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No. 23427-4-III

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STATE OF WASHINGTON
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WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

RECEIVED

v.

Washington Office of Appeals Division Five
By _____

KYLE K. KRONICH,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Kyle Kronich asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the decision in *State v. Kronich*, 23427-4-III. __ Wn. App. __, 128 P.3d 119 (Feb. 7, 2006) (Baker, J. concurring in part and dissenting in part). A copy of the decision is in the Appendix at pages A-1 through 14.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Mr. Kronich's breath test refusal should have been suppressed because the State failed to prove a knowing, intelligent and voluntary waiver of counsel under CrRLJ 3.1 when the only evidence it produced in response to Mr. Kronich's unequivocal request for an attorney, was the ambiguous notation within a police report, "did not want to call."

2. Whether the State's use of an ex parte declaration from an employee at the Department of Licensing as evidence of a necessary element for driving while license suspended violated Mr. Kronich's Sixth Amendment right to confront the witnesses called against him.

D. STATEMENT OF THE CASE

Kyle Kronich was charged with driving under the influence and driving while his license was suspended in the third degree. Before trial, Mr. Kronich filed a motion to suppress his refusal to submit to a breath test, contending he was denied access to counsel as provided in CrRLJ 3.1. In support of this motion, Mr. Kronich filed a copy of the police report, which indicated that Mr. Kronich had requested an attorney, but was not provided with access to one. Within the “Attorney’s Name” box, the officer made the ambiguous notation: “Did not want to call.” The report does not identify whether it was the officer or Mr. Kronich that did not want to call, or the circumstances surrounding this comment. (App. 15)

At hearing on this motion, the State incorrectly argued that Mr. Kronich bore the burden of clarifying the ambiguity created by the officer’s report. As such, the State did not call the officer to testify. Although acknowledging the ambiguity, the trial court accepted the State’s argument that Mr. Kronich bore the burden of proof and denied Mr. Kronich’s motion.

At trial, the State submitted a declaration from Trina Truong, claiming to be the custodian of record for the Department of Licensing (DOL). Within this declaration, Ms. Truong stated that

she “diligently” searched DOL’s records and believes that on the day Mr. Kronich was arrested he “[h]ad not reinstated his/her driving privilege. Was suspended/revoked.” (App. 16) A jury convicted Mr. Kronich of driving under the influence (DUI) and third degree driving with a suspended license (DWLS).

Mr. Kronich appealed to Superior Court. The Superior Court, Honorable Robert A. Austin, held that the trial court had applied the wrong burden of proof when considering the motion to suppress in that the State bore the burden of showing a valid waiver after an unequivocal request for an attorney. Nevertheless, the Superior Court held that Mr. Kronich had failed to show prejudice because the evidence at trial “focused on the defendant’s level of intoxication, the officer’s opinion of his level of intoxication, and the lack of confusion on the part of the defendant.” (CP 98-99)

The Superior Court also denied Mr. Kronich’s appeal on the State’s use of ex parte declarations to convict him of DWLS. The Superior Court held that “these records are public records and are kept in the regular course of business by the Department of Licensing, the admission of such records are not precluded by the *Crawford* decision.” (CP 99)

The Court of Appeals accepted discretionary review. As to the first issue, the Court rejected the Superior Court's conclusion that the State had failed to meet its burden and held instead that the "DUI report provides substantial evidence that Deputy Jenkins offered access to counsel and Mr. Kronich accepted, but then changed his mind." *Kronich*, 128 P.3d at 121.

As to the second issue, the Court exercised its discretion under RAP 2.5(a) to consider the issue despite the lack of objection at trial because the issue would likely arise again. *Id.* at 122. In a somewhat confusing opinion, the Court seems to hold that the declaration in this case was a certificate of the non-existence of a public record. The Court reasoned that since business records were non-testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and public records were like business records, public records were likewise non-testimonial as were any certificates of the non-existence of a public record. *Kronich*, 128 P.3d at 123.

Judge pro tem, Baker dissented with this portion of the decision. Specifically, Judge Baker noted that the declaration used in this case was not a certificate of the non-existence of a public record because the declarant did not merely certify that certain records were not found within DOL's records. *Id.* at 127. Instead,

“[t]he statement tells us what the records mean, and what the witness concludes from them, not whether they *are* records or what, if any, records there are – or are not.” *Id.* (emphasis in original).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Court should accept review of Mr. Kronich’s first assignment of error because the Court of Appeals decision conflicts with this Court’s decision in *Templeton* and Division II’s decision in *Kirkpatrick*, and lower courts are in need of more guidance. RAP 13.4(b)(1), (2) & (4).

In *State v. Templeton*, 148 Wn.2d 193, 212, 59 P.3d 632 (2002) this Court held that “the right to counsel under CrRLJ 3.1 is essential to the effective preparation of defense against the charge of DUI.” *Id.* (citing *State v. Fitzsimmons*, 93 Wn.2d 436, 610 P.2d 893 (1980) and *City of Tacoma v. Heater*, 67 Wn.2d 733, 409 P.2d 867 (1966)). Access to counsel at the preliminary stage of a DUI investigation gives a suspect the opportunity to make an informed decision on “whether to submit to the BAC breath test, arrange for alternative testing, and present other exculpatory evidence such as video and disinterested third party witnesses.” *Templeton*, 148 Wn.2d at 212.

This case provides this Court with another opportunity to further clarify the requirements of CrRLJ 3.1, along with clarifying

the requisite burdens of proof and production. There is no dispute that Mr. Kronich made an unequivocal request for an attorney prior to refusing the breath test. Nor is there any dispute that Mr. Kronich was not put in contact with an attorney. The issue presented here is whether a notation “did not want to call” is enough to meet the State’s burden of proving that Mr. Kronich made a knowing, intelligent and voluntary waiver of his previously requested counsel. If not, the next question is whether Mr. Kronich has shown prejudice.

The rule provides that when a person is arrested, he must be advised as soon as practicable of his right to contact a lawyer. CrRLJ 3.1(c)(1). When a lawyer is requested, the suspect “shall be provided with access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place him or her in communication with a lawyer.” CrRLJ 3.1(c)(2). The rule requires that once an unequivocal request for an attorney has been made, the State must show “reasonable efforts to contact an attorney, why such efforts could not have been made, or a valid waiver by [the defendant] before the ‘earliest opportunity’ arose.” *State v. Kirkpatrick*, 89 Wn.

App. 407, 416, 948 P.2d 882 (1997). *Kirkpatrick* makes it clear that the burden of proving a valid waiver is on the State.

In *Templeton*, this Court found a rule violation because the suspects were not immediately advised of their right to an attorney. Here, unlike *Templeton*, the violation occurs because Mr. Kronich unequivocally requested counsel and the State failed to show a valid waiver. Although the State claims Mr. Kronich waived this request because he “did not want to call,” this notation is entirely ambiguous and insufficient to meet the State’s burden. For example, there is no indication in the record of when Mr. Kronich supposedly changed his mind. Was it immediately after requesting an attorney? If not, was Mr. Kronich “immediately” provided with the number of a public defender and access to a telephone? Or was he denied access for a significant period of time before allegedly changing his mind? Was anything said to him that may have influenced his decision? Since the State has the burden of showing a valid waiver, these are issues that it must put to rest in order to show a valid waiver.

But to hold, as the Court of Appeals did, that an ambiguous statement such as “did not want to call” is sufficient to meet the State’s burden of showing a knowing, intelligent and voluntary

waiver trivializes the rule's requirements, and effectively place the burden on the defendant to disprove a waiver. Consequently, the Court of Appeals decision below conflicts with this Court's decision in *Templeton* and Division II's decision in *Kirkpatrick*. See RAP 13.4(b)(1) and (2).

If the rule was violated, the next question is whether Mr. Kronich can show prejudice. *Templeton* noted that because this right to counsel is rule-based and not constitutional, a court must apply a "reasonable probabilities" standard and determine if the outcome of the trial would have been materially affected had the error not occurred. *Templeton*, 148 Wn.2d. at 220. In *Templeton*, the court found the defendants had failed to show prejudice because none of the defendants had requested counsel even after they were finally advised of their right. *Id.* at 220-21. As such, there was no evidence that had they been immediately advised of their right to counsel, they would have requested counsel. *Id.*

The Court of Appeals decision below did not reach the issue of prejudice because it determined the State had met its burden of showing a valid waiver. The Superior Court found a rule violation, but then determined there was no prejudice after incorrectly focusing on the sufficiency of evidence presented by the State.

