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NO. 64327-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LAKI MOIMOI,

Petitioner

8
2008/12/27 11:14:33
COURT OF APPEALS
DIVISION I

**STATE'S RESPONSE NOT OPPOSING DEFENSE'S MOTION
FOR DISCRETIONARY REVIEW**

(King County Superior Court RALJ Decision
No. 08-1-07953-4 SEA

King County District Court No. Y0-SD0013

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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Deputy Prosecuting Attorney
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ORIGINAL

A. IDENTITY OF MOVING PARