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WASHINGTON COURT OF APPEALS, DIVISION THREE

No. 21148-7-III

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

KENDRA LYNN WATT,

Petitioner

PETITION FOR REVIEW BY THE SUPREME

COURT OF THE STATE OF WASHINGTON

June 23, 2005

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A. Identity of Petitioner

Kendra Lynn Watt asks this court to accept review of the decision or parts of the decision designated in Part B of this motion pursuant to RAP 13.4 (b)(1), (3), and (4).

B. Court of Appeals Decision

The Petitioner request review of *State v. Kendra Lynn Watt*, _____ Wn. App. _____, _____ P.3d _____, WL21148-7-III (Div. III, May 24, 2005) which upheld the trial court. A copy of the Appellate Court ruling is attached as Appendix A-1 through A-11.

C. Issues Presented for Review

1. Is the Court of Appeals decision contrary to the decision of the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) applied by *Bockington v. Bayer*, 399 F.3d 1010 (9th Cir. 2005) establishing a watershed rule of criminal procedure?

2. Is the Court of Appeals decision contrary to the United States Supreme Court ruling in *Schriro v. Sommerlin*, U.S. 124 S.Ct. 2519, 2523, 159 L.Ed.2d 442 (2004) and *Sawyer v. Smith*, 497 U.S. 227, 244, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) implicating fundamental fairness requiring reversal on appeal?

D. Statement of the Case

The defendant, Kendra Watt, resided at 402 Abbott Street, Richland, Washington, with her husband James Watt. (RP 317-318) The Tri-City Metro Drug Task Force Detective Rick Runge obtained a search warrant based on his affidavit and that of a "concerned citizen." (CP 204-217) On June 1, 2001 at approximately 11:00 A.M., the officers of the Metro Drug Task Force executed the search of 402 Abbott Street, Richland, Washington. (RP 51-52) The home was a ranch style home with a detached garage located in the northeast corner of the backyard. (CP 204) Mr. James Watt and Mrs. Kendra Watt were both arrested and charged with drug charges involving the manufacture of methamphetamine. (CP 186-187, 253-258, 274-275)

The prosecution brought a motion to join Mr. and Mrs. Watts' trials. (CP 260; RP Sept. 19, 2001 p. 1-8) The trials were not consolidated and ultimately Mr. Watt pled guilty (CP Exhibit 83; RP 313-316) while Mrs. Watt proceeded to trial. (RP Vol. 1-3). Prior to the plea and trial, the parties challenged the sufficiency of the affidavit for the search warrant (CP 239-247) and requested in the same motion that the confidential informant be disclosed. (CP 239-247, CP 248) Additional briefing was filed by the defendant Kendra Watt asking the court to grant a request for both a "Franks Hearing" and a "Casal Hearing." (CP 200-217, CP 188-190) The defense motions regarding the search and seizure issues were argued before the Honorable Craig J. Matheson on November 2, 2001. (RP November 2, 2001

p. 1-63) Findings of Fact from that hearing were prepared and filed on December 7, 2001. (CP 180-182) That document refers to "Defendant's List of Witnesses" attached (CP 180) which is in the record in CP 218-220.

On February 14, 2002, the state issued a subpoena for James E. Watt. (CP 177) The case proceeded to trial on March 18, 2002 (RP Vol. 1 p. 1) before the Honorable Carolyn A. Brown. At trial the prosecution indicated that they had no intention of calling James Watt. (RP 8-10) The state argued that it wanted to introduce in opening argument the plea of Mr. James Watt in the trial against Mrs. Watt. The defense objected and the court ruled that this information should not come in during opening statements, (RP 10), however, the court indicated a willingness to allow the state to introduce the "Statement of Defendant on Plea of Guilty" at trial. (RP 11) The defendant noted an exception to the court's ruling. (RP 11)