In determining whether prejudice has been shown, the *Templeton* Court looked to the rule's purpose, noting that the rule was created so that a suspect can be provided with access to counsel "in order that the suspect may determine whether to submit to the BAC breath test, arrange for alternative testing, and present other exculpatory evidence such as video and disinterested third party witnesses." *Templeton*, 148 Wn.2d. at 212. In other words, the rule is intended to give a suspect access to counsel at a critical stage in the investigation so that he may make an intelligent choice about gathering exculpatory evidence. In determining prejudice then, the focus is on the evidence denied to the defendant instead of the evidence presented by the State. Otherwise, the State has no incentive to follow the rule. Instead, the State can simply argue its own evidence is overwhelming. And in most cases where the defendant is denied the ability to gather exculpatory evidence, it will be.

In this case, unlike *Templeton*, Mr. Kronich did request an attorney. While the *Templeton* Court found lack of prejudice when no attorney was requested, the *Templeton* decision failed to clarify whether a denial after an unequivocal request would constitute

prejudice. Consequently, this is an issue of substantial public interest that needs to be decided by this Court. RAP 13.4(b)(4).

2. This Court should accept review of Mr. Kronich's second assignment of error because it raises a significant question of constitutional law and the Court of Appeals decision conflicts with *Crawford v. Washington*. RAP 13.4(b)(1) and (3).

As in most prosecutions for Driving While License Suspended (DWLS), the State introduced an ex parte declaration from a Department of Licensing (DOL) employee, who claimed that she made a "diligent" search of DOL's records and concluded from her search that on the day he was arrested, Mr. Kronich "[h]ad not reinstated his/her driving privilege. Was suspended/revoked." The declaration did not certify a copy of Mr. Kronich's driving record, instead it gave the declarant's opinion of that record.

This ex parte declaration was prepared by a government agent for the sole purpose of establishing an essential fact at trial. Its use by the State to prove an element of the crime violated Mr. Kronich's Sixth Amendment right to confront the witnesses against him. In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d. 177, (2004), the United States Supreme Court clarified that the use of ex parte testimonial evidence by the government violates a criminal defendant's right to confrontation unless the

declarant is truly unavailable and has been subject to prior cross examination by the defendant. *Id.*, 124 S. Ct. at 1374. In this case, it is undisputed that the declaration was submitted ex parte and that Mr. Kronich was not provided an opportunity to cross-examine the witness. Consequently, the only issue in deciding whether *Crawford* applies, is determining whether the declaration provided by DOL and submitted by the State constitutes “testimonial” evidence.

The majority opinion by the Court of Appeals below failed to make any analysis on whether the DOL declaration was testimonial. Instead, it concluded that the declaration was either a public record or a certification of the nonexistence of a public record, and then reasoned that since public records are like business records and all business records are excluded as nontestimonial, then this declaration was likewise nontestimonial. But as Judge Baker pointed out in her dissent, this declaration was far from merely a certificate about the existence or nonexistence of a public record. Instead, this declaration told the jury what the DOL records meant and then gave the witness’s opinion of those records.

Courts across the country are reaching different conclusions on whether government certificates such as these qualify as testimonial under *Crawford*. Many court have held that such declarations constitute testimonial statements. See, *Shiver v. State*, 900 So.2d 615, 618 (Fla. App. 2005) (“affidavit of breath test” testimonial); *Belvin v. State*, ___So.2d___, 2005 WL 1336497 (Fla. App. 2005) (unpublished) (same); *People v. Capellan*, 791 N.Y.S.2d 315, 317-18 (N.Y. 2004) (Slip Op.) (“affidavit of regularity/proof of mailing” on driver’s license offense testimonial); *People v. Rogers*, 8 A.D.3d 888, 891 (N.Y. App. 2005) (Slip Op.) (“Defendant had the right to cross-examine witnesses regarding authenticity of the [blood] sample for foundation purposes”); *People v. Niene*, 798 N.Y.S.2d 891, 893-94 (N.Y. 2005) (Slip Op.) (affidavit of non-existence of vendor’s license “testimonial,” although admission harmless); *People v. Pacer*, 796 N.Y.S.2d 787, 788-89 (N.Y. App. 2005) (Slip Op.) (an “affidavit of regularity/proof of mailing” used to prove notice of suspension of driving privileges is testimonial); *People v. Orpin*, 796 N.Y.S.2d 512 (N.Y. 2005) (Slip Op.) (breath machine certifications testimonial); *City of Las Vegas v. Walsh*, 124 P.3d 203, 207-08 (Nev. 2005) (affidavit of nurse on blood draw testimonial), *reversed on other grounds*, *City of Las*

Vegas v. Walsh, 91 P.3d 591, 593-94 (Nev. App. 2004)(nurses affidavit testimonial).

These decisions generally conclude that authenticating statements found in certifications and affidavits are testimonial because such evidence is prepared for the purpose of litigation, a core class of statements recognized by *Crawford* to constitute testimonial statements. *Crawford*, 541 U.S. at 51. For example, the federal district court in *United States v. Wittig*, 2005 WL 1227790, 67 Fed. R. Evid. Serv. 364 (D. Kan. 2005) (Slip Copy) found that the declarants of business records certifications “know that they are providing foundational testimony for business records to the government, and thus, must reasonably expect that their certifications will be used prosecutorially.” *Wittig*, 2005 WL 1227790; see also *Walsh*, 124 P.3d at 208 (affidavit of blood samples “are made for use at a later trial or legal proceeding”); *Shiver*, 900 So.2s at 618 (“the only reason the affidavit was prepared was for use at trial”); *Neine*, 798 N.Y.S.2d at 893 (the affidavit “was prepared at the request of law enforcement for use in the criminal trial”). *Capellan*, 791 N.Y.S.2d at 812 (“Greene affidavit was created expressly for use in this litigation”); *Belvin*, 2005 WL 1336497 at *3 (“it is undisputed that the sole purpose of the breath

test affidavit generated by law enforcement is for use at a DUI trial”).

Other court decisions since *Crawford* have concluded that record certifications or affidavits are non-testimonial. See *United States v. Cervantes-Flores*, 421 F.3d 825, 833 (9th Cir. 2005) (certificate of non-existence of records not testimonial); *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005) (same); *Green v. DeMarco*, ___ N.Y.S.2d ___, 2005 WL 3421707, *10 (N.Y. 2005) (Slip Op.) (certification of calibration for breath test not testimonial)¹; *State v. Norman*, 125 P.3d 15 (Or. App. 2005) (certification of accuracy of breath test not testimonial); *Commonwealth v. Williams*, 2005 WL 3007781 (Va. 2005) (unpublished) (certification of chemical analysis not testimonial); *Rembusch v. State*, 836 N.E.2d 979, 982 (Ind. App. 2005) (certification of breath test instrument not testimonial); *Luginbyhl v. Commonwealth*, 618 S.E.2d 347, 475 (Va. App. 2005) (same); *State v. Godshalk*, 885 A.2d 969, 973 (N.J. 2005) (same) *Commonwealth v. Verde*, 827

¹ *DeMarco* granted relief for prosecutors in New York by allowing the admission of certifications for breath instruments, contrary to the practice of Judge Demarco who required live testimony as to the functioning of the breath machine pursuant to *Crawford*. See *People v. Orpin*, 796 N.Y.S.2d 512, 517 (N.Y. 2005).

