

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2006 AUG -9 P 12: 51

No. 78428-1

BY C. J. MERRINGTON  
WASHINGTON STATE SUPREME COURT

CLERK *h/h*

---

STATE OF WASHINGTON,

Respondent,

v.

KYLE K. KRONICH,

Petitioner.

---

SUPPLEMENTAL BRIEF OF PETITIONER - KRONICH

---

TRACY A. STAAB, WSBA #23321  
Attorney for Petitioner

10 N Post St.  
Suite 700  
Spokane, WA 99201

## TABLE OF CONTENTS

A. ISSUE ACCEPTED FOR REVIEW.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT AND ANALYSIS.....	3
1. The State’s use of an ex parte declaration to prove an essential element of driving while license suspended violated Mr. Kronich’s Sixth Amendment right to confrontation. ....	3
2. Whether a statement is “testimonial” is not determined by whether the statement otherwise fits within a firmly rooted hearsay exception. ....	4
3. The definition of “testimonial.” ....	7
4. Ms. Truong’s declaration did not qualify as a business or public record. ....	11
5. A Sixth Amendment violation is not dependent on whether the defendant can show prejudice. ....	16
6. Harmless Error.....	18
D. CONCLUSION .....	19
CERTIFICATE OF SERVICE.....	20

## TABLE OF AUTHORITIES

### **United States Supreme Court Cases**

<i>Crawford v. Washington</i> , 541 U.S. 36 (2004) .....	passim
<i>Davis v. Washington</i> , ___ U.S. ___, 126 S. Ct. 2266 (2006) .....	passim
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980).....	5, 17
<i>White v. Illinois</i> , 502 U.S. 346 (1992).....	9

### **Washington State Cases**

<i>Owens v. Seattle</i> , 49 Wn.2d 187, 299 P.2d 560 (1956).....	12
<i>State v. Davis</i> , 154 Wn.2d 291, 111 P.3d 844, 851 (2005) .....	19
<i>State v. Kronich</i> , 131 Wn. App. 537, 128 P.3d 119 (2006) ....	passim
<i>State v. Monson</i> , 113 Wn.2d 833, 839, 784 P.2d 485 (1989) .....	14
<i>Steel v. Johnson</i> , 9 Wn.2d 347, 358, 115 P.2d 145 (1941).....	14

### **Cases from Other States**

<i>Belvin v. State</i> , 922 So.2d 1046, 1051 (Fla.App.4.Dist. 2006).....	7
<i>People v. Pacer</i> , 6 N.Y.3d 504, 847 N.E.2d 1149 (2006).....	15

### **Washington State Statutes**

RCW 46.20.342 .....	1
RCW 5.44.040 .....	13
RCW 5.45.020 .....	13

### **Other Authorities**

Richard D. Friedman, <i>Grappling With the Meaning of “Testimonial”</i> , 71 Brooklyn L. Rev. 241, 246 (2005).....	6
Richard D. Friedman, <i>Confrontation: The Search For Basic Principles</i> , 86 Geo. L.J. 1011 (1998).....	9

### **A. ISSUE ACCEPTED FOR REVIEW**

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.

### **B. STATEMENT OF THE CASE**

Kyle Kronich was charged with driving under the influence and driving while his license was suspended ("DWLS") in the third degree. To convict Mr. Kronich of DWLS, the State must prove that on the date of his arrest, Mr. Kronich was driving a vehicle while his license was suspended by the Department of Licensing. RCW 46.20.342.

To prove this element at trial, the State submitted a declaration from Trina Truong, an employee of the Department of Licensing (DOL). Within her declaration, Ms. Truong stated that she had "diligently" searched DOL's records and from this search believes that on the day Mr. Kronich was arrested he "[h]ad not reinstated his/her driving privilege. Was suspended/revoked." The 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, 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. The Court held that Ms. Truong's declaration was a public record or a certificate of the non-existence of a public record and then 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. *State v. Kronich*, 131 Wn. App. 537, 546-47, 128 P.3d 119 (2006).

