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THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 77281 - 9
	)	
Respondent,	)	
	)	OBJECTION TO MOTION TO
vs.	)	SUPPLEMENT THE RECORD
	)	
KENDRA L. WATT,	)	
Appellant	)	

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1. Facts Relevant to Motion:

The defendant was found guilty at trial of Manufacture of a Controlled Substance, Possession of a Controlled Substance and Criminal Mistreatment in the Second Degree. During the trial, the state made no attempt to call as witness James Watt, electing instead to present only a portion of his statement upon plea of guilty, an action which has been found to be an error.

The admission of this statement without the opportunity to cross-examine the declarant forced the defendant into a line of defense. The state maintains that simply because this was the line of defense taken at trial, it would be the only line of defense possible were the defendant allowed to cross-examine the declarant, and therefore by the state's logic this error was harmless even on the raised constitutional standard. The

defendant contends that the ability to cross-examine the declarant would have opened a different theory of the case to present to the jury, and therefore the admission of that statement without that opportunity to cross-examine was not harmless error, especially considering the elevated standard of error for constitutional issues.

The state never, during the course of the trial, attempted to call Mr. Watt as a witness. The state now wishes to present evidence of the divorce of Mr. Watt and the defendant, saying that in the new trial they would be able to call Mr. Watt. The state asserts that this new piece of evidence must be considered by this court in determining whether or not the error at the original trial was harmless. Petitioner objects to this assertion.

## 2. Argument

*A. The fact that the parties are now divorced is not a fact needed to fairly resolve the issues on review.*

The error assigned to the trial court is of a violation of *Crawford v. Washington*. Testimony was admitted without the opportunity to cross-examine. This court's duty, at the moment, is to decide whether it is convinced beyond a reasonable doubt that the evidence absent the error is so overwhelming that it necessarily leads to a finding of guilt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The state's request shows a fundamental misunderstanding of *Crawford*. At trial, the state noted that it had no intention of calling Mr. Watt as a witness. (RP 8-10). The state now believes that, in order to fairly resolve the issues on review, this court should speculate as to what the full testimony of Mr. Watt will or will not be at a new trial. However, the entire error that has already been assigned to the state is not the admission of any testimony of Mr. Watt, but rather the admission of that testimony without

affording the defense an opportunity to cross-examine. The presence or absence of Mr. Watt at trial is the very issue on which error has already been assigned.

The state now wishes to say that, since it intends to call Mr. Watt at a new trial (thus making him subject to cross-examination), that this court should simply hold that the admission of his testimony *without* the ability to cross-examine was harmless. This holding would require the court to speculate that the entirety of Mr. Watt's testimony would be parallel to the redacted statement that was admitted by the state, and that the defense would be completely incapable of eliciting any information during cross-examination. This kind of speculation would not only be bad form for an appellate court to engage in, but would also run directly contrary to the holding of *Crawford* itself that the only constitutional way to weigh a testimonial statement is in the "crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36 at 61 (2004).

Mr. Watt's presence at the new trial will afford the defense the opportunity to cross-examine him with regard to his statements. However, it has no bearing as to whether or not the evidence presented at trial, absent the admission of his statements without that ability to cross-examine, convinces this court beyond a reasonable doubt that it is so overwhelming that it necessarily leads to a finding of guilt.

*B. The additional evidence would not change the decision being reviewed.*

On page 3 of it's motion, the state argues that the divorce decree renders the admission of the statement *not to be in error at all*. This is completely fallacious. That statement was still admitted to the jury without the opportunity to cross-examine the declarant. It was still testimonial. The United States Supreme Court has held that it was

error. The fact that, in a new trial, the state would actually call the declarant as a witness, and the defendant would actually be allowed to cross-examine that witness does not somehow mystically render the lack of cross-examination not in error. This court is not empowered to overrule a decision made by the United States Supreme Court in regards to the United States Constitution. Therefore, the additional evidence cannot change the decision being reviewed.

*C. It is inequitable to excuse the state's failure to present the evidence to the trial court.*

The state did not even attempt to call Mr. Watt as a witness at trial. The state has, in effect, waived any argument as to what could or could not have happened had they attempted to do so. No waiver of marital privilege was ever obtained from the defendant, but, at trial, none was sought. The state cannot now assert that it would have called Mr. Watt as a witness absent that privilege.

*D. The appellate court remedy of granting a new trial is neither inadequate nor unnecessarily expensive.*

The state's entire argument on this point consists of a single sentence, and it ignores the point of a *Crawford* error. At trial, the defendant will now be able to cross-examine the declarant of the statements that were admitted by the state. Again, the state asks that this court simply assume that Mr. Watt's testimony, in its entirety, will consist of nothing but the statements admitted by the state in the previous trial, which in turn ignores the entire rationale of *Crawford*. At the prior trial, the defendant was not given an

opportunity by the state to cross-examine the declarant. At a new trial, the defendant will be given that opportunity. This is the very essence of *Crawford v. Washington*, and simply to show that the statement itself will be admitted at a new trial does not mean that the old trial was somehow valid.

*E. It would be inequitable to decide this case by considering this information.*

This court's duty is to decide whether it is convinced beyond a reasonable doubt that the evidence absent the error is so overwhelming that it necessarily leads to a finding of guilt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). It is not this court's job to speculate as to the outcome of a new trial, as the state suggests. Rather, this court should be focused on the evidence that was presented by the state at the old trial. The simple fact that, in a new trial, the state will be able to correct its error by affording the defendant an opportunity to cross-examine does not change the error that occurred in the old trial.

The state's evidence at the prior trial was not so overwhelming as to make the error harmless. In an attempt to draw attention away from this, the state wishes this court to decide this case based on what may or may not happen at a new trial, and not what did or did not happen at the old trial. Playing such a cup-game with the evidence at trial is both illogical and inequitable.

For the above reasons, the Motion to Supplement the Record should be denied.

Respectfully submitted this 18<sup>th</sup> day of September, 2006.

  
Douglas Phelps  
Attorney for Petitioner