N.E.2d 701, 705-06 (Mass. 2005) (toxicologist certification not testimonial); *Napier v. Indiana*, 827 N.E.2d 565, 568-69 (Ind. App. 2005) (toxicologist certification not testimonial); *State v. Carter*, 114 P.3d 1001, 1007 (Mont. 2005) (breath test certification not testimonial); *Rackoff v. State*, 621 S.E.2d 841, 845 (Ga. App. 2005) (inspection certificate for breath test instrument not testimonial); *State v. Cook*, 2005 WL 736671 (Ohio App. 2005) (Slip Copy) (business records certification not testimonial); *Moreno Denoso v. State*, 156 S.W.3d 166, 182 (Tex. App. 2005) (certified copy of autopsy report not testimonial); *Rollins v. State*, 866 A.2d 926 (Md. App. 2005) (same); *People v. Schreck*, 107 P.3d 1048, 1060-61 (Colo. App. 2005) (affidavits used to establish chain of custody for documents not testimonial); *State v. N.M.K.*, 118 P.3d 368, 371-72 (Wash. App. 2005) (certified copy of absence of records not testimonial).

These courts generally conclude that certifications or affidavits used to authenticate records or reports are nontestimonial due to the contents of the certificate or the fact being proven. See *United States v. Weiland*, 420 F.3d 1062, 1077 (9th Cir. 2005) (although foundation certificate was arguably testimonial, it was merely “routine cataloguing of an unambiguous factual matter” and

not testimonial); *see also Cervantes-Flores*, 421 F.3d at 833 (same); *Schreck*, 107 P.3d at 1061 (public records affidavit “provided solely to verify the chain of custody and authenticity” of DOC records); *Moreno Denoso*, 156 S.W.3d at 182 (certified copy of autopsy “report set forth matters observed pursuant to duty imposed by law”); *Cook*, 2005 WL 736671 at * 4 (certificate breath test instrument “not evidence against appellant; it merely lays the foundation for attached documents”); *Carter*, 114 P.3d at 1007 (“certification reports are nontestimonial in nature in that they are foundational, rather than substantive or accusatory”); *Napier*, 827 N.E.2d at 569 (“operator certifications in circumstances such as these should be considered a function that is ministerial in nature” and “have no bearing on guilt or innocence”); *Verde*, 827 N.E.2d at 705 (“Certificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance”); *Godshalk*, 885 A.2d at 973 (breathalyzer certifications are reliable and trustworthy”); *Luginbyhl*, 618 S.E.2d at 355 (breath test instrument certifications are “neutral in character, relating only to the operation of the machine and the qualifications of the officer administering the test” and “do not

accuse [the defendant] of any wrongdoing”); *Rembusch*, 836 N.E.2d at 982 (breath test instrument certificates “are prepared in a routine manner rather than for the purpose of the individual case”); *Norman*, 125 P.3d at 17-18 (breath test instrument certifications are “created by state employees in the course of carrying out routine ministerial duties required by statute and administrative rule to certify the accuracy of test results”); *Williams*, 2005 WL 3007781 at *3 (certificates “do not accuse the defendant of any wrongdoing but rather simply serve to authenticate the routine test results”); *DeMarco*, ___ N.Y.S.2d ___, 2005 WL 3421707 at *10 (“The Confrontation Clause targets only that testimony that contains accusations against the defendant”) (*quoting Ryan v. Miller*, 303 F.3d 231, 247 (2d Cir. 2002))).

These various rationales circumvent *Crawford*'s impact on *Ohio v. Roberts*, 448 U.S. 56 (1980), where the Court abandoned the test of reliability. *Crawford*, 541 U.S. at 61; *see also People v. Walker*, 697 N.W.2d 159, 170 (Mich. App. 2005) (“it is merely a reliability analysis in disguise”). Indeed, the *Crawford* Court held that “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence . . . [the Sixth Amendment]

commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.*

Moreover, the Confrontation Clause “applies to ‘witnesses’ against the accused -- in other words, those who ‘bear testimony.’” *Crawford*, 541 U.S. at 51. Confrontation Clause protections are not based upon the nature of the witness’s testimony, but rather, it is based upon a witness’s “solemn declaration or affirmation made for the purpose of establishing or proving *some fact.*” *Id.* (emphasis added). Whether a hearsay statement is non-accusatorial, neutral or foundational, is of no consequence to the testimonial determination.

Finally, the majority opinion below reasoned that to require DOL witnesses such as this to appear at trial would not add anything to the truth-seeking process. *Kronich*, 128 P.3d at 123 (quoting *Crawford*, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring)). *Crawford*, however, did not dispense with the right of confrontation for witnesses that create “logistical challenges” for the prosecution or witnesses whose presence may be unreasonable to require at every trial. “The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be

developed by the courts.” *Crawford*, 541 U.S. at 54; *C.f. also Orpin*, 796 N.Y.S.2d at 517 (the Supreme Court in “interpreting the guarantees of the Sixth Amendment provides little room for accommodation of the pragmatic issues its decisions might raise in the day-to-day administration of criminal justice”); Friedman, Richard D., *Statements by Government Agents*², (January 14, 2005) (impractical effects of ascribing confrontation rights to certification witnesses “is an inadequate argument. It is always cheaper and easier to do without confrontation, and if courts have gotten used in a given context to doing without it then the requirement that the right be respected will always seem expensive”).³

Certifications used to authenticate records or reports meet all of the core classes of testimonial statements spelled out in *Crawford*. See 3 Michael H. Graham, *Handbook of Federal*

² http://confrontationright.blogspot.com/2005_01_01_confrontationright_archive.html

³ The feared impact of requiring authenticating witnesses to testify at trial is likely lessened by a defendant’s ability to stipulate to prior conviction records, and the like. See, *Old Chief v. United States*, 519 U.S. 172, 175 (1997). The parties are free to determine whether a stipulation is appropriate or whether problems exist with a certification. However, dispensing with Confrontation Clause based upon the logistical challenges caused by its proper application, should not be sustained. An accused should have the ability to cross-examine an authenticating witness even if the witness is merely establishing the fact about the existence of public records or other reports.

Evidence, § 802.2 at 229 (pocket part at 87) (5th ed. 2005) (self-authentication of public records meets all the same goals as authentication of business records which fit within “[a]ll the suggested possible definitions of ‘testimonial statement’” which “on their face clearly encompass affidavits . . . [and] are designed to permit introduction in criminal cases against the criminal defendant in the form of an affidavit of the custodian . . .”).

Clearly, the use of ex parte declarations, certifications, and affidavits is an issue that has split courts and circuits across the country. In addition, because the declaration used in this case is the standard form declaration used by DOL in almost all DWLS trials, the confrontation issue will continue to arise until decided by this Court or the United State Supreme Court. See *State v. Smith*, 155 Wn.2d 496, 499, 120 P.3d 559 (2005).

F. CONCLUSION

For the reasons stated above, this Court should grant review of this case.

Dated this 8th day of March, 2006.



Tracy Staab
Attorney for the Petitioner
Kyle Kronich

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on March 8, 2006, I personally delivered a copy of the Petition for Review in this matter to:

Brian O'Brien
Deputy Prosecutor
Spokane County Prosecutor's Office
Public Safety Building, 1st floor
1100 West Mallon
Spokane, WA 99260

And hand delivered a copy to my client, Kyle Kronich.

Signed at Spokane, Washington on March 8, 2006.

A handwritten signature in cursive script, appearing to read "Tracy Staab", written over a horizontal line.

Tracy Staab, WSBA #23321
Attorney for the Respondent

Westlaw.

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Court of Appeals of Washington,
Division 3.
STATE of Washington, Respondent,
v.
Kyle K. KRONICH, Appellant.
No. 23427-4-III.

Feb. 7, 2006.

Background: Defendant was convicted in the Superior Court Spokane County, Robert D. Austin, J., of driving while under the influence (DUI) and third degree driving while license suspended. Defendant appealed.

Holdings: The Court of Appeals, Brown, J., held that:

- (1) defendant was not denied right to counsel when he was arrested, and
 - (2) admission of a Department of Licensing (DOL) record custodian's certification regarding the status of defendant's driving privileges did not violate right to confrontation.
- Affirmed.

West Headnotes

[1] Automobiles ⇌421

48Ak421 Most Cited Cases

An arrested driver subject to a breath test

must be advised of the *Miranda* rights and right to access counsel, and if the defendant requests the assistance of counsel, access to counsel must be provided before administering the test. CrRLJ 3.1.

