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Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32398-6-III

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STATE OF WASHINGTON, Respondent,

v.

WILMER SANTIAGO GUERRERO, Appellant.

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APPELLANT'S BRIEF

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## **I. INTRODUCTION**

In Wilmer Santiago Guerrero's jury trial, a Department of Licensing custodian testified over objection that the Defendant was a habitual traffic offender based upon the custodian's review of a certified abstract of driving record prepared by an unidentified Department of Licensing employee. Guerrero was subsequently convicted of driving with a suspended license in the first degree and now appeals, contending that the introduction of the certified abstract of driving record violated Guerrero's confrontation rights, requiring a new trial.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR 1:** The trial court erred in admitting Exhibit 3, a copy of a driver's abstract, without establishing that the testifying witness prepared the abstract or independently verified its contents.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE 1:** May the State overcome the Sixth Amendment right to confront witnesses by identifying a testimonial certification prepared by a non-testifying witness through a Department of Licensing employee? NO.

#### **IV. STATEMENT OF THE CASE**

Wilmer Guerrero was charged with several offenses including one count of driving with a suspended license in the first degree. CP 1-3. At his jury trial, the trial court, over Guerrero's objection, admitted an abstract of driver's record that had been certified by an unidentified Department of Licensing employee. 2 RP (Trial) at 183-89. Upon introducing the document, the State's witness then testified to its contents to establish that Guerrero's license had been revoked as a habitual traffic offender on the date in question as follows:

Q I'm handing you again what's been admitted as Plaintiff's Exhibit 3. And I believe you previously testified that you're able to determine from Plaintiff's Exhibit 3 the driver's status of the driver there on October 29<sup>th</sup>, 2013?

A Yes.

Q Could you please review that document and if you are able to determine the driver's status on October 29<sup>th</sup>, 2013.

A October 20<sup>th</sup>?

Q 29<sup>th</sup>, 2013.

A 29<sup>th</sup>. He was revoked as an habitual traffic offender.

Q How did you come to that determination?

A On 9/27/12, here on the abstract, under the driver's history, it shows that he was revoked as an habitual traffic offender on that date.

2 RP (Trial) at 189-90. The witness then offered additional testimony from the abstract's contents, including the prior convictions it showed that fulfilled the criteria for the habitual traffic offender classification. 2 RP (Trial) at 190-91. On cross-examination, the State's witness conceded that he had not reviewed any official record of conviction and only one judgment and sentence supporting the habitual traffic offender designation. 2 RP (Trial) 196-97.

The jury convicted Guerrero of the charge of driving with a suspended license in the first degree. CP 208. Guerrero now appeals. CP 213.

#### **V. ARGUMENT**

The sole issue on appeal is whether the trial court violated Guerrero's confrontation rights when it admitted a certified driving record of the kind discussed in *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012), without producing the Department of Licensing employee who certified the record. Instead, the Department of Licensing custodian who testified identified the document as a business record and then testified to its contents, with no foundation presented to establish that the testifying witness had independent knowledge of Guerrero's driving record. Because the driving abstract is a testimonial document as acknowledged in

*Jasper*, the State was required to produce the witness that certified it to satisfy the requirements of the Confrontation Clause.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009), the U.S. Supreme Court evaluated the admissibility of sworn affidavits attesting to the results of a forensic chemical analysis in the absence of live testimony. The Court held that under the Sixth Amendment's confrontation clause, "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.* at 309. Responding to the argument that requiring expert witnesses to testify subject to cross-examination adds no value to the truth-finding process of trial, the Court observed:

The affidavits submitted by the analysts contained only the bare-bones statement that "[t]he substance was found to contain: Cocaine." At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed. While we still do not know the precise tests used by the analysts, we are told that the laboratories use "methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs." At least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination.

*Id.* at 320. Thus, *Melendez-Diaz* firmly established the Sixth Amendment guarantee that testimonial assertions must be presented through live testimony, regardless of disagreement over whether live testimony adds any substantial value to the trial process.

The *Melendez-Diaz* Court further distinguished the practice of admitting a clerk's written certification authenticating a record from the admission of certifications to the existence or non-existence of records. While authentication serves to merely validate an existing business record for admission in court, certifying the results of a search creates a new record for the purpose of providing substantive evidence against the defendant. Accordingly, while the clerk's authentication does little more than establish foundational facts to introduce otherwise admissible records, the certification of search is a testimonial statement requiring confrontation. *Id.* at 322-23.

The Washington Supreme Court applied these principles to precisely the types of statements at issue here – statements by custodians of driving records that licenses were suspended or revoked on certain dates, that records had been searched, and whether a driver's privilege had been reinstated in *State v. Jasper, supra*, 178 Wn.2d 96. In *Jasper*, written certifications by Department of Licensing employees were admitted that

stated a search of records had been performed and the defendant's privilege to drive was suspended. *Id.* at 101, 104. Recognizing that *Melendez-Diaz* overruled prior Washington Supreme Court authority rejecting confrontation challenges to the admission of such certifications, the *Jasper* Court expressly held, "Because the defendants were not given the opportunity to cross-examine the official who authored the certifications, the admission of the certifications into evidence violated the defendants' rights under the confrontation clause." *Id.* at 116. (Emphasis added).

As acknowledged in *Jasper*, it is plainly established under present jurisprudence that satisfying the Confrontation Clause requires not simply the testimony of *some* government official in the office where the certification was produced, but the official who conducted the search and authored the certification. In *Bullcoming v. New Mexico*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2705, 2710, 180 L.Ed.2d 610 (2011), the U.S. Supreme Court specifically rejected the tactic of producing "surrogate" testimony and held that the Sixth Amendment specifically requires production of the witness who produced the certification. Accordingly, the *Bullcoming* Court reversed the conviction due to the introduction of one witness's testimonial statement through a second witness's live testimony. 131 S. Ct. at 2713.

Guerrero's case falls squarely within the *Jasper* and *Bullcoming* precedents. The State failed to establish an adequate foundation that the Department of Licensing employee who testified to the contents of the driving abstract was the employee who prepared the abstract. The employee did not testify about performing any review process, other than the brief acknowledgment during cross-examination that he had not reviewed any conviction documents besides a single judgment and sentence. To the contrary, the employee witness appeared to base his conclusion as to Guerrero's driving status by reviewing the contents of the abstract. He did not describe personally performing any record search or abstract preparation.

The State bears the burden of demonstrating that admitting out-of-court statements does not run afoul of the Sixth Amendment. *See State v. Koslowski*, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009). In the present case, the State's foundation is insufficient to show the written driving abstract comports with the requirements of *Jasper* and *Bullcoming*.

Courts review admission of evidence contrary to the Confrontation Clause for harmless error, evaluating whether the untainted evidence is so overwhelming as to necessarily lead to a finding of guilt. *Koslowski*, 166 Wn.2d at 431. Here, without the testimonial driving abstract, there is no

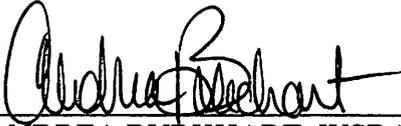
independent evidence of Guerrero's driving status at the time. The error indisputably affected the outcome of the trial.

The appropriate remedy for a Confrontation Clause violation is remand for retrial. *Jasper*, 174 Wn.2d at 120. Under the facts presented, Guerrero should receive a new trial on the charge of driving with a suspended license.

## VI. CONCLUSION

For the foregoing reasons, Guerrero respectfully requests that this court vacate his conviction for driving with a suspended license in the first degree and remand the cause for retrial.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of December,  
2014.

  
\_\_\_\_\_  
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**DECLARATION OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 29th day of December, 2014 in Walla Walla,  
Washington.

  
Breanna Eng