

NO. 77719-5

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

NATHAN KIRKPATRICK,

Petitioner.

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BY C. J. HERRITT  
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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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NORM MALENG  
King County Prosecuting Attorney

JAMES M. WHISMAN  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

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A. ISSUES

1. Should this Court refuse to review a constitutionally-based search and seizure claim that was never raised in the trial court?

2. Would the trial court have been correct in refusing to suppress Kirkpatrick's admissions, and in determining he was not "seized" where a police officer approached a parked car suspected of driving recklessly, and, in a normal tone of voice, asked questions of four young men associated with that car, where the officer did not restrict their movement or otherwise compel them to provide information?

3. Is a Department of Licensing (DOL) letter testimonial under Crawford v. Washington, where the letter merely establishes the absence of any record that the defendant had a driver's license?

B. FACTS

Nathan Kirkpatrick was born on 8/28/88. CP 15. On September 8, 2003 -- two weeks after his 15<sup>th</sup> birthday and before he was legally eligible to hold an actual driver's license -- Kirkpatrick was observed by Rocky Johnson driving a black Honda

automobile. Johnson, a resident of Jewell Street in Enumclaw, saw Kirkpatrick speeding at about twice the posted speed limit. 2RP 6, 8.<sup>1</sup> Johnson yelled at the Honda, and Kirkpatrick momentarily stopped the car but then drove off before Johnson could approach. 2RP 8. Around the same time, another Jewell Street resident, Roger Miller, observed the black Honda speeding, bang over a curb, and drive across a lawn and on the sidewalk. 2RP 21-23, 27.

Enumclaw Police Department officers responded to Jewell Street and interviewed Johnson and Miller. 2RP 45, 67. Officer Osterdahl was dispatched to investigate the reckless driving report and he located the black Honda parked at a McDonald's restaurant just blocks from Jewell Street. 2RP 45. Kirkpatrick was sitting in the front passenger seat, another boy was sitting in the back seat, and two more boys were standing near the car. 2RP 45.

Officer Osterdahl pulled his car in behind the parked Honda, in a manner that still permitted the Honda to leave. 2RP 49 (testimony), 57 (court's finding). The officer did not activate his emergency lights. 2RP 49 (testimony), 57 (court's finding). The

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<sup>1</sup> The verbatim report of proceedings consists of two volumes referred to as follows: "1RP" (June 25, 2004); "2RP" (June 21, 2004; July 9, 2004; and July 16, 2004). The trial court was the factfinder in this juvenile proceeding so the court considered and ruled upon legal or "pretrial" matters in the course of hearing testimony on the charged offenses.

officer briefly asked each young man if he would provide his name and date of birth, and the officer jotted this information in a spiral notebook that he keeps in his breast pocket. 2RP 46. The officer did not restrain Kirkpatrick's movements in any way. 2RP 48.

Although he could not recall precisely, the officer said he may have asked the boys in the car if they would step out of the car so that he could have all four in front of him at the same time. 2RP 49-50.

The officer did not recall if he patted anyone down, and testified that he does so if he is concerned for his safety. 2RP 51. He also testified that he "did not feel threatened by this group." 2RP 50.

The officer used a normal tone of voice in addressing the young men. 2RP 51-52. Although he wanted the young men to speak to him, he "did not have enough [evidence] to make them stay." 2RP 51. When asked by the officer if he knew anything about the Honda being over on Jewell Street, Kirkpatrick admitted to driving the car on Jewell Street, and to having no driver's license. 2RP 59.

In seeking to suppress Kirkpatrick's admissions, defense counsel focused on the failure to supply Miranda<sup>2</sup> warnings where "we've got custody amounting to a degree associated with formal

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

arrest." 2RP 55-56. The prosecutor argued that the custody standard for triggering Miranda warnings had not been shown, and the trial court agreed. 2RP 54-58. No findings were requested or made regarding whether Kirkpatrick was "seized" pursuant to Article 1, Section 7 of the Washington State Constitution.

Johnson testified that he identified Kirkpatrick at the McDonalds as the driver of the Honda. 2RP 60. At trial, Johnson and Miller both identified Kirkpatrick in Court. 2RP 8, 29. The State admitted Ex. 2, a certification from the Department of Licensing, indicating that there was no record of a driver's license for Kirkpatrick. 2RP 75-76. The defense objected to Ex. 2 as hearsay but the objection was overruled. 2RP 14, 70, 75. Ex. 2 was admitted under ER 803(a)(10), absence of public record. 2RP 75. Kirkpatrick did not testify.

On appeal, Kirkpatrick argued that he was illegally seized so his admissions should have been suppressed. The Court of Appeals rejected this argument by distinguishing the authority upon which the argument was based. It did not consider whether this argument had been preserved in the trial court. Kirkpatrick also argued that the DOL letter establishing his lack of a driver's license violated the Confrontation Clause of the United States Constitution.

The Court of Appeals rejected this argument by holding that the letter was not testimonial.

C. ARGUMENT

Kirkpatrick presented two issues in his petition to this Court - one is reviewable, the other is not. First, he claims on appeal that, under Article 1, Section 7 of the Washington State Constitution, the trial court should have suppressed his admissions to driving without a license because the admissions were obtained following an illegal seizure. Pet. for Review at 7. This argument was never made in the trial court so there are no findings to support it, and this Court may decline to review the issue.

Nonetheless, on the existing record Kirkpatrick cannot prove that he was seized when a police officer investigating a fresh report of reckless driving walked up to a parked car that matched the description of the recklessly driven car and asked Kirkpatrick and three other juveniles for identification. Because he has not proved that he was seized, Kirkpatrick's subsequent admissions need not be suppressed pursuant to Article 1, Section 7.

Second, Kirkpatrick argues that the "absence of public records" exception is unconstitutional because it permitted use of

Exhibit 2, which he claims was "testimonial" evidence. Although this claim also was not made in the trial court, the alleged error is "manifest" and the record is sufficient for review.

On the merits, however, his argument should be rejected. If the constitution permits, without live testimony, the use of business records and public records to prove the truth of the matter asserted by the record, then the constitution must also permit evidence of the *lack* of that same record. The certified letter from the custodian of records at DOL simply says that the department has no record indicating that Kirkpatrick had a license. By its very nature, this evidence is inherently reliable and objectively verifiable, and cross-examination of the custodian would add little. Neither the constitution nor logic dictates that this Court must require live testimony under the *absence* of public records exception where live testimony is not required under the public records exception to establish the *presence* of the same type of document.

Finally, even if this Court were to conclude that Exhibit 2 violated the Confrontation Clause, any error is harmless beyond a reasonable doubt in light of the unrebutted evidence that Kirkpatrick admitted to driving without a license.

1. KIRKPATRICK WAS NOT SEIZED WHEN AN OFFICER APPROACHED HIM AND HIS FRIENDS GATHERED AT A PARKED CAR.

Kirkpatrick argues in his petition for review that his statements to Officer Osterdahl must be suppressed because, under State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004), he was illegally seized by the officer.<sup>3</sup> This claim was not preserved and should not be considered now.<sup>4</sup>

A party may not raise a claim of error on appeal that was not raised in the trial court unless it involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a). The rule reflects "a policy of encouraging the efficient use of judicial resources." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule is "also supported by considerations of fairness to the opposing party. . . . the opposing parties should have an

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<sup>3</sup> The Court of Appeals also held that Kirkpatrick was not arrested, so Miranda warnings were not required. State v. N.M.K., 129 Wn. App. 155, 160-61, 118 P.3d 368 (2005). Kirkpatrick does not challenge this holding in his petition for review, so it is not before this Court. RAP 13.7(b) (supreme court review is limited to issues presented in the petition for review and answer).

<sup>4</sup> Neither the State nor the Court of Appeals dealt with the RAP 2.5 issue below. Were this Court to simply reject Kirkpatrick's arguments on a purely legal basis, as did the Court of Appeals, then the failure to preserve the state constitutional argument is not particularly troublesome because the state of the record is largely irrelevant. If, however, this Court were to attempt to decide whether Kirkpatrick was seized, then the principles supporting RAP 2.5(a) would be implicated because no findings or conclusions were entered by the trial court.

opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal." State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

Under RAP 2.5(a)(3), an issue may be raised for the first time on appeal if it is "a manifest error affecting a constitutional right." "Constitutional errors are treated specially because they often result in serious injustice to the accused." State v. Scott, 110 Wn.2d at 686. But, "the exception actually is a narrow one, affording review only of certain constitutional questions." Scott, 110 Wn.2d at 682. This narrow exception is frequently misread; it may not be invoked merely because a defendant can identify a constitutional issue not litigated below. State v. Valladares, 31 Wn. App. 63, 75-76, 639 P.2d 813 (1982). Allowing "every possible constitutional error" to be raised for the first time on appeal undermines the trial process and would waste resources. State v. Lynn, 67 Wn. App. 339, 344, 835 P.2d 251 (1992); see also State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995);

State v. Warren, No. 54032-7-I, Slip op. at 10-11 (Court of Appeals, Div. 1, 7/10/06).<sup>5</sup>

This Court should engage in a two-step process under RAP 2.5(a)(3): 1) ask whether the alleged error suggests a constitutional issue; 2) determine whether the error is "manifest." Lynn, 67 Wn. App. at 345. Here, Kirkpatrick plainly alleges a constitutional error. Thus, the question becomes whether the error is "manifest." An alleged error is "manifest" only if the defendant can show it had "practical and identifiable consequences in the trial of the case." State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001) (quoting Lynn, 67 Wn. App. at 345); see also State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2001). The term "'manifest' means

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<sup>5</sup> The analysis does not change simply because the claimed error is an illegal search or seizure. "[E]xclusion of improperly obtained evidence is a privilege," State v. Smith, 50 Wn.2d 408, 411, 314 P.2d 1024 (1957), and it must be asserted in a timely fashion. Admission of illegally obtained evidence does not require a new trial if the defendant makes no timely objection. State v. Mierz, 72 Wn. App. 783, 789, 866 P.2d 65, 875 P.2d 1228 (1994), aff'd, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). "Error predicated upon evidence allegedly obtained by illegal search and seizure cannot be raised for the first time on appeal." State v. Silvers, 70 Wn.2d 430, 432, 423 P.2d 539, cert. denied, 389 U.S. 871 (1967) Some cases have suggested that the error might be considered a "manifest error affecting a constitutional right," which could be raised for the first time on appeal. See, e.g., State v. Donohoe, 39 Wn. App. 778, 782, 695 P.2d 150, review denied, 103 Wn.2d 1032 (1985). Such analysis misses a key point. The constitution only requires exclusion of illegally obtained evidence *upon timely objection*. "While the constitutional rights of the individual are to be preserved, those rights are dependent, for their recognition, upon a timely assertion." State v. Gunkel, 188 Wash. 528, 534-35, 63 P.2d 376 (1936).

unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. 'Affecting' means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient." Lynn, 67 Wn. App. at 345. In other words, the defendant must show how the alleged error actually affected his constitutional rights. Id. at 346. In Lynn, the impact of the alleged confrontation clause error was purely speculative, so the court declined to review it on appeal. Id. at 346-47.

In this case, however, the Court of Appeals should not have considered Kirkpatrick's "seizure" argument because Kirkpatrick never brought a motion in the trial court to suppress evidence pursuant to CrR 3.6, or pursuant to the state constitution. He simply argued that his statements to the officer should be suppressed pursuant to CrR 3.5. See 2RP 45 (referring to the necessity for a CrR 3.5 hearing); 2RP 53-54 (trial court reads the CrR 3.5 advisement regarding testimony at the hearing); 2RP 55-56 (arguing that Miranda warnings were required); 2RP 54-57 (argument and ruling on CrR 3.5 motion); and CP 17-19 ("Findings of Fact and Conclusions of Law on CrR 3.5 Motion to Admit the Respondent's Statements"). The evidence adduced at trial, the arguments of counsel, and the ruling made by the trial judge were

made through a completely different constitutional lens than Kirkpatrick now uses to examine this police/citizen encounter. Article 1, Section 7 of the Washington Constitution provides that, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A person claiming to have been seized bears the burden of proving seizure. State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). It is impossible to determine whether Kirkpatrick was "disturbed in his private affairs" where that question was not posed in the trial court. In other words, the impact of the constitutional provision is speculative. The alleged violation is not manifest -- this Court should decline to review it.

Even if this Court exercises its discretion to review the issue, it can be rejected on a purely legal basis. Based on the analysis in State v. Rankin, Kirkpatrick claims he was seized. In Rankin, this court observed that "a passenger faced with undesirable questioning by the police does not have the realistic alternative of leaving the scene as does a pedestrian...[T]he passenger is forced to abandon his or her chosen mode of transportation and, instead, walk away into a frequently foreign location thereby risking the departure of his or her ride while away." Rankin, 151 Wn.2d at 697 (quoting Wayne R. LaFave, The Present and Future Fourth

Amendment, 1995 U. Ill. L.Rev. 111, 114-15). Thus, the Court held that passengers in a moving vehicle that is then stopped by police may not be questioned without independent basis to believe the passenger is violating the law. Rankin, 151 Wn.2d at 699.

However, "not every encounter between a police officer and a citizen is an intrusion requiring an objective justification." Rankin, 151 Wn.2d at 695 (citing United States v. Mendenhall, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). For instance, "asking for identification from a pedestrian does not constitute a seizure." Id. at 697 (referring to State v. Young, 135 Wn.2d 498, 957 P.2d 681 (1998)). And, a person is not seized simply because an officer says he would like to speak to the person, and asks the person to remove his hands from his pockets. State v. Nettles, 70 Wn. App. 706, 708, 855 P.2d 699 (1993), review denied, 123 Wn.2d 1010 (1994). Nor has an officer seized a person simply by walking up to a parked, smoke-filled car and asking, "Where is the pipe?" State v. Thorn, 129 Wn.2d 347, 352, 917 P.2d 108 (1996), overruled in part by State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Moreover, the Rankin court also noted that "there are good reasons for making a distinction between pedestrians and passengers" in deciding when a seizure occurs. Id. This Court has

also noted that "where a vehicle is parked in a public place, the distinction between a pedestrian and the occupant of a vehicle dissipates." State v. O'Neill, 148 Wn.2d 564, 579, 62 P.3d 489 (2003).

The Court of Appeals recently articulated this analysis in State v. Mote, 129 Wn. App. 276, 120 P.3d 596 (2005). Mote was sitting in a illegally parked car that an officer considered suspicious. The officer approached and engaged the driver and Mote in casual conversation. Mote agreed to supply identification, the officer checked his identity, and, because Mote was acting nervous, the officer also checked for arrest warrants. A warrant for Mote was found, he was arrested, and narcotics were found in a search incident to arrest. Mote, 129 Wn. App. at 280-81. On appeal of his conviction, Mote claimed that he had been illegally seized. The Court of Appeals rejected his argument. It held that passengers parked in public places were, for search and seizure analysis, like pedestrians, not passengers, and that under the pedestrian standard, Mote had not been seized. Id. at 289-91.

This case is like Mote, and can be resolved by applying the rationale of that case. The black Honda was not moving when the officer approached, so nobody was trapped against his will in

unfamiliar surroundings by the officer's actions. Rather, the car was stopped, parked on the driver's own volition, and some occupants were inside the car and others were outside the car. They all were where they apparently wanted to be. In this way, Kirkpatrick and his associates were more like pedestrians, and were quite unlike passengers in a moving vehicle stopped by police. They could walk away and terminate the encounter if they so chose. This Court should apply Mote, distinguish Rankin, and reject Kirkpatrick's seizure argument.

Moreover, this case is distinct from Rankin in another respect: it was not at all clear, upon the officer's approach, who was the driver versus who was the passenger of the black Honda. In fact, the driver's seat was empty so there was no actual "driver" at the moment the officer arrived. Although Kirkpatrick was sitting in the passenger seat, two other boys were standing nearby, and a third was sitting in the back seat. It was impossible for the officer to know with certainty who had driven the car to the parking place, because he did not see it pull up.

Kirkpatrick now asserts that "as a matter of common sense and simple deduction, the two people standing outside of the car had to be the driver and back driver's-side passenger." Pet. for

Rev. at 8. This overstates the conclusions that can be drawn. The two people standing near the car may not have been associated with the reckless driving incident at all. Since the officer had not seen the car as it was being parked, he could not tell whether those two had just arrived, or had earlier exited the car. Also, the "simple deduction" that Kirkpatrick now urges, i.e. that he was not driving, conflicts with his admission to the officer that, indeed, he had been driving the car on Jewell Street. For these reasons, it would be inappropriate to apply Rankin as a basis to suppress evidence on this record.

Finally, even if this court reviews this issue under RAP 2.5(a), and even if Rankin applies, Kirkpatrick has not met his burden of showing that he was seized. To the extent the factual record is not sufficiently developed to decide whether Kirkpatrick was seized, that deficiency should not inure to his benefit. Instead, this Court should simply conclude that he has not met his burden of proving that a seizure occurred. The officer did not park his car in a way that prevented Kirkpatrick's departure, he did not activate his emergency lights, he did not restrain Kirkpatrick's movements, the area is not geographically isolated, 2RP 57 (court's finding), the officer asked for identification in a normal voice, and Kirkpatrick

complied. Kirkpatrick was not seized even under the Rankin standard. Kirkpatrick's claim should be rejected.

2. THE DOL LETTER SHOWING THAT KIRKPATRICK HAD NO DRIVER'S LICENSE WAS PROPERLY ADMITTED.

Kirkpatrick argues that the DOL letter was testimonial hearsay admitted in violation of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Kirkpatrick did not argue at trial that Exhibit 2 violated his rights under the Confrontation Clause; he simply objected that the record was hearsay. 2RP 14, 70, 75. Although his constitutional claim was not preserved, the error is "manifest" because if Kirkpatrick is correct that Crawford precludes use of Exhibit 2 without testimony, the exhibit should not have been admitted, and his confrontation rights were unquestionably violated. Thus, the alleged error has obvious, direct consequences. See State v. Lynn, 67 Wn. App. at 345-47.<sup>6</sup>

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<sup>6</sup> Moreover, this is not a case like State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005), wherein the DOL record at issue was never submitted to the trial court, the DOL record was not a part of the record on review, the appellant's argument depended on the precise nature of the DOL record, and litigants had attempted to reinvent the appellate record with records from other cases. Smith, 155 Wn.2d at 499-500.

The substantive issue as framed by Kirkpatrick is very narrow. In Crawford, the United States Supreme Court indicated that business records by their very nature are not "testimonial" and, thus, are admissible without confrontation of a live witness. Crawford, 541 U.S. at 56. Kirkpatrick does not challenge this language in Crawford, nor does he claim that public records are constitutionally distinct from business records. Instead, he argues that the "absence of public record" exception is different, such that an attestation that a record is *missing* is constitutionally distinct from an attestation that a public record *exists*. See Pet. for Review at 9-13. These arguments should be rejected. Exhibit 2, attesting to the absence of a public record, is by its very nature not "testimonial" evidence under Crawford.

a. Business Records, Public Records, and the "Absence of Public Record" Exceptions.

Business and public records are admissible in Washington courts pursuant to statute; the evidence rules simply refer to the specific statutes. See RCW 5.45.020 and ER 803(a)(6) (business records); RCW 5.45.040 and ER 803(a)(8) (public records). In State v. Monson, 113 Wn.2d 833, 784 P.2d 485 (1989), this Court

held that a certified copy of a driving record was admissible under the public records statute, RCW 5.44.040, noting that the statute was unchanged since 1891. Monson, 113 Wn.2d at 836-37. The Court specifically rejected arguments that the public records statute addresses only authentication. Id. at 837-38.

Washington's hearsay rules also exempt documents that prove business or public record does not exist. ER 803(a)(7) (absence of business record); ER 803(a)(10) (absence of public record). In particular, the absence of public record exception provides:

(a) **Specific Exceptions:** The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ...

(10) *Absence of Public Record or Entry.*

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that a diligent search failed to disclose the record, report, statement, or data compilation, or entry....

ER 803(a)(10) (bold and italics in original). ER 902(d) establishes that certified copies of public records are self-authenticating.

The absence of public record exception "is a logical extension of the hearsay exceptions for public records and vital

statistics." 5C Karl B. Tegland, Washington Practice: Evidence Law & Practice § 803.52, at 40 (4th ed.1999).

The exception is based upon the assumption that evidence admissible under the rule is highly reliable, particularly because the records from which the evidence comes are open to the public, thereby increasing the probability that errors will be found and corrected.

Id. It is rooted in the inherent trustworthiness of records prepared and kept pursuant to a public duty, the necessity for using certifications instead of live testimony, and the minimal likelihood that live testimony would add much to the certificate. Mueller & Kirkpatrick, 4 Federal Evidence § 460 at 610 (2<sup>nd</sup> ed.).<sup>7</sup>

As Washington Courts have held, the very nature of public records is such that cross-examination serves little or no purpose:

A number of reasons underlie the business or public records exception to the hearsay rule. Many public or business records and documents are the products of daily routine government and business transactions. Cross-examination, therefore, serves little or no purpose. It is also unrealistic to expect that those who generate these records, or record custodians, would recall the details of a particular transaction or event. And, frequently, the mere fact that they are kept is an indication of their genuineness.

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<sup>7</sup> This Court has endorsed these principles by finding, in a different context, that DOL records are presumptively reliable. State v. Gaddy, 152 Wn.2d 64, 73-74, 93 P.3d 872 (2004).

State v. Hines, 87 Wn. App. 98, 101, 941 P.2d 9 (1997). Because records custodians are unlikely to recall the details of the transaction or event, "cross-examination would not serve to enhance truth-finding," and is of little value in insuring the reliability of the document. Monson, 113 Wn.2d at 843; State v. Chapman, 98 Wn. App. 888, 891-92, 991 P.2d 126 (2000); State v. Sosa, 59 Wn. App. 678, 800 P.2d 839 (1990). The same logic applies to the absence of public record exception.

b. The Absence of Public Record Exception Does Not Violate the Confrontation Clause.

Crawford clearly suggests that firmly-rooted hearsay exceptions like business records are not excluded by the Confrontation Clause because, by their very nature, they are not "testimonial." Crawford, 541 U.S. at 56; See also Crawford, 541 U.S. at 75 ("...the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records.") (Rehnquist, C.J., concurring). This language in Crawford is not surprising, as courts have traditionally rejected arguments that the confrontation clause requires live testimony to admit business records or public records. See Monson, 113 Wn.2d at

839-47. This term, the Supreme Court again indicated that official records are not testimonial. Davis v. Washington, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2266, 2274-75, \_\_\_ L. Ed. 2d \_\_\_ (2006) (citing Dowdell v. United States, 221 U.S. 325, 330-31, 31 S. Ct. 590, 55 L.Ed. 753 (1911)(facts regarding conduct of prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to defendants' guilt or innocence and hence were not statements of "witnesses" under the Confrontation Clause)).

Moreover, even after Crawford, numerous courts have held that business and public records are not testimonial, as long as they contain simple recitations of facts as opposed to conclusions or opinions.<sup>8</sup> This is likely the reason Kirkpatrick does not argue that business and public records are testimonial.

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<sup>8</sup> See e.g. State v. Kronich, 131 Wn. App. 537, 128 P.3d 119, review granted, \_\_\_ Wn.2d \_\_\_ (2006); State v. Bellerouche, 129 Wn. App. 912, 120 P.3d 971 (2005) (trespass notice); United States v. Evans, No. 04-10239, 2006 WL 1217901 (9<sup>th</sup> Cir. May 8, 2006) (cell phone records are business records); Acuna v. Commonwealth, No. 1396-05-4, 2006 WL 1888703 (Va. App. July 11, 2006) (Department of Motor Vehicles Record); Johnson v. State, 2006 WL 1738288 (Tex. Crim. App. June 27, 2006) (purely factual components of a sexual assault examination report and a DNA report); Fencher v. State, 931 So.2d 184 (Fla. Dist. Ct. App. 5<sup>th</sup> Dist. 2006)(record of evidence gathered from rape kit was business record); Rollins v. State, 392 Md. 455, 897 A.2d 821 (2006) (purely factual aspects of autopsy reports were non-testimonial, and opinions had been redacted, so report was admissible as a business record and a public record); Card v. State, 927 So.2d 200 (Fla. App. 5 Dist., Apr. 28, 2006) (driving records).

Instead, he argues that the certification as to the *absence* of a public record is different, and that the certification is testimonial evidence, even if the actual public record is not. There is nothing in the law or logic to support this view.

First, as for the law, courts have traditionally held that it is constitutional to prove the absence of records by certification, without live testimony. See Mueller & Kirkpatrick, supra, § 460 at 615; United States v. Moschetta, 673 F.2d 96 (5<sup>th</sup> Cir.1982) (affidavit of lawyer for the Central Intelligence Agency saying that the agency had no record of ever employing the defendant); United States v. Neff, 615 F.2d 1235, 1242-43 (9<sup>th</sup> Cir.) (IRS certificate showing absence of records that defendant filed tax returns), cert. denied, 447 U.S. 925, 100 S. Ct. 3018, 65 L. Ed. 2d 1117 (1980); United States v. Lee, 589 F.2d 980, 987-89 (9<sup>th</sup> Cir.) (CIA affidavit regarding absence of employment record), cert. denied, 444 U.S. 969, 100 S. Ct. 460, 62 L. Ed. 2d 382 (1979); United States v. Thompson, 420 F.2d 536, 545 (3<sup>rd</sup> Cir.1970) (certified report by IRS agent as to absence of record that gun was properly transferred); T'Kach v. United States, 242 F.2d 937, 938 (5<sup>th</sup> Cir.1957) (affidavit of White House personnel officer attesting that defendant had never been employed as a personal representative of the president).

Although these cases all predate the new Confrontation Clause analysis in Crawford, there is no reason to expect, given the language in Crawford approving of the business record exception, that the United States Supreme Court intended to change the results in these cases. More importantly, the reasoning in these cases traces back to the original rationales for the exception --- that the records are inherently reliable and open for inspection, that cross-examination of a records custodian would add little, if anything, to the truth-seeking function of the trial, and that, on balance, the cost of repeatedly producing witnesses in such cases far outweighs any benefit to the accused.

Moreover, since Crawford was decided, numerous courts have held that certifications attesting to the absence of a public record are not testimonial. In United States v. Rueda-Rivera, 396 F.3d 678 (5<sup>th</sup> Cir. 2005), the defendant was convicted of reentering the United States after deportation, without the consent of the government. To prove a lack of consent by the United States, a Certificate of Non-Existence of Record (CNR) was admitted into evidence. The CNR was a document created by a records custodian at the Immigration and Naturalization Service stating that “after a diligent search no evidence [was] found to exist in the

records of the Immigration and Naturalization Service of the granting of permission for admission into the United States after deportation . . . . “ Rueda-Rivera, 396 F.3d at 679. The records custodian did not testify at trial. The court concluded that the contents of the defendant’s immigration file were business records and, therefore, not testimonial. Id. at 680. The CNR was also admissible because it “does not fall into the specific categories of testimonial statements referred to in Crawford.” Id.

Other courts have reached similar results. See United States v. Salazar-Gonzalez, 445 F.3d 1208 (9<sup>th</sup> Cir. 2006) (CNR regarding applications for alien re-entry to United States not testimonial); United States v. Bahena-Cardenas, 411 F.3d 1067, 1074-75 (9th Cir.2005) (warrant of deportation not testimonial), cert. denied, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1652, 164 L. Ed. 2d 398 (2006); United States v. Cervantes-Flores, 421 F.3d 825, 830-34 (9th Cir.2005) (CNR not testimonial), cert. denied, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1911, \_\_\_ Ed. 2d \_\_\_ (2006); U.S. v. Lopez-Chamu, 2006 WL 1722529 (9<sup>th</sup> Cir.2006) (CNR not testimonial); United States v. Torres-Hernandez, 447 F.3d 699 (9<sup>th</sup> Cir. 2006) (same); Michels v. Commonwealth, 47 Va. App. 461, 624 S. E. 2d 675 (2006) (documents from the Delaware Secretary of State certifying that

entities were not corporations licensed in Delaware were non-testimonial); United States v. Bryant, Slip Op., 2006 WL 1700107 (W.D.Va., June 15, 2006) (CNR from IRS regarding absence of tax records to show that defendant's income was derived from drug sales).

Second, logic does not support Kirkpatrick's argument. Public records do not become testimonial simply because a certification is prepared for trial. The existence or absence of the record is the salient fact -- it is the matter that is presented for the jury's consideration. And, the absence of a record cannot be "prepared" for litigation. Either Kirkpatrick had a license on file with the DOL on September 8, 2003, or he did not. The certification simply describes the objectively verifiable contents of the DOL records at that point in time. It is not an accusatory statement or testimony. As the Ninth Circuit said in Cervantes-Flores:

It is true that Jones' certificate was prepared for litigation, one of the circumstances that Crawford emphasized as a concern of the Sixth Amendment. However, the document her certification addresses is part of a class of documents that were not prepared for litigation. Adopting the concerns of the common law, the Court in Crawford based its distinction between testimonial and nontestimonial evidence in part on skepticism of government officers preparing evidence against a defendant...

Cervantes contends that the CNR is just such a document-prepared by an INS official at the request of a federal prosecutor for use in the prosecution against the defendant-but Cervantes mischaracterizes the CNR.

The CNR certifies the nonexistence of a record within a class of records that themselves existed prior to the litigation, much like business records. ...Thus, had the Attorney General in fact denied Cervantes' application for consent, a government official would have prepared-for trial-a certification that the denial (which could be submitted in evidence as an extant document) was indeed an official record. Conversely, the CNR states that no such preexisting public record, which would have been created and kept in the ordinary course of the INS's regular course of operations, can be found in those official records.

Cervantes-Flores, 421 F.3d at 832-33 (internal citations and quotations omitted).

And, although the certification was produced upon request of the prosecutor, "the class of records as to whose contents the [custodian] prepared her certification were created and kept in the ordinary course of the [agency's] activities, prior to and regardless of ... prosecution." Id. at 853.

Kirkpatrick's argument would also lead to some stark incongruities. For one, it would be strange indeed to establish a different constitutional rule for missing versus existing records. As the Ninth Circuit observed:

By issuing the CNR, Jones certified that a record that the INS would keep in the course of its regularly conducted activities did not exist in the agency's files. She certified this fact in the same manner that she would certify that such a record *did* exist in those files and that it was an official record of the INS. ... In either case, someone would have had to search the INS database to verify the document's existence or nonexistence.

Cervantes-Flores, 421 F.3d at 832.

The relevance of cross-examination is minimal whether the record is found, or absent. In either case, a defendant might ask whether the custodian looked carefully enough, whether he had used the correct name or date of birth, or whether some other error had been made in the "diligent" search. But these sorts of questions are very different from the cross-examination of a witness to crime -- the sort of "witness" that is discussed in Crawford. And, perhaps most importantly, the accused or his counsel can easily verify the correctness of the certification and records by obtaining a copy for himself. Cross-examination of the custodian is simply not as critical here as it would be with truly testimonial evidence, whether the record is found or absent, so use of such evidence does not fall within the Confrontation Clause.

Also, under Kirkpatrick's argument, the mere form of DOL records could change the constitutionality of "absent records"

cases. Since Kirkpatrick essentially concedes that public records are admissible without live testimony, DOL could theoretically reconfigure its computer system so that if an inquiry was made regarding a person who did not possess a license, the computer would produce a blank page, on DOL stationery, perhaps with columns and headings in the format of a normal driving record, but devoid of any license information. This "record" would be sent to the prosecutor, accompanied by a certification attesting to the fact that it is the "driving record" of Nathan Kirkpatrick, and it would be admitted into court without live testimony, and without offending the Confrontation Clause. Yet, the blank record would attest to the same absence of record that Exhibit 2 attests to in this case, and the certification would be the same, i.e. that a diligent search had produced this empty "record." There would be no greater opportunity to cross-examine the DOL employee in this circumstance, yet it appears that the blank record would be admissible under Kirkpatrick's argument. It is unlikely that the constitutional analysis turns on such matters of form rather than substance.

Alternatively, this Court could hold that Exhibit 2 is not testimonial because the absence of a public record is not hearsay

at all. See Mueller & Kirkpatrick, 4 Federal Evidence § 460 at 611 (2<sup>nd</sup> ed.) (citing United States v. M'Biye, 655 F.2d 1240, 1241 n. 2 (D.C. Cir. 1981); United States v. Lee, 589 F.2d 980 987 (9<sup>th</sup> Cir. 1979) (noting that "[t]he Advisory Committee to the Federal Rules of Evidence said that the absence of any record is "probably not hearsay as defined in Rule 801)"). This argument is logical. "'Hearsay' is [an out of court statement] offered in evidence to prove the truth of the matter asserted." ER 801(c). A "statement" includes a written assertion intended as an assertion. ER 801(a). The lack of a record is not an assertion, nor is it intended to prove the truth of some matter asserted. It is simply the absence of a record -- a negative -- a void. And, if a record is not hearsay, then it is not covered by the Confrontation Clause at all. Crawford, 541 U.S. at 59 n. 9.

Finally, even if the record was erroneously admitted, the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (Confrontation Clause error is subject to harmless error

analysis).<sup>9</sup> Officer Osterdahl testified that Kirkpatrick admitted to driving, and admitted that he did not have a driver's license. 2RP 59. Moreover, Kirkpatrick's was born on 8/28/88, meaning that he had just turned fifteen years old when this incident occurred. At that age, he is not eligible by law to obtain a license, RCW 46.20.031, and there is no evidence that he met the criteria for driving with an instructor's permit. RCW 46.20.055.

D. CONCLUSION

This Court should decline to review Kirkpatrick's search claim because it was never raised in the trial court. Alternatively, the claim should be rejected because the case upon which it is based, State v. Rankin, is distinguishable. Finally, the claim should be rejected even under the Rankin standards.

This Court should also reject Kirkpatrick's argument for exclusion of Exhibit 2. The document was properly admitted under ER 802(a)(10), and did not violate Kirkpatrick's rights under the

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<sup>9</sup> An error may be "manifest" under RAP 2.5(a) but still "harmless." The "manifest" question asks whether the alleged error would have impacted the constitutional right, *i.e.* the right to confront the witness, whereas the "harmless error" question asks whether, excluding the evidence that should not have been considered, the result of the trial would have been the same.

Confrontation Clause. The decision of the Court of Appeals should be affirmed.

DATED this 28<sup>th</sup> day of July, 2006.

Respectfully submitted,

NORM MALENG  
King County Prosecuting Attorney

By:   
JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I sent by electronic mail, and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT, in STATE V. NATHAN KIRKPATRICK, Cause No. 77719-5, in the Supreme Court of the State of Washington.

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

W Brame

Name

Done in Seattle, Washington

7/28/06

Date 7/28/06