[2] Automobiles ⇌421

48Ak421 Most Cited Cases

The remedy for denying the right to counsel to an arrested driver subject to a breath test is suppression of the evidence acquired after the violation. CrRLJ 3.1.

[3] Criminal Law ⇌1134(2)

110k1134(2) Most Cited Cases

When the trial court does not make explicit written findings on a subject, Court of Appeals may look to the trial court's oral decision for interpretation.

[4] Criminal Law ⇌1158(4)

110k1158(4) Most Cited Cases

In reviewing a suppression motion denial, Court of Appeals examines whether substantial evidence supports the trial court's findings of fact.

[5] Automobiles ⇌421

48Ak421 Most Cited Cases

In prosecution for drunk driving, officer's DUI report provided substantial evidence that arresting officer offered access to counsel and defendant accepted, but then

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changed his mind; defendant's indecisiveness was not a surprise given the officer's observation that defendant had been drinking, was lethargic, and very slow moving. CrRLJ 3.1.

[6] Automobiles ⇌421

48Ak421 Most Cited Cases

While court rule requires the State to offer access to counsel to an arrested driver subject to a breath test, it is not required to force the defendant to accept. CrRLJ 3.1.

[7] Criminal Law ⇌1166(1)

110k1166(1) Most Cited Cases

Because the asserted error in denying access to counsel to an arrested driver subject to a breath test, is a violation of a court rule, rather than a constitutional violation, it is governed by the harmless error test, and Court of Appeals determines whether the error was prejudicial in that within reasonable probabilities, if the error had not occurred, the outcome would have been materially affected. CrRLJ 3.1.

[8] Criminal Law ⇌662.40

110k662.40 Most Cited Cases

In prosecution for drunk driving, defendant was not denied his Sixth Amendment confrontation rights under *Crawford v. Washington* when the court allowed admission of a Department of Licensing (DOL) record custodian's certification regarding the status of defendant's driving privileges; because *Crawford* did not change the law pertinent to admission of nontestimonial hearsay that falls within a

hearsay exception, the DOL document was properly admitted. U.S.C.A. Const.Amend. 6.

[9] Criminal Law ⇌1030(2)

110k1030(2) Most Cited Cases

Rule permitting court to address new constitutional issue raised for the first time on appeal if the claim reflects a manifest error affecting a constitutional right, was not designed to allow parties a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.

[10] Criminal Law ⇌662.9

110k662.9 Most Cited Cases

A testimonial statement of a declarant who does not testify at trial is inadmissible unless (1) the declarant is unavailable and (2) the defendant had a previous opportunity to cross-examine the declarant; testimonial statements are declarations or affirmations made for the purpose of establishing some fact. U.S.C.A. Const.Amend. 6.

*120 Tracy A. Staab, Federal Public Defenders, Spokane, WA, for Appellant.

Kevin M. Korsmo, Brian C. O'Brien, Attorneys at Law, Spokane, WA, for Respondent.

BROWN, J.

¶ 1 Kyle K. Kronich appeals his convictions for driving while under the influence (DUI) and third degree driving

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while license suspended. He contends (1) his breath test refusal should have been suppressed because he was denied an attorney and (2) a Department of Licensing (DOL) record violated *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). We affirm.

FACTS

¶ 2 Deputy Sheriff Jeff Jenkins was behind Mr. Kronich's vehicle at a train crossing waiting for a train to pass. While waiting, Deputy Jenkins checked Mr. Kronich's license plate by radio and learned Mr. Kronich's license was suspended. Deputy Jenkins verified Mr. Kronich's description and then stopped the vehicle. Mr. Kronich exited the vehicle and appeared "lethargic." Clerk's Papers (CP) at 47. His eyes were half-closed and he appeared sleepy and very slow moving.

¶ 3 Deputy Jenkins smelled a strong odor of intoxicants on Mr. Kronich's breath. Mr. Kronich was arrested for driving with a suspended license. Deputy Jenkins saw numerous open beer containers in the car. Mr. Kronich refused a breath test, blood test, and field sobriety tests. Deputy Jenkins completed a DUI Arrest Report box showing, "Attorney Requested?" DUI Arrest Report at 2. Deputy Jenkins checked "Yes." Id. Then, the Deputy filled in "No" in the box, "Attorney Contacted?" Id. Within the "Attorney's Name" box, the deputy noted, "Did not want to call." Id.

¶ 4 Mr. Kronich was charged with

driving under the influence of intoxicating liquor and/or drugs and third degree driving while license suspended. Before trial, Mr. Kronich unsuccessfully sought suppression of his breath test refusal, arguing denial of access to counsel. The court reasoned Mr. Kronich accepted the deputy's offer to contact an attorney, but "for some reason Mr. Kronich decided that he didn't want to call anybody." CP at 30. The court concluded he waived his right to access to counsel, noting, "All the State has to do or the law enforcement agency has to do is help provide access." CP at 30. Further, the court reasoned the defense failed to make "the case that total access to an attorney was denied." CP at 31.

¶ 5 During trial, the State admitted a DOL Order of Revocation of Mr. Kronich's driving privileges and a cover letter from the DOL custodian of records, certifying that DOL records indicated Mr. Kronich: "Had not reinstated his/her driving privilege. Was suspended/revoked." Exhibit 2.

¶ 6 Mr. Kronich was convicted as charged. On RALJ review, the superior court affirmed Mr. Kronich's convictions, finding the district court "applied the wrong standard regarding who has the burden of producing evidence in *121 the suppression hearing." CP at 98. But, the superior court concluded, the error was harmless because even without the evidence of Mr. Kronich's refusal to submit to the breath test, substantial

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evidence existed to show intoxication. Additionally, the superior court concluded admission of the DOL document falls under the public record exception and, therefore, does not violate *Crawford*, 541 U.S. 36, 124 S.Ct. 1354. This court granted discretionary review.

ANALYSIS

A. Access to Counsel

¶ 7 The issue is whether the trial court erred in denying Mr. Kronich's suppression motion to exclude evidence of his refusal to perform the breath test on the grounds he was denied access to counsel.

¶ 8 In a RALJ review, our focus is error in the district court, not the superior court. *State v. Brokman*, 84 Wash.App. 848, 850, 930 P.2d 354 (1997). We review legal issues de novo and factual issues for substantial evidence. *City of Bellevue v. Jacke*, 96 Wash.App. 209, 211, 978 P.2d 1116 (1999).

[1][2] ¶ 9 An arrested driver subject to a breath test must be advised of the *Miranda* [FN1] rights and right to access counsel under CrRLJ 3.1. *State v. Staeheli*, 102 Wash.2d 305, 309, 685 P.2d 591 (1984). "If the defendant requests the assistance of counsel, access to counsel must be provided before administering the test." *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wash.2d 824, 831, 675 P.2d 599 (1984). According to CrRLJ 3.1(c)(2): "At the earliest opportunity a person in custody who desires a lawyer shall be

provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place him or her in communication with a lawyer." The remedy for denying the right to counsel is suppression of the evidence acquired after the violation. *City of Spokane v. Kruger*, 116 Wash.2d 135, 803 P.2d 305 (1991).

FN1. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[3][4] ¶ 10 In denying Mr. Kronich's motion to suppress, the trial court reasoned under the facts Mr. Kronich accepted the deputy's offer to contact an attorney, but "for some reason Mr. Kronich decided that he didn't want to call anybody." CP at 30. Although the trial court did not make explicit written findings to this effect, this court may look to the trial court's oral decision for interpretation. *State v. Motherwell*, 114 Wash.2d 353, 358 n. 2, 788 P.2d 1066 (1990). In reviewing a suppression motion denial, we examine whether substantial evidence supports the trial court's findings of fact. *State v. Vickers*, 148 Wash.2d 91, 116, 59 P.3d 58 (2002).

[5] ¶ 11 Here, Deputy Jenkins completed a DUI Arrest Report. On the report, it asks, "Attorney Requested?" DUI Arrest Report at 2. Deputy Jenkins checked the box "Yes." *Id.* Then, the report asks,

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"Attorney Contacted?" *Id.* The deputy checked, "No." *Id.* Within the "Attorney's Name" box, the deputy noted, "Did not want to call." *Id.* The DUI report provides substantial evidence that Deputy Jenkins offered access to counsel and Mr. Kronich accepted, but then changed his mind. Mr. Kronich's indecisiveness is not a surprise given the deputy's observation that Mr. Kronich had been drinking, was lethargic, and very slow moving.

[6] ¶ 12 Accordingly, substantial evidence shows Mr. Kronich changed his mind about his desire for counsel. While CrRLJ 3.1 requires the State to offer access to counsel, it is not required to force the defendant to accept. *See State v. Halbakken*, 30 Wash.App. 834, 837, 638 P.2d 584 (1981) (in DUI cases, the State has no duty to provide counsel in the absence of a request). The rule was not violated.

[7] ¶ 13 However, assuming Mr. Kronich was denied his CrRLJ 3.1 right of access to counsel, Mr. Kronich would still have to prove prejudicial error. "Because the asserted error is a violation of a court rule (rather than a constitutional violation), it is governed by the harmless error test." *State v. Robinson* 153 Wash.2d 689, 697, 107 P.3d 90 (2005) (citing *122*State v. Templeton*, 148 Wash.2d 193, 220, 59 P.3d 632 (2002)). When a court rule is involved, this court determines whether the error was prejudicial in that " 'within reasonable probabilities, [if] the error [had]

not occurred, the outcome ... would have been materially affected.' " *Robinson*, 153 Wash.2d at 697, 107 P.3d 90 (quoting *State v. Neal*, 144 Wash.2d 600, 611, 30 P.3d 1255 (2001)).

¶ 14 Other DUI evidence exists beyond the refusal. Deputy Jenkins testified he observed Mr. Kronich driving. Upon stopping him for a suspended driver's license, Deputy Jenkins noticed Mr. Kronich appeared lethargic with his eyes half-closed and moving very slowly. As the deputy approached, he smelled a strong odor of intoxicants on Mr. Kronich's breath. Upon searching his vehicle, Deputy Jenkins observed numerous open containers of beer. Within reasonable probabilities, even if the jury did not learn of Mr. Kronich's refusal to perform the breath test, it would have still convicted him of DUI.

B. Public Record Admissibility

[8] ¶ 15 The next issue is whether Mr. Kronich was denied his Sixth Amendment confrontation rights under *Crawford* when the court allowed admission of a DOL record custodian's certification regarding the status of Mr. Kronich's driving privileges.

¶ 16 We review evidence rulings for abuse of discretion. *State v. Chapman*, 98 Wash.App. 888, 890, 991 P.2d 126 (2000). Discretion is abused when it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12,

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26, 482 P.2d 775 (1971).

¶ 17 Mr. Kronich did not object to the DOL document at trial based on *Crawford*, even though *Crawford* was decided before his trial. Rather, he objected based on "foundation." CP at 60. The State explained the document was under seal. It was then admitted without further objection. This is unsurprising given ER 902 (document under seal is self-authenticating).

¶ 18 Our Supreme Court recently addressed a similar situation. In *State v. Smith*, 155 Wash.2d 496, 120 P.3d 559 (2005), Mr. Smith objected at his first degree driving while license suspended or revoked trial to a letter from a DOL custodian of records based on foundation. On appeal, he argued the letter should have been excluded as hearsay. The court of appeals held a DOL letter, certifying information in DOL's database regarding an individual's driving status is a public record. *See State v. Smith*, 122 Wash.App. 699, 704, 94 P.3d 1014 (2004) (driving record is "a classic example of a public record"). The Supreme Court held the court of appeals should not have reached this issue because Mr. Smith objected at trial to foundation, not hearsay. *Smith*, 155 Wash.2d at 501 n. 4, 120 P.3d 559. The Court also declined to reach Mr. Smith's unidenited "constitutional questions." *Smith*, 155 Wash.2d at 501, 120 P.3d 559.

[9] ¶ 19 Here, Mr. Kronich raises a

constitutional objection. Under RAP 2.5(a), this court declines to address new constitutional issues raised for the first time on appeal unless the claim reflects a manifest error affecting a constitutional right. RAP 2.5(a) was not designed to allow parties a means for obtaining new trials whenever they can identify a constitutional issue not litigated below. *State v. WWJ Corp.*, 138 Wash.2d 595, 602, 980 P.2d 1257 (1999). While our Supreme Court in *Smith* declined to address Mr. Smith's constitutional issues, we acknowledge Mr. Kronich's confrontation clause issue and consider it in passing because this issue is likely to arise again.

¶ 20 The Sixth Amendment's confrontation clause guarantees a criminal defendant's right to be confronted with the witnesses against him or her. *Crawford*, 124 S.Ct. at 1359. The *Crawford* court rejected the reliability test for testimonial statements derived from *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[10] ¶ 21 Now, a testimonial statement of a declarant who does not testify at trial is inadmissible unless (1) the declarant is unavailable and (2) the defendant had a previous opportunity to cross-examine the declarant. *Crawford*, 124 S.Ct. at 1369. Generally, testimonial statements are declarations or affirmations made for the purpose of establishing some fact. *Id.* at 1364. Examples of testimonial statements

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include *123 pretrial statements the declarants would reasonably expect to be used by the prosecutor, such as affidavits, depositions, confessions, and statements taken by police officers in the course of interrogations. *Id.* "Business records" are not included in this category. *Crawford*, 124 S.Ct. at 1367 n. 6; *see also* 124 S.Ct. at 1378 (Rehnquist, C.J., noting in his concurrence that "the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records").

¶ 22 Other jurisdictions have found public records to be analogous to business records. *People v. Shreck*, 107 P.3d 1048 (Colo.2005); *People v. Selassie*, 140 Misc.2d 616, 532 N.Y.S.2d 326, 328 (N.Y.Sup.Ct.1988). Adopting this finding, public records, like business records, should not be considered "testimonial" statements for purposes of applying *Crawford*.

¶ 23 Recently, Division One of this court reached the same conclusion under quite similar facts. *State v. N.M.K.*, 129 Wash.App. 155, 118 P.3d 368 (2005). The *N.M.K.* court additionally approved the application of ER 803(a)(10) related to admission of evidence in the absence of a public record. Considering the similarity between business records and public records and the *Crawford* reasoning, the trial court did not err in denying suppression. We reach the same conclusion as did the *N.M.K.* court.

¶ 24 In sum, because *Crawford* did not change the law pertinent to admission of nontestimonial hearsay that falls within a hearsay exception, the DOL document here was properly admitted. "To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process." *Crawford*, 124 S.Ct. at 1378 (Rehnquist, C.J. concurring). Considering all, we hold the trial court did not err in denying suppression. [FN2]

FN2. The parties motions to supplement the record are granted.

¶ 25 Affirmed.

I CONCUR: SWEENEY, A.C.J.

BAKER, J. [FN*] (concurring in part and dissenting in part).

FN* Judge Rebecca Baker is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

¶ 26 I concur with the reasoning and result of Part A of the majority's opinion but respectfully dissent as to Part B. Like the majority, I would affirm Mr. Kronich's conviction for driving while under the influence. But, in contrast to the majority's view, I conclude that a challenge under *Crawford* [FN1] is fatal to the type of Department of Licensing (DOL) statement made in this case, even when the challenge is made for the first time on appeal.

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Accordingly, I would reverse the trial court's ruling admitting the DOL statement and, in turn, would reverse the conviction for driving while license suspended in the third degree.

FN1. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

1. Challenge First Made on Appeal

¶ 27 The majority cites RAP 2.5(a) and *State v. WWJ Corp.*, 138 Wash.2d 595, 602, 980 P.2d 1257 (1999), and points out that *Crawford* was decided prior to Mr. Kronich's trial. The majority then refuses to address the constitutional challenge at all. But I respectfully disagree with the majority's assertion that we should not address a challenge under *Crawford* just because it is made for the first time on appeal, despite its being a challenge arguably based on a "manifest error affecting a constitutional right." RAP 2.5(a)(3). I reach this conclusion because I see the constitutional challenge made here as being fairly deemed "manifest." *Id.* The record here is sufficient to determine that, had the *Crawford* challenge been made at trial, it would have resulted in the exclusion of the DOL employee's testimonial statement. The absence of the DOL statement would, in turn, have been fatal to the State's case on the charge of driving while license suspended. In other words, Mr. Kronich's challenge on appeal is one of manifest constitutional error, and

the failure to raise it at trial was not harmless error beyond a reasonable doubt.