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 555 (Baker, J.

dissenting). 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.*

### C. ARGUMENT AND ANALYSIS

#### 1. **The State’s use of an *ex parte* declaration to prove an essential element of driving while license suspended violated Mr. Kronich’s Sixth Amendment right to confrontation.**

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him.” This Amendment commands, “not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61. “[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.” *Id.* at 50. With this historical animosity toward written *ex parte* evidence in mind, the Supreme Court construed the right to confrontation as a categorical rule – prohibiting altogether the use of *ex parte* testimonial statements by the government in a criminal trial unless

the declarant is truly unavailable and has been subject to prior cross examination by the defendant. *Id.* at 53-54.

In this case, it is undisputed that the State submitted the written declaration of a DOL employee to prove an essential element of the crime. The declaration was created and submitted *ex parte*; Mr. Kronich was not provided an opportunity to cross-examine Ms. Truong. The central issue presented here, is whether Ms. Tuong's declaration constituted a "testimonial" statement. If it was, then it is categorically prohibited by the Confrontation Clause. *Id.* at 51. If it was not testimonial, its admission is subject only "to traditional limitations upon hearsay evidence ...." *Davis v. Washington*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2266, 2273 (2006).

**2. Whether a statement is "testimonial" is not determined by whether the statement otherwise fits within a firmly rooted hearsay exception.**

The Court of Appeals below erred by looking first to traditional hearsay rules to define a testimonial statement, and then concluding that since Ms. Truong's statement was a public record (or a certificate of the nonexistence of a public record), and since public record were similar to business records, and all business records were nontestimonial, then Ms. Truong's declaration was likewise nontestimonial. *Kronich*, 131 Wn. App. at 546. In

determining whether a statement was admissible under the Confrontation Clause by whether it fell within a firmly rooted hearsay exception, the Court of Appeals reverted back to the test for admissibility under *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980).

The *Roberts* test was rejected and overruled in *Crawford*, 541 U.S. at 60.<sup>1</sup> After *Crawford*, the Supreme Court no longer defines a testimonial statement by considering whether it falls within a firmly rooted hearsay exception or is otherwise deemed reliable. While the *Crawford* Court acknowledged that some “historical hearsay exceptions covered statements *that by their nature* were not testimonial—for example, business records” the Court went on to note that these exceptions were not intended to apply to prior testimony. *Crawford*, 541 U.S. at 55 (emphasis added).

Indeed, in rejecting the dissent’s argument that traditional hearsay exceptions are sufficient to protect the Right to Confrontation, the Court emphatically stated:

Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out

---

<sup>1</sup> See also *Davis*, 126 S. Ct. at 2275 n.4 (“We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.”).

time and again throughout a history with which the Framers were keenly familiar. **This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.**

*Id.* at 56 n.7 (emphasis added).

Likewise in *Davis*, the *Hammon* state court admitted the witness's affidavit over confrontation objections because it fell within the hearsay exception for present sense impressions. The witness's oral statements likewise came in under the hearsay exception for excited utterances. *Davis*, 126 S. Ct. at 2272. Yet, in deciding that these statements were testimonial, the Supreme Court never once referred to the rule-based hearsay exceptions as decisive or even helpful to the issue. *Id.* at 278-79.

*Davis* and *Crawford* make clear that it is error to determine whether an *ex parte* statement is testimonial by filtering it through the hearsay rules. "[T]o make the question of whether a statement is testimonial, the key criterion in applying the Confrontation Clause is not merely a matter of choosing a convenient term that will help distinguish between categories of hearsay." Richard D. Friedman, *Grappling With the Meaning of "Testimonial"*, 71 *Brooklyn L. Rev.* 241, 246 (2005).

Instead, the court must decide first whether a statement is testimonial. If it is, then its *ex parte* use is prohibited by the Confrontation Clause regardless of whether it may otherwise qualify under a hearsay exception. See *Crawford*, 541 U.S. at 51 (“*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.”). On the other hand, if the statement is nontestimonial then, and only then, is its admission governed by traditional hearsay rules such as the business and public records exception. See *e.g.*, *Belvin v. State*, 922 So.2d 1046, 1051 (Fla.App.4.Dist. 2006) (statute specifically qualifying breath test affidavits as “public records” did not control whether affidavits were nonetheless testimonial for confrontation purposes).

### **3. The definition of “testimonial.”**

The first question this Court must ask is not whether Ms. Truong’s declaration falls within a hearsay exception, but whether Ms. Truong’s declaration is testimonial. Although the Supreme Court was crystal clear on how not to define “testimonial,” it was less clear on what exactly constitutes a testimonial statement. The *Crawford* Court did adopt the dictionary definition of “testimony” as “[a] solemn declaration or affirmation made for purposes of

establishing or proving some fact.” *Crawford*, 541 U.S. at 51 (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)), *affirmed in Davis*, 126 S. Ct. at 2274. Under this definition, “an accuser who makes a formal statement to government officers bears testimony... .” *Crawford*, 541 U.S. at 51.

The *Crawford* Court then went on to provide three possible examples of testimonial statements: “*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;” “extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;” and “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 51-52.

Of these three possible examples, the third is the broadest, and proposed by Prof. Richard D. Friedman of Michigan Law School, whose law review articles was cited with approval by

*Crawford*.<sup>2</sup> The second example is the narrowest, requiring “formalized” statements, and was proposed by Justice Thomas (joined by Scalia), in a concurring opinion in *White v. Illinois*, 502 U.S. 346, 365 (1992). The *Crawford* Court declined to specifically endorse one of these possible variations because Sylvia Crawford’s statements fell within even the narrowest definition. *Crawford*, 541 U.S. at 52.

Nonetheless, the Supreme Court repeatedly condemned the use of *ex parte* affidavits prepared for use at trial in lieu of live testimony. See *Id.* at 52 n.3 (“We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK.” (emphasis in original)); see also *White*, 502 U.S. at 352 (rejecting, as too narrow, the government’s interpretation of the Confrontation Clause as only prohibiting the use of *ex parte* affidavits “where the utterance suggests that the statement has been made for the principal purpose of accusing or incriminating the defendant.”)

In *Davis*, the Court was asked to define testimonial statements within the context of police interrogations. Although the

---

<sup>2</sup> *Id.* at 61; Friedman, *Confrontation: The Search For Basic Principles*, 86 Geo. L.J. 1011 (1998).

Court specifically disclaimed any attempt to provide an exhaustive classification, it did hold that a statement was testimonial “when the circumstances objectively indicate that ... the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 126 S. Ct. at 2273-74. Although focusing on interrogations, the Court clarified that an interrogation was not necessary to make a statement testimonial. “The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended question than they were to except answers to detailed interrogations.” *Davis*, 126 S. Ct. at 2274 n.1.

Moreover, in distinguishing between the two statements in *Davis* and *Hammon*, the Court noted that one was a cry for help while the other was not. Whereas the *Davis* witness would not be expected to go “into court to proclaim an emergency and seek help,” the *Hammon* statement was “an obvious substitute for live testimony,” because it accomplished precisely the same goal as a witness on direction examination. *Id.* at 2277-78.

In this case, the State submitted a declaration by Ms. Truong in which she claimed to have made a “diligent” search of the DOL records, which led her to the conclusion that on the day Mr. Kronich

was arrested he “[h]ad not reinstated his/her driving privilege. Was suspended/revoked.” Like the statement in *Crawford*, this declaration is testimonial under even the narrowest definition of that term. It is an extrajudicial statement contained in a “formalized” declaration created and submitted to the court for purpose of proving a fact essential for the State’s case. See 3 Michael H. Graham, *Handbook of Federal Evidence*, § 802.2 at 229 (pocket part at 87) (5<sup>th</sup> 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....”).

**4. Ms. Truong’s declaration did not qualify as a business or public record.**

The Court of Appeals below acknowledged that the Confrontation Clause generally prohibits the use of *ex parte* pretrial affidavits to establish some fact, but nonetheless concluded that this prohibition did not apply to business records or public records. *Kronich*, 131 Wn. App. at 546. In reaching this conclusion the court

erred in two respects. First, as noted above, the court erred in concluding that all business and public records are nontestimonial. In addition, the Court of Appeals also failed to make any attempt to determine if Ms. Truong's statement would even constitute a business or public record. Likewise, the State has maintained Ms. Truong's declaration is nontestimonial because it is a business or public record. Beyond repeating this assertion repeatedly however, the State has failed to provide any analysis on why Ms. Truong's declaration does not otherwise fall within the various definitions of "testimonial" given by the *Crawford* Court.

