Amendment right to confrontation was also violated when the trial court admitted cell phone and text message reports but Mr. Cross did not have an opportunity to cross-examine the person who created the reports.

Finally, the court abused its discretion in admitting a particularly gruesome autopsy photograph that was cumulative and unnecessary. Thus, his conviction must be reversed.

Respectfully submitted this 2nd day of August 2011.



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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 66276-7-I
	)	
	)	
BUD FRASER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |   |                   |                                     |
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| [X] | BUD FRASER<br>345509<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVE<br>WALLA WALLA, WA 99362 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 2<sup>ND</sup> DAY OF AUGUST, 2011.

X \_\_\_\_\_ 

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