¶ 28 I agree that RAP 2.5(a)(3) was "not designed to allow parties a means for obtaining *124 new trials whenever they can identify a constitutional issue not litigated below." Majority Opinion at 122 (citing *WWJ Corp.*, 138 Wash.2d at 602, 980 P.2d 1257). But it is still important to conduct the inquiry as to whether the claimed constitutional error is "manifest" before declining to address it at all. As enunciated in *State v. Scott*, 110 Wash.2d 682, 687-88, 757 P.2d 492 (1988):

The exception [to the general rule that issues cannot be raised for the first time on appeal] actually is a narrow one, affording review only of "certain constitutional questions." Comment (a), *RAP 2.5*, 86 Wash.2d 1152 (1976). Moreover, the exception does not help a defendant when the asserted constitutional error is harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 24 A.L.R.3d 1065 (1967).

We disagree, however, that by deciding that an error is not "manifest", an appellate court can usefully shortcut the review process. Even the threshold determination of "reviewability" requires diligent attention to the record. *Cf. United States v. Young*, 470 U.S. 1, 16, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) ("Especially when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a

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claim against the entire record."). Thus, no appellate effort is saved by cutting off review of those cases in which reversal is determined to be unnecessary.

The proper way to approach claims of constitutional error asserted for the first time on appeal is as follows. First, the appellate court should satisfy itself that the error is truly of constitutional magnitude--that is what is meant by "manifest". If the asserted error is not a constitutional error, the court may refuse review on that ground. If the claim is constitutional, then the court should examine the effect the error had on the defendant's trial according to the harmless error standard set forth in *Chapman v. California*, *supra*.

(Footnotes omitted.)

2. Adequacy of Record for Constitutional Review

¶ 29 The test of whether an alleged constitutional error is "manifest" involves, in part, whether the record is conducive to review--in other words, whether the record itself "manifests"--or shows--the constitutional error. *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995).

¶ 30 Here, the record is readily reviewable on the *Crawford* principle that "testimonial" statements given in a criminal trial without the opportunity of cross-examination by the defendant violate the confrontation clause of the Sixth

Amendment to the United States Constitution. The alleged "testimonial statement" at issue in this case was introduced at trial as Exhibit 2. The record on appeal here, then, is in contrast to some cases where for some reason the trial record is not conducive to an adequate review--for example, when a suppression motion implicating the Fourth Amendment was not made and no suppression hearing was held. *See, e.g., State v. Baxter*, 68 Wash.2d 416, 413 P.2d 638 (1966).

¶ 31 The record here is sufficient for review of the constitutional error raised.

3. Sixth Amendment Violation

¶ 32 The next part of the inquiry under RAP 2.5(a)(3) is whether the error is truly of "constitutional magnitude." *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251. I would conclude that it is.

a. *N.M.K. is distinguishable.*

¶ 33 This case is distinguishable from *State v. N.M.K.*, 129 Wash.App. 155, 118 P.3d 368 (2005). There, the language of the DOL "certification" was "that after a diligent search of computer files there is no document or other evidence ... to indicate that ... the [DOL] had issued a valid license to" the defendant. *Id.* at 163, 118 P.3d 368. Similarly, a post-*Crawford* federal case on which Division One of this court heavily relied in reaching its decision in *N.M.K.*--the Fifth Circuit case of *United*

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States v. Rueda-Rivera, 396 F.3d 678 (5th Cir.2005)--involved language in the Immigration and Naturalization Service's records custodian's "certification" substantially similar language to that in *125 *N.M.K.* The certificate in *Rueda-Rivera* stated that "after a diligent search no evidence [was] found to exist in the records of the [INS] of the granting of permission for admission into the United States after deportation." *Rueda-Rivera*, 396 F.3d at 679.

¶ 34 By contrast, in Mr. Kronich's case, the DOL records custodian said in her letter:

[A]fter a diligent search of the computer files the said official record indicates on November 15, 2000, the following statements apply to the status of the above named person:

Had not reinstated his/her driving privilege. Was suspended/revoked.

Ex. 2.(emphasis added).

¶ 35 I would have to conclude that this particular statement is "testimonial," under the meaning of *Crawford*, for several reasons.

b. Certifying a copy of a record is different from searching for and finding none.

¶ 36 First, at the risk of appearing overly technical, I must admit to finding it somewhat problematic that both *N.M.K.* and *Rueda-Rivera* seem to gloss over a

distinction that I deem important. That is the difference between when a records custodian certifies a true and accurate copy of an original on file-- a purely ministerial act if there ever was one--and the process someone must go through when ultimately certifying the absence of a record. The certification of the *absence* of a record begins with a search that is both diligent and knowledgeable and ends with the *testimonial statement*. The testimonial statement outlines the actions of the records seeker: that he or she knew for what record to search, knew how to find it in the records or database, searched for it diligently, and found no such record.

¶ 37 In this regard, ER 803(a)(7)--the hearsay exception for *absence* of a business record--appears to require live testimony concerning the absence of records. That rule states:

(7) *Absence of Entry in Records Kept in Accordance With RCW 5.45.* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

¶ 38 Karl B. Tegland, in his *Courtroom*

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Handbook on Washington Evidence, offers the following thoughts pertaining to ER 803(a)(7).

Although the rule does not specifically require the testimony of a custodian or other qualified witness, some courts have read the requirement into the rule. *See, e.g., United States v. Rich*, 580 F.2d 929 (9th Cir.1978) [*cert. denied*, 439 U.S. 935, 99 S.Ct. 330, 58 L.Ed.2d 331 (1978)]. A qualified witness would seemingly be necessary to make a foundation showing that the business routinely kept records of the information not located, and that the information would have come promptly to the attention of regular record keepers and would have been recorded at that time.

5D KARL B. TEGLAND,
WASHINGTON PRACTICE:
COURTROOM HANDBOOK ON
WASHINGTON EVIDENCE, at 406
(2005). And in his earlier treatise, he went on to say, unlike the evidence admissible under [RCW 5.45], evidence admissible under [ER 803(a)(7)] ... will ordinarily be testimonial. 5C KARL B. TEGLAND,
WASHINGTON PRACTICE:
EVIDENCE LAW & PRACTICE §
803.44, at 28 (4th ed.1999) (citing *United States v. Rich*, 580 F.2d 929 (9th Cir.1978); *United States v. Zeidman*, 540 F.2d 314(7th Cir.1976)) (emphasis added).
[FN2]

FN2. While the holdings in *Rich* and *Zeidman* do not address the Sixth Amendment issues here, and

while the opinions in those cases do not address the concerns I have about the lack of guidance provided by ER 902, both cases appear to stand for the requirement of at least some form of live testimony in order for evidence of *absence* of a business record to be admissible. *See* ER 803(a)(10); ER 902.

¶ 39 I acknowledge that ER 803(a)(10) pertaining to the absence of a public record is *126 worded differently from ER 803(a)(7)'s absence of business records rule. ER 803(a)(10) reads:

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 diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(Emphasis added.) But this may beg the question, for ER 902 is merely a rule for the self-authentication of public documents themselves, and a careful reading of it gives no hint of approval for the method used in either *N.M.K.* or *Rueda-Rivera* for establishing the *absence* of such a document. True, subsections (a), (b) and (d) discuss the "certification" pertaining to *records* of a state agency apparently

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referenced in the language of ER 803(a)(10). Yet, nothing approving the *N.M.K.* type of statement for *absence* of a record can be gleaned from these subsections--at least, not without implicating *Crawford* since the "certifications" would still, effectively, be testimonial. Here is what these subsections actually say, in pertinent part:

(a) Domestic Public Documents Under Seal. A *document bearing a seal* purporting to be that of ... any state, or ... of a ... department, officer or agency thereof, and a signature purporting to be an attestation or execution.

(b) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in section (a), having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

....

(d) Certified Copies of Public Records. A *copy* of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, *certified as correct* by the custodian or other person authorized to make the certification, by certificate complying with section ... (b) or (c) of this rule.

ER 902 (emphasis added). In other words, nothing in the language of ER 902 would provide any authority for bypassing "testimony" to establish that (1) a search was made, and (2) the search revealed *no pertinent* record.

¶ 40 But, I do admit that the decisions in *N.M.K.* and *Rueda-Rivera* give us license to make what I consider the "jump" from merely certifying the *copies* of records to certifying the *nonexistence* of a DOL record. Accepting the holdings in *N.M.K.* and *Rueda-Rivera* and applying them to Mr. Kronich's case, *if* there had been a proper certification not only of a "true copy" of the Order of Suspension but also of the absence of a public record of any *reinstatement* of Mr. Kronich's driving privilege as of the date in question, *Crawford* would have been satisfied.

¶ 41 But, as I have pointed out, the facts of Mr. Kronich's case are different from those in *N.M.K.* and *Rueda-Rivera*. See discussion in Part 3.a., *supra*.

c. State v. Smith (2005) is not controlling.

¶ 42 The majority relies on a very recent case decided by our Supreme Court, *State v. Smith*, 155 Wash.2d 496, 120 P.3d 559 (2005). True, *Smith* addressed a DOL employee's statement with language virtually identical to the language in Mr. Kronich's Exhibit 2; and, as at Mr. Kronich's trial, and in the *Smith* trial, the trial court had overruled a "foundation"

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objection, and the defendant raised an argument on appeal on another basis. [FN3] But the similarities end there. In *127 *Smith*, the Supreme Court merely and narrowly held that a trial objection on the basis of "foundation" was inadequate to preserve an issue on appeal based on the *hearsay rule*. Unlike in the case at bar, in *Smith*, there was no confrontation clause issue raised by the appellant, much less addressed by our Supreme Court.

FN3. In addition, at Mr. Kronich's trial, in response to the foundation objection, the State asserted that ER 902 made the "record" self-authenticating, and defense counsel acceded.

¶ 43 The distinctive factual (even conclusory) statement made by the DOL employee both in Mr. Kronich's case and in *Smith*, does, in my view, create an issue in a *Crawford* context. The DOL custodian's letter does not say, for example, that her diligent search "revealed no document, record or other evidence of reinstatement," as in *N.M.K.* or *Rueda-Rivera*. Instead, she states, in a conclusory way, that defendant "[h]ad not reinstated [his] driving privilege," and that the defendant's driving privilege "[w]as suspended/revoked." Exhibit 2. While, again, I acknowledge that the distinction may be overly technical, it seems to me to be significant. *How* does this DOL employee conclude that the privilege has "not [been] reinstated"? *How* does she

conclude that the privilege is still "suspended/revoked"? Whatever the actions and thought processes leading up to this statement, it is a testimonial statement. [FN4]

FN4. It may also be a legal conclusion, or at least an opinion on an ultimate fact offered by a non-expert, but these are subjects for another day.

¶ 44 Another way of looking at the problem is to ask: Is it not a records custodian's role merely to state whether or not there are records or documents in her custody which have been filed since the Order of Suspension, and, if so, to certify a copy of them as true and correct? Or, if we accept the holdings in *N.M.K.* and *Rueda-Rivera*, the custodian may apparently go on and "certify" under ER 902 (without being subject to cross-examination) that no such record of any reinstatement was located in her diligent search. Thus, if the DOL employee's statement in Mr. Kronich's case had been in the nature of, "I have searched the DOL database, and no record of reinstatement was located as of 'x' date," it would clearly pass the post-*Crawford* rulings enunciated in *Rueda-Rivera* and *N.M.K.* But, since it does not and further because of what the custodian *concludes* regarding the status of defendant's driving *privilege*, rather than the status of *records* in her custody, I would have to conclude that the statement is testimonial in nature.

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The statement tells us what the records mean, and what the witness concludes from them, not whether there *are* records or what, if any, records there are--or are not. The statement is therefore testimonial, it, therefore, implicates the Sixth Amendment confrontation clause under *Crawford*.

¶ 45 In conclusion, had there been an objection at trial on the basis of *Crawford*--which was, after all, decided before the defendant's trial--I conclude that it would have been error to admit the particular DOL statement at issue in this case.

4. Harmless Error Standard

¶ 46 Because the *Crawford* issue was not raised at trial, the final step of the inquiry under RAP 2.5(a)(3) is whether the error in admitting Exhibit 2 was harmless beyond a reasonable doubt. *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251.

¶ 47 In my view, this portion of the inquiry is quite simple on the record before us. Absent trial Exhibit 2, there is no other evidence in the record to suggest that the defendant's privilege to drive was suspended on the date charged. Mr. Kronich could not have been convicted of driving while license suspended without the admission of Exhibit 2. The error of admitting Exhibit 2 at trial was not harmless beyond a reasonable doubt. It was, therefore, "manifest error affecting a constitutional right," and subject to

reversal when raised for the first time on appeal. RAP 2.5(a)(3); *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251.

CONCLUSION

¶ 48 I agree with the majority that Mr. Kronich's conviction for DUI should be affirmed; but I would reverse the third degree *128 driving while license suspended conviction and dismiss that charge, with prejudice.

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END OF DOCUMENT

WASHINGTON STATE PATROL
DUI ARREST REPORT

CASE / EVIDENCE NUMBER
00 - 336364

SUBJECT'S NAME (LAST, FIRST, MI) KRONICH, KYCE, Keith	SEX <input checked="" type="checkbox"/> M <input type="checkbox"/> F	DATE OF BIRTH 10-16-63	DATE / TIME OF ARREST 11-15-00, 02570 PK
---	---	----------------------------------	--

DUI INTERVIEW

DO YOU HAVE ANYTHING IN YOUR MOUTH? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	MOUTH CHECKED? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	TIME? 2326	ANY FOREIGN SUBSTANCES FOUND? EXPLAIN: <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
1. DO YOU HAVE ANY PHYSICAL DEFECTS? EXPLAIN: <input type="checkbox"/> YES <input type="checkbox"/> NO		13. ANYTHING MECHANICALLY WRONG WITH THE VEHICLE? <input type="checkbox"/> YES <input type="checkbox"/> NO	
2. DO YOU LIMP? <input type="checkbox"/> YES <input type="checkbox"/> NO		14. HAVE YOU BEEN INJURED OR INVOLVED IN ANY COLLISION(S) IN THE PAST 24 HOURS? <input type="checkbox"/> YES <input type="checkbox"/> NO	
3. ARE YOU SICK / INJURED? EXPLAIN: <input type="checkbox"/> YES <input type="checkbox"/> NO		15. HAVE YOU HAD ANY ALCOHOL TO DRINK SINCE BEING STOPPED / THE COLLISION? <input type="checkbox"/> YES <input type="checkbox"/> NO	
4. UNDER CARE OF A DOCTOR OR DENTIST? <input type="checkbox"/> YES <input type="checkbox"/> NO		15A. WHAT?	15B. HOW MUCH?
5. ARE YOU DIABETIC / EPILEPTIC? <input type="checkbox"/> YES <input type="checkbox"/> NO		16. TIME COLLISION OCCURRED	
6. DO YOU TAKE INSULIN? <input type="checkbox"/> YES <input type="checkbox"/> NO		17. WHERE WERE YOU GOING BEFORE STOPPED / THE COLLISION?	
7. HAVE YOU TAKEN ANY MEDICINES/DRUGS IN THE PAST 24 HRS? <input type="checkbox"/> YES <input type="checkbox"/> NO		18. WITHOUT LOOKING, WHAT TIME DO YOU THINK IT IS? (ACTUAL TIME)	
7A. PRESCRIPTION <input type="checkbox"/> YES <input type="checkbox"/> NO		19. WHAT STREET / HIGHWAY WERE YOU ON?	
7B. NON-PRESCRIPTION <input type="checkbox"/> YES <input type="checkbox"/> NO		20. DIRECTION OF TRAVEL	
7C. LAST DOSE		21. STARTED FROM?	
7D. QUANTITY		22. TIME STARTED?	
7E. COCAINE? <input type="checkbox"/> YES <input type="checkbox"/> NO		23. DAY OF THE WEEK? <input type="checkbox"/> Mon <input type="checkbox"/> Tues <input type="checkbox"/> Wed <input type="checkbox"/> Thurs <input type="checkbox"/> Fri <input type="checkbox"/> Sat <input type="checkbox"/> Sun	
7F. MARIJUANA? <input type="checkbox"/> YES <input type="checkbox"/> NO		24. WHAT CITY / COUNTY ARE YOU IN NOW?	
7G. OTHER: <input type="checkbox"/> YES <input type="checkbox"/> NO		25. WHAT IS THE DATE?	
8. DO YOU HAVE IMPAIRED VISION? <input type="checkbox"/> YES <input type="checkbox"/> NO		26. HAVE YOU BEEN DRINKING ALCOHOLIC BEVERAGES? <input type="checkbox"/> YES <input type="checkbox"/> NO	
8A. DO YOU WEAR CORRECTIVE LENSES? <input type="checkbox"/> YES <input type="checkbox"/> NO		26A. WHAT HAVE YOU BEEN DRINKING?	
8B. WERE YOU WEARING THEM WHEN YOU WERE STOPPED / BEFORE COLLISION? <input type="checkbox"/> YES <input type="checkbox"/> NO		26B. HOW MUCH?	
8C. WHEN DID YOU START?		26C. WHEN DID YOU START?	
9. DID YOU WORK TODAY? <input type="checkbox"/> YES <input type="checkbox"/> NO		27. WHO HAVE YOU BEEN DRINKING WITH?	
10. TIME YOU GOT OFF WORK?		28. WHERE WERE YOU DRINKING?	
11. HOURS OF SLEEP LAST NIGHT?		29. TIME OF LAST DRINK?	
12. WERE YOU DRIVING THE VEHICLE? <input type="checkbox"/> YES <input type="checkbox"/> NO		30. DO YOU BELIEVE YOUR ABILITY TO DRIVE WAS AFFECTED BY YOUR ALCOHOL AND / OR DRUG USAGE?	