During the trial, the prosecution called Robert Savage who was referred to as the concerned citizen in the search warrant affidavit. Mr. Savage testified that "he used to get drugs from Kendra Watt." (RP 12) He testified at the trial and claimed to have provided evidence against James Watt out of concern for children. (RP 15-18) Mr. Savage described the process he observed Mr. Watt use in cooking methamphetamine. (RP 18-20) He testified that he assisted the police with cases involving Yance Bradley and Sean Dorman prior to Mr. Watt's case. (RP 23-25) The defense questioned Mr. Savage regarding his ability to "recollect" events (RP 26 line 6-21). The defense questioned him about his drug use and psychiatric

admissions. (RP 26 line 11-19) The prosecution objected (RP 26 line 17) arguing it was merely to discredit the witness. The defense argued that the information regarding drug use and psychiatric admissions was admissible for consideration of how it affects the witness's memory or powers of observation and ability to testify accurately. (RP 22 line 13-25 to RP 29 line 14) The court ruled that was not allowed as an area of cross-examination. (RP 29-32)

The state prepared a certified copy of Mr. Watt's Statement of the Defendant on Plea of Guilty, crossing out "I have reviewed the evidence against me on my own with my attorney. I've come to the conclusion that a jury would find me guilty after hearing the evidence on all three counts, as well as the enhancement. I wish to take advantage of the State's offer." (RP 87 line 19-25) Other information blocked out included "I admit to making a small amount of meth" and "For my wife's use." (RP 88) The prosecutor sought to admit the redacted pages 1 and 7 of Mr. Watt's Statement on Plea of Guilty as Exhibit 83. (RP 88) The two pages that were admitted had large spaces that were blacked out. (Ex 83) The defense argued against admission of the document arguing that if the purpose of admitting the document was to show Mr. Watt's plea that could be accomplished without using the Statement of Defendant on Plea of Guilty. (RP 89-93) The argument against admission of the document was renewed again prior to admission of the document. (RP 294-300) Cases cited by defense counsel included *State v. Hoffman*, 116 Wn.2d 51 (1991), *Bruton v. United States*, 391 U.S. 123

(1968), and *Gray v. Maryland*, 532 U.S. 185 (1998). A limiting instruction was requested and the court stated, "I will do the limiting instruction. The sole purpose of the admission is to establish Mr. Watt pled guilty and the jury may consider it for no other purpose." (RP 300 line 2-5) The defense-requested and court ordered instruction was never given after the decision was made by the court to give the limiting instruction. (RP 394-408; CP 131-157)

Additionally, the prosecution at trial sought to introduce hearsay statements allegedly made by Mr. James Watt to Detective Rick Runge that "he manufactured his own anhydrous ammonia." (RP 235) The defense objected, arguing that this was an attempt to introduce testimony without granting the defense the right of confrontation. (RP 235-238 and 248-250) The court ruled that only testimony that Mr. Watt made his own anhydrous would be admitted. (RP 238 line 3-10). Then the prosecution brought testimony beyond that allowed by the court's order. Detective Runge testified that, "it was fewer people to be aware of what he was involved in and he also didn't believe in theft and that's how. . ." (RP 250 line 6-10). The defense sought a mistrial for the prosecution's violation of the court's order. (RP 250-251) The court refused the defense motion for a mistrial. (RP 251)

The state moved the court to exclude any evidence of physical violence or domestic violence. (RP 303 line 15 to RP 307 line 19) The defense argued for admission of the evidence to show the power and control

exerted by Mr. Watt over Mrs. Watt and to show that Mrs. Watt was not allowed into the garage. (RP 305-307) The court excluded testimony about domestic violence perpetrated by Mr. Watt. (RP 307 line 3-14)

In closing argument, the prosecutor argued that, “Mr. Watt, you’ll see his Statement of Plea of Guilty, pled guilty because he has the methamphetamine lab and because he was around children.” (RP 418) The prosecution argued that if the jury convicted her of manufacture, “that this follows as night follows day – that she created an imminent and substantial risk.” (RP 418) Further, in closing argument during rebuttal the prosecutor argued repeatedly, “Mr. Phelps said” (RP 440 line 17-18); “Mr. Phelps said” (RP 441 line 4-5); “Mr. Phelps said, well, maybe” (RP 441 line 13) at which time the defense objected to the personalization of the argument. The court admonished and instructed the prosecutor on how to form the argument. (RP 441-442) The prosecutor then returned to argue, “We know that’s true. You can take a look at what Mr. Watt said about this in his Statement on Plea of Guilty. He said I make methamphetamine.” (RP 442 line 1-8) Then the prosecutor returned to arguing about the defense counsel stating, “There is nobody who says that ...I’m gonna go back to this – except the defense attorney.” (RP 442-443 line 1-2) An objection was made, citing the prosecutorial misconduct in continuing this tactic after a court instruction, with a motion for mistrial. (RP 443 line 7-21) The court denied the motion for mistrial and instructed the prosecutor again. (RP 443 line 23-25)

The case proceeded and the jury was instructed by the court without any limiting instruction on the use of the Statement of Defendant James Watt designated as Exhibit 83. (RP 394-408; CP 131-157) Kendra Watt never testified at her trial. (RP Vol. I – III) The defense moved the court for a new trial (CP 71-80, 107-115 RP April 19, 2002 p. 1-12) which was denied by the court. (CP 60).

On May 22, 2002 Kendra Watt was sentenced before Judge Carolyn Brown (CP 10-17, RP May 22, 2002). The court imposed a standard range sentence required by the Sentencing Reform Act as the court cites the ranges mandated by statute. (RP May 22, 2002, lines 1-12). At the time of sentencing, the trial judge Carolyn Brown stated; "I've read the pre-sentence investigation. I've considered the letters which have been sent to the court. And I'm sorry that Mr. Watt did not testify at trial. That may have made some difference with the jury. I don't know."

On appeal, Division III set the case for oral argument and denied the appellant's appeal based upon the denial of the right of confrontation under the Sixth Amendment and Article I, Section 22. The Court of Appeals allowed admission of the "statement of defendant on plea of guilty" citing ER804 (b) (3) holding "Mr. Watt's guilty plea statement bears sufficient indicia of reliability to satisfy the requirements of Confrontation Clause." Ms. Watt filed a motion for Discretionary Review on September 3, 2003. Review was denied on April 6, 2004. Ms. Watt then filed a Writ of Certiorari to the United States Supreme Court on July 3, 2004. The

Certiorari was granted and the U.S. Supreme Court remanded to the Court of Appeals, Divisions III for further consideration in light of *Crawford v. Washington*, 541 U.S. _____, (2004). Oral argument was held on March 24, 2005 and the Court of Appeals issued an unpublished opinion on May 24, 2005 affirming the conviction.

Ms. Watt now prays for discretionary review at the Supreme Court under RAP 13.4 (b)(1), RAP 13.4 (b) 3, and RAP 13.4 (b) 4.

E. Argument

1. The Court of Appeals decision is contrary to the decision of the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) applied by *Bockington v. Bayer*, 399 F.3d 1010 (9th Cir. 2005) establishing a watershed rule of criminal procedure.

The Supreme Court should review the decision of the Court of Appeals because the decision is contrary to the U.S. Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004) that the right to confront witnesses is a "bedrock rule of criminal procedure". The U.S. Supreme Court has clearly held that the *Crawford* case established a bedrock rule of criminal procedure.

The Ninth Circuit further explained that "the Supreme Court has repeatedly and without deviation held that the purpose of the Confrontation Clause is to promote accuracy". *Bockington v. Bayer*, 399 F.3d 1010 at 1017 (9th Cir. 2005). The "heart of the Court's concerns in *Crawford* was

the reliability of admitted evidence. Where admitted evidence is unreliable, the accuracy of convictions is seriously undermined....[The rule in *Crawford*] is an absolute pre-requisite to fundamental fairness". *Bockington* at 1018 (9th Cir. 2005).

The *Bockington* court held that: "The Court has found repeatedly that the purpose of the Confrontation Clause is to promote accuracy, and thus *Crawford* rejected the *Roberts* framework as reflective of 'a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion.' Viewing these holdings together lead to the conclusion that the *Crawford* rule is one without which the likelihood of accurate conviction is severely diminished."

The case law is clear the harmless error standard does not apply, because the failure is one involving fundamental fairness requiring reversal or alternatively is a "new rule" that applies to criminal cases still pending a direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The appellant request review and that the case be remanded for a new trial.

2. The Court of Appeals decision is contrary to the U.S. Supreme Court decision in *Schriro v. Summerlin*, 124 S.Ct. 2519, 2523, 159 L.Ed.2d 442 (2004) and *Sawyer v. Smith*, 497 U.S. 227, 244, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) implicating fundamental fairness requiring a reversal on appeal.

The *Crawford* case established that testimonial statements of absent witnesses are inadmissible unless the witness is unavailable and the

defendant had a prior opportunity for cross examination. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). As a watershed rule of criminal procedure, implicating the fundamental fairness and accuracy of the criminal proceeding, “and without which the likelihood of an accurate conviction is seriously diminished”. *Schriro v. Summerlin*, 124 S.Ct. 2519, 2523, 159 L.Ed.2d 442 (2004). The new rule in *Crawford* “altered our understanding of the bedrock procedural elements essential to the fairness of the proceedings”. *Sawyer v. Smith*, 497 U.S. 277, 242, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

After the *Crawford* case, testimonial statements of absent witnesses are inadmissible unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford*, 124 S.Ct. at 1374. *Crawford* established a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding and “without which the likelihood of an accurate conviction is seriously diminished”. *Schriro v. Summerlin*, 124 S.Ct. 2519, 2523, 153 L.Ed.2d 442 (2004).

In the Watt case the Court of Appeals has applied the harmless error analysis to find that the trial court did not commit error requiring a new trial. (A-10). It is the appellant’s position that this decision is in error as the court has improperly applied the harmless error analysis to a case on direct review. The appellant request that the Supreme Court order remand for a new trial.

F. Conclusion

The petitioner respectfully request that the State Supreme Court grant a new trial based upon the Court of Appeals failure to apply the proper standard for a case on direct appeal. Additionally, the appellate court has failed to apply the proper standard as *Crawford v. Washington* established a new rule in admitting hearsay testimony which requires the right of confrontation. The harmless error analysis is not then properly applied. A new trial must be granted based upon the case law, including *Bockington v. Bayer*, 399 F.3d 1010 at 1017 (9th Cir. 2005).

RESPECTFULLY submitted this 23rd day of June, 2005.



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FILED

MAY 24 2005

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 21148-7-III
)	
Respondent,)	
)	
v.)	Division Three
)	Panel One
KENDRA L. WATT,)	
)	
Appellant.)	UNPUBLISHED OPINION

KATO, C.J.—Kendra L. Watt was convicted of possession of methamphetamine and manufacture of methamphetamine. She claims the trial court had erroneously admitted two statements of her husband: (1) a redacted plea agreement; and (2) a statement made to the police during an interrogation. Her husband did not testify. The conviction was affirmed by this court in an unpublished opinion.¹ The United States Supreme Court remanded for further consideration in light of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We affirm.

¹ *State v. Watt*, noted at 117 Wn. App. 1089 (2003), cert. granted, judgment vacated, 125 S. Ct. 477 (2004).

A-1

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On May 31, 2001, a confidential informant contacted Detective Rick Runge of the Tri-Cities Metro Drug Task Force about a methamphetamine laboratory at the residence of Kendra and James Watt in Richland, Washington. The informant had seen Mr. Watt preparing methamphetamine more than once. On one of those occasions, Ms. Watt was present during the process itself. The informant said Mr. Watt was preparing to manufacture a new batch. Mr. Watt had told the informant, though, that he needed to obtain Toluene, a necessary ingredient, before he could start the batch.

During an independent police investigation, Detective Runge determined that Terry Carpenter, an employee of Richland Standard Paints, had recently sold five gallons of Toluene to a white female matching the description of Ms. Watt. The white female told Mr. Carpenter she was purchasing the Toluene to clean adhesive off tile. On average, a professional painter would only use a quart of Toluene for cleaning purposes during an entire year. Mr. Carpenter carried the Toluene to her vehicle. Later, the police drove him by the Watt residence, where he positively identified the vehicle parked there as the vehicle driven by the white female.

On June 1, 2001, a search warrant for the Watt residence was issued. During the search, Detective Lee Barrow and other officers of Tri-City Metro Drug Task Force found several items associated with manufacturing

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methamphetamine in the master bedroom, including two baggies of methamphetamine located in a black purse, a scale, glass pipes, and receipts for items traditionally used in the production of methamphetamine. Baggies of methamphetamine and additional empty baggies were uncovered in a fire proof safe. Numerous items associated with manufacturing methamphetamine were located in the detached garage. Also discovered was a video surveillance camera, which allowed the Watts to monitor the front of their home from the master bedroom.

Ms. Watt was charged by amended information with unlawful manufacture of a controlled substance, methamphetamine, with notice of a child present; unlawful possession of a controlled substance, methamphetamine; and criminal mistreatment in the second degree. Mr. Watt was also charged with manufacture of a controlled substance, methamphetamine, with notice of a child present; and criminal mistreatment in the second degree. He pleaded guilty.

Over Ms. Watt's objection at trial, the State introduced a redacted copy of Mr. Watt's plea statement. Though the statement was originally seven pages in length, the copy introduced into evidence was limited to three sentences:

I admit to making a small amount of meth[.] I did so in a detached garage on the premises. The children lived on the premises but were not present when I made the drugs.

Ex. 83 at 7.

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Over Ms. Watt's objection, the State also introduced the testimony of Detective Runge about Mr. Watt's statements during a police interrogation. The detective testified that Mr. Watt told him he had manufactured the anhydrous ammonia himself. Anhydrous ammonia, a necessary ingredient to manufacture methamphetamine, was not uncovered in the residence during the search.

Ms. Watt disclosed she would assert the spousal privilege if the State called Mr. Watt as a witness. She did not testify in her own defense.

Ms. Watt was found guilty of manufacture of a controlled substance, methamphetamine; criminal mistreatment in the second degree; and possession of a controlled substance. The jury found a juvenile was present in or upon the premises of manufacture during the commission of the crime. The conviction was upheld by this court in an unpublished opinion. The Washington State Supreme Court denied review. The United States Supreme Court vacated the judgment and remanded for further consideration in light of *Crawford*.

Ms. Watt claims the admission of the two previous statements by her husband violated the confrontation clause. She argues the admission of the redacted plea agreement and the admission of Mr. Watt's statement to Detective Runge violate her constitutional right to confront her accusers.

Alleged violations of the confrontation clause are reviewed de novo. *United States v. Aguilar*, 295 F.3d 1018, 1020 (9th Cir.), cert. denied, 537 U.S.

966 (2002). The admission of evidence under exceptions to the hearsay rule is reviewed for an abuse of discretion. *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1217 (9th Cir. 2001), *cert. denied*, 537 U.S. 868 (2002).

Under the Sixth Amendment's confrontation clause, the accused in a criminal prosecution enjoys the right to be confronted by the witnesses against him. *Crawford*, 541 U.S. at 42. The United States Supreme Court in *Crawford* established a high standard for admissibility of testimonial statements from witnesses who do not appear at trial. The testimonial statement of a witness is inadmissible if the witness did not appear at trial unless (1) the witness was unavailable to testify, and (2) the defendant had a prior opportunity to cross examine the witness. *Id.* at 54.

The confrontation clause applies to in-court testimony and out-of-court statements that are considered the functional equivalent. *Id.* at 50-51. The functional equivalent includes affidavits, custodial examinations, prior testimony, and other pretrial statements. *Id.* at 51. It also includes statements taken by police officers in the course of interrogations and plea allocutions that show the existence of a conspiracy. *Id.* at 64; *see also United States v. Bruno*, 383 F.3d 65, 77 (2d Cir. 2004).

Mr. Watt's statement on guilty plea could be considered a plea allocution showing the existence of a conspiracy. The statement itself admits Mr. Watt

manufactured methamphetamine in his residence, but that his children were not present. Because the statement does not similarly admit Ms. Watt's absence, an inference can be drawn that she was present and involved in the manufacturing process. Mr. Watt's admission to Detective Runge also constitutes a statement taken by a police officer in the course of an interrogation.

The statements themselves are inadmissible under Crawford. Mr. Watt was unavailable to testify. Under ER 804(a)(1), a witness is unavailable if he is exempted by a privilege. Under the spousal privilege, a spouse cannot testify against the other without consent. RCW 5.60.060(1). A spouse who is unable to testify is considered unavailable. *State v. Torres*, 111 Wn. App. 323, 330-31, 44 P.3d 903 (2002), *review denied*, 148 Wn.2d 1005 (2003). Here, Ms. Watt disclosed she would assert the spousal privilege if Mr. Watt testified. He was thus unavailable. The record does not reflect whether any prior cross examination took place. Both statements are testimonial and inadmissible under the confrontation clause.

Ms. Watt argues the trial court committed reversible error by admitting the two statements in violation of the confrontation clause. She complains that she was convicted based on weak evidence consisting almost entirely of an untrustworthy confidential informant and the improperly admitted statements of

Mr. Watt. She concludes the erroneous admission of the evidence substantially influenced the jury and her conviction must be reversed.

A confrontation clause violation constitutes harmless error if the reviewing court finds the error was harmless beyond a reasonable doubt. *Olden v. Kentucky*, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988). In making this determination, the reviewing court analyzes a host of factors that include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." *Id.* at 233.

Here, the confrontation clause violation constitutes harmless error. Under the first factor, the testimony was not important to the prosecution's case. The State presented a detailed case outlining many direct ties between Ms. Watt and the manufacturing process. The prosecution provided evidence that Ms. Watt (1) purchased items associated with manufacturing methamphetamine under suspicious circumstances; (2) possessed methamphetamine; (3) resided in a dwelling where methamphetamine was produced; and (4) was present during production. Evidence was also addressed that items associated with manufacturing methamphetamine were present both in the garage and the

master bedroom, showing that the manufacturing process was prevalent throughout the house and was not simply relegated to the garage. The State presented evidence that an intricate monitoring system allowed Ms. Watt to view all the activities occurring at the front door from the safety of the master bedroom. A reasonable inference can be drawn from all the evidence that Ms. Watt was not only aware, but also participated in the manufacturing process itself. The disputed evidence only indirectly connects Ms. Watt to the process.

As for the second factor, the testimony was cumulative. Substantial evidence connected the manufacturing to the dwelling and to Ms. Watt. Mr. Watt's statements merely provided cumulative evidence supporting the assertion that manufacturing was indeed occurring. Under the third factor, there was testimony corroborating the statement. The informant testified Mr. Watt manufactured methamphetamine on at least two occasions. Mr. Watt merely confirmed he had done so. Under the fourth factor, the extent of the cross examination otherwise permitted was apparently great. Ms. Watt has not asserted there were any limits placed upon her ability to cross-examine witnesses.

Under the fifth factor, the State's case against Ms. Watt was strong. Methamphetamine was located in a purse in the bedroom, as well as numerous items associated with manufacturing methamphetamine. Items associated with

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manufacturing methamphetamine were located in the detached garage. An employee at Richland Standard Paints sold an unusually large quantity of Toluene to a woman matching Ms. Watt's description. The paint store employee positively identified Ms. Watt's vehicle. The informant testified Ms. Watt was present when methamphetamine was being manufactured. The police discovered a surveillance monitor on the Watts' front door. The State's case against Ms. Watt was strong as substantial evidence connected her to the manufacturing.

But Ms. Watt maintains a harmless error analysis fails under *United States v. Jean-Baptiste*, 166 F.3d 102 (2d Cir. 1999). *Jean-Baptiste* is not persuasive. It involves a traditional harmless error analysis, not a constitutional rights analysis. *Id.* at 107.

Ms. Watt suggests the court committed reversible error because she was convicted based upon the testimony of an untrustworthy confidential informant. The record, however, reflects Ms. Watt was convicted on substantial evidence aside from the informant's testimony. Ms. Watt contends *Crawford* established a watershed rule that is applied retroactively. But the United States Supreme Court has already determined *Crawford* applies here.

The State argues the admission of the evidence is harmless because Mr. Watt's statement is consistent with Ms. Watt's theory of the case. The State

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explains that at trial Ms. Watt maintained it was Mr. Watt, not her, who manufactured the methamphetamine. The State claims that because Mr. Watt's testimony is consistent with Ms. Watt's theory of the case, the error is automatically harmless. The State, however, does not provide any authority to support its assertion that the confession of a codefendant is admissible and constitutes harmless error when the confession is consistent with the defendant's theory of the case. Indeed, the U.S. Supreme Court in *Crawford* specifically refused to answer that question and refused to determine that the confession of a codefendant should be admitted when its discrepancies with the defendant's own statement are insignificant. *Crawford*, 541 U.S. at 58. But even if Mr. Watt's statement was consistent with his wife's theory of the case, it does not automatically follow that the constitutional violation committed by the State constitutes harmless error as a matter of law. In any event, the confrontation clause violation constitutes harmless error beyond a reasonable doubt because Ms. Watt was convicted based upon substantial untainted evidence directly connecting her to the manufacturing process itself.

Affirmed.

A majority of the panel has determined this opinion will not be printed in

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the Washington Appellate Reports, but it will be filed for public record pursuant to
RCW 2.06.040.

Kato CJ

Kato, C.J.

WE CONCUR:

Sweeney, J.

Sweeney, J.

Brown, J.

Brown, J.

E. KAY STAPLES
BENTON COUNTY CLERK

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

By _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON)	
Plaintiff)	
)	CASE No. 01-1-00548-4
vs.)	
)	ORDER OF INDIGENCY
KENDRA L. WATT)	
Defendant)	
_____)	

THIS MATTER coming on regularly to be heard before the undersigned Judge upon the motion of the defendant, and the Court having considered the records and files herein and the affidavits presented to it, and being fully advised in the premises, hereby makes the following findings:

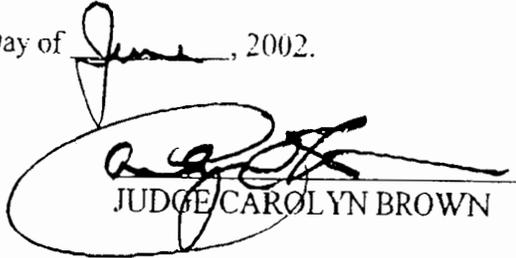
The court finds that the defendant lacks sufficient funds to prosecute an appeal and applicable law grants a defendant a right to review at public expense to the extent defined in this order;

Further, the Court orders as follows:

1. Defendant is entitled to counsel for review wholly at public expense;
2. Defendant is not asking for appointed counsel as her family has paid the attorney's fees.
3. Defendant, upon application to the court, is entitled to copies of clerk's papers at public expense and verbatim report of proceedings, and the cost of transmitting exhibits.
4. Defendant is entitled to reproduction of briefs and other papers on review which are produced by the Clerk of the Appellate Court, at public expense.

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DONE IN OPEN COURT this 7th Day of June, 2002.



JUDGE CAROLYN BROWN

Presented by:



DOUGLAS D. PHELPS
Attorney for Defendant Watt