Yet, despite the State's attempt to pigeon-hole Ms. Truong's declaration as a business or public record, it is nevertheless testimonial. While rejecting the dissent's argument that hearsay exceptions under the evidence rules are sufficient to protect the right to confrontation, the *Crawford* court noted that in most instances the confrontation right will not affect the admissibility of business records because business records *by their nature* are not testimonial. *Crawford*, 541 U.S. at 55. **But this is true only because the business records exception specifically excludes documents created for litigation.** *Owens v. Seattle*, 49 Wn.2d 187, 299 P.2d 560 (1956).

Instead, business records are simply “[a] record of an act, condition or event. . . made in the regular course of business” RCW 5.45.020. In other words, business records, in their true sense, are created for the purpose of promoting business, and are not testimonial because the record is not made under circumstances that would lead a reasonable declarant to believe the record would be used in a later trial. See *Davis*, 126 S. Ct. at 2273-74 (statement is testimonial when the circumstances objectively indicate that its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution).

Because Ms. Truong’s declaration was created specifically for the purpose of litigation, it would not constitute a business record. Again, Ms. Truong was not certifying a copy of previously created records. She was giving her interpretation of DOL’s records. The clear purpose of her declaration was to avoid the need for her testimony. Without her declaration there is no evidence on an essential element of the crime.

Nor did Ms. Truong’s declaration qualify as a public record. Public records in their true sense are likewise non-testimonial. Public records include “[c]opies of all records and documents on record or on file in the offices of. . . this state...” RCW 5.44.040.

“[N]ot every public record is automatically admissible under the statute,” however. *State v. Monson*, 113 Wn.2d 833, 839, 784 P.2d 485 (1989). Instead, a statement is only admissible as a public record if it contains facts “and not conclusions involving the exercise of judgment or discretion or the expression of opinion.” *Id.* (quoting *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)).

In *Monson*, this Court upheld the admission of a certified copy of a driver’s record (“CCDR”) as a public document. *Id.* at 839. The exhibit allowed in *Monson* is different than the exhibit introduced in this case. In *Monson*, the exhibit was a copy of the driver’s record. In this case, the exhibit is another person’s conclusory opinion of Mr. Kronich’s driving record, created after the declarant exercised judgment and discretion. Ms. Truong’s declaration is not “a record or document on file” with DOL, but rather a document created at the request of the prosecutor for the sole purpose of establishing a necessary element of the crime at trial. Thus, even under *Monson*, the DOL declaration used in this case would not be admissible under the public records exception.

Several courts across the country have concluded that declarations similar to Ms. Truong’s are testimonial. In *People v.*

*Pacer*, 6 N.Y.3d 504, 847 N.E.2d 1149 (2006), New York’s highest court recently held that an “affidavit prepared by a Department of Motor Vehicle official in 2003 describing the agency’s revocation and mailing procedures, and averring that on information and belief they were satisfied” was a testimonial statement.

While acknowledging that this affidavit was prepared by a government agent specifically for use at trial, the state argued it was nonetheless admissible as a business or public record. *Id.* 847 N.E.2d at 1151. The *Pacer* Court rejected this argument, noting that the affidavit was not neutral, but rather a direct accusation of an essential element of the crime. *Id.* at 1152. In addition, the affidavit prevented the defendant from challenging the government’s evidence on a critical element, and “[t]his is exactly the evil the Confrontation Clause was designed to prevent.” *Id.* at 1154. (See also cases cited in Petition for Review, p.12-13.)

Finally, Ms. Truong’s declaration did not constitute a certificate of the nonexistence of a business or public record. Ms. Truong did not merely declare that a certain record could not be found. Instead, she gave her opinion that Mr. Kronich had not reinstated his license and was suspended and/or revoked.