OBSERVATIONS

1. ATTITUDE <input checked="" type="checkbox"/> COOPERATIVE <input type="checkbox"/> MOOD SWINGS <input checked="" type="checkbox"/> ARGUMENTATIVE <input type="checkbox"/> CRYING <input type="checkbox"/> LAUGHING <input type="checkbox"/> OTHER:	2. COORDINATION <input type="checkbox"/> GOOD <input type="checkbox"/> FAIR <input checked="" type="checkbox"/> POOR <input type="checkbox"/> FUMBLER FOR DRIVER'S LICENSE <input type="checkbox"/> OTHER:	3. CLOTHES <input type="checkbox"/> ORDERLY <input checked="" type="checkbox"/> SOILED - EXPLAIN <input type="checkbox"/> OTHER - EXPLAIN <input type="checkbox"/> SHOES (Describe) Paint on overalls	4. EYES <input type="checkbox"/> NORMAL <input type="checkbox"/> WATERY <input checked="" type="checkbox"/> SLEEPY <input checked="" type="checkbox"/> BLOODSHOT <input type="checkbox"/> PUPILS DILATED <input type="checkbox"/> PUPILS CONSTRICTED	5. FACIAL COLOR <input type="checkbox"/> NORMAL <input checked="" type="checkbox"/> FLUSHED <input type="checkbox"/> PALE <input type="checkbox"/> OTHER	6. ODOR OF INTOXICANTS ON BREATH <input type="checkbox"/> NONE <input type="checkbox"/> FAINT <input type="checkbox"/> MEDIUM <input checked="" type="checkbox"/> STRONG <input checked="" type="checkbox"/> OBVIOUS <input type="checkbox"/> OTHER	7. SPEECH <input type="checkbox"/> GOOD <input checked="" type="checkbox"/> FAIR <input type="checkbox"/> REPETITIVE <input type="checkbox"/> FAST <input type="checkbox"/> SLURRED	
8. OFFICER'S OPINION (of subject's impairment due to use of alcohol/drugs) <input type="checkbox"/> SLIGHT <input checked="" type="checkbox"/> OBVIOUS <input type="checkbox"/> EXTREME		9. SUBJECT'S NATIVE LANGUAGE <input checked="" type="checkbox"/> ENGLISH <input type="checkbox"/> OTHER		9A. SUBJECT APPEARED TO UNDERSTAND INSTRUCTIONS <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		10. ATTORNEY REQUESTED? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
		9B. INTERPRETER REQUESTED? <input type="checkbox"/> YES <input type="checkbox"/> NO		10A. ATTORNEY CONTACTED? <input checked="" type="checkbox"/> YES <input type="checkbox"/> UNABLE <input type="checkbox"/> NO <input type="checkbox"/> TIME:		ATTORNEY'S NAME Did not want to call ATTORNEY'S PHONE NO.	
11. PBT READING N/A		12. PASSENGERS' NAME(S) ADDRESS(ES) AND PHONE NO.(S) N/A					

I was certified to operate the
 BAC DATAMASTER PBT on the date of this test.

I observed the subject during the entire observation period.
 During that time, the subject did not vomit, eat, drink, smoke, or place any foreign substance in his/her mouth.

On the date, time and location of this arrest, I had authority to arrest pursuant to my agency's jurisdiction or a mutual aid agreement.

Exhibit 1

App 15



STATE OF WASHINGTON
DEPARTMENT OF LICENSING

P. O. Box 9030, Olympia, WA 98507-9030

December 19, 2000

tnt

Having been appointed by the Director of Licensing as legal custodian of driving records of the State of Washington, I certify that such records are official, and are maintained in the office of the Department of Licensing, Olympia, Washington. I certify that all information contained in this certificate pertains to the driving record of:

Lic. #: KRONIKK376PW
Name: KRONICH, KYLE KEITH
1708 N PARK BASEMENT
SPOKANE, WA 99212

Birthdate: October 16, 1963
Eyes: HAZ Sex: M
Hgt: 5 ft 10 in Wgt: 175 lbs
License Issued: September 29, 1987
License Expires: October 16, 1989

I certify under penalty of perjury that the attached document(s) herein is/are a true and accurate copy of the document(s) in the official record of the above named driver. I further certify that after a diligent search of the computer files the said official record indicates on November 15, 2000, the following statements apply to the status of the above named person:

Had not reinstated his/her driving privilege. Was suspended/revoked.

Trina Truong
Custodian of Records
Place: Olympia, Washington
Date: December 19, 2000



Exhibit 2 at trial.
(Admitted at CP 61,
RP 48)

The Department of Licensing has a policy of providing equal access to its services.
If you need special accommodations, please call (360) 902-3900 or TTY (360) 664-0116.

APP. 16

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
DRIVER RESPONSIBILITY DIVISION
PO BOX 9030
OLYMPIA, WASHINGTON 98507-9030

FILE COPY

October 29, 1997
ORDER OF REVOCATION

12-15-97 3CRA 12-15-01 12-15-98
CITATION #:10169700

KRONICH, KYLE KEITH
110 11 E 4TH
SPOKANE WA 99206

LICENSE #: KRONIKK376PW
BIRTHDATE: 10-16-1963 M

On December 15, 1997 AT 12:01 AM you must stop driving a motor vehicle in this state. If you have a Washington State driver's license it must be surrendered to this department.

Your driving privilege will be revoked for one year and thereafter until it is reinstated and a new driver license is issued.

DO NOT RESUME DRIVING UNTIL YOU HAVE BEEN NOTIFIED OF REINSTATEMENT AND HAVE OBTAINED A VALID DRIVER'S LICENSE.

P218673004

Driver Responsibility Division
Suspension Section
Phone: (360) 902-3900

WA Bradley
I certify under penalty of perjury under the laws of the State of Washington that I caused to be placed in a U. S. Postal Service mail box, a true and accurate copy of this document to the person named herein at the address shown, which is the last address of record. Postage prepaid, on October 29, 1997 in Olympia, Wa.
Agent for the Department of Licensing



DR-552-002 (IV 1/96)

Exhibit 1 at trial.
(Admitted at CP 61,
RP 48)