In addition, as Judge Baker noted in her dissent, a declaration or certificate that a certain record does not exist is testimonial. It is a declaration intended to prove a fact, i.e., that there is no such record. *Kronich*, 131 Wn. App. at 553 (Baker, J. dissenting). Such a certificate is prepared in anticipation of trial and introduced by the State as a substitute for the declarant's live testimony.

**5. A Sixth Amendment violation is not dependent on whether the defendant can show prejudice.**

Boiled down to its essentials, this case presents two issues: whether there was a violation of the Sixth Amendment, and if so, the necessary remedy. The Court of Appeals below justified its conclusion that there was no constitutional violation by noting that requiring Ms. Truong's live testimony would not provide any apparent gain in the truth seeking process. *Kronich*, 131 Wn. App. at 547. In the context of a confrontation analysis however, this justification is irrelevant. In other words, it does not matter whether the error affected the fairness of the trial. The violation is complete upon the introduction of ex parte testimonial evidence.

The Confrontation Clause is a procedural rule. It is intended as a restraint on judicial discretion. *Crawford*, 541 U.S. at 67. It

“commands not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61. While the purpose of the Sixth Amendment is to ensure a fair trial, “it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.” *Gonzalez-Lopez*, 126 S. Ct. at 2559.

In *Gonzalez-Lopez*, the Supreme Court was asked to consider whether the erroneous deprivation of a defendant’s choice of counsel violated his Sixth Amendment right to counsel. While conceding the trial court erred, the Government argued that there was no constitutional violation because the defendant could not show the error affected the fairness of his trial. *Id.* at 2561-62. The Supreme Court disagreed. Citing extensively to *Crawford*, the *Gonzalez-Lopez* Court held that the Government’s argument was similar to that adopted in *Ohio v. Roberts*, 448 U.S. 56 (1980), and allows the right to be extracted from its purpose and then eliminated. *Gonzalez-Lopez*, 126 S. Ct. at 2562. This reasoning was rejected in *Crawford*, which recognized the right to a particular procedure is separate from the right to a fair trial.

In this case, it does not matter whether the cross-examination of Ms. Truong would have affected the outcome of the

trial. The confrontation violation was complete when the State introduced her *ex parte* declaration in lieu of her live testimony. The only issue remaining is whether this error was harmless.

### **6. Harmless Error**

The Supreme Court has not decided whether confrontation violations are subject to a harmless error analysis. In *Crawford*, the Court reversed upon finding the violation. *Crawford*, 541 U.S. at 68-69. In *Davis*, the Supreme Court acknowledged this Court's earlier holding that even if the admitted statements were testimonial, their admission was harmless beyond a reasonable doubt, but clarified that since *Davis* was not challenging this holding the Court "assume[d]" it to be correct. *Davis*, 126 S. Ct. at 2278. In the consolidated *Hammon* decision, the Court again reversed upon finding a Sixth Amendment Violation without conducting any type of harmless error analysis. *Davis*, 126 S. Ct. at 2279. Finally, in *Gonzalez-Lopez*, the Court held that a violation of the Sixth Amendment procedural right to counsel of choice was a structural error, requiring automatic reversal. *Gonzalez-Lopez*, 126 S. Ct. at 2564-65.

In this case, reversal is required regardless of whether the violation of the Confrontation Clause is subject to harmless error

analysis or is a structural error. Under a harmless error analysis, the State must prove the constitutional violation was harmless beyond a reasonable doubt. In doing so, the Court considers whether “the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt.” *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844, 851 (2005).

In this case, Ms. Truong’s declaration provided the only evidence that Mr. Kronich’s license was suspended on the date he was arrested. Consequently, the error in admitting her *ex parte* declaration was not harmless.

#### **D. CONCLUSION**

For the reasons stated above, this Court should reverse Mr. Kronich’s conviction for driving while license suspended.

Dated this 9<sup>th</sup> day of August, 2006.

FILED AS ATTACHMENT  
TO E-MAIL

---

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 August 9, 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 mailed a copy to my client, Kyle Kronich.

Signed at Spokane, Washington on August 9, 2006.

FILED AS ATTACHMENT  
TO E-MAIL

Tracy Staab, WSBA #23321  
Attorney for the Petitioner

CLERK

BY C.J. MERRITT

2006 AUG -9 P 12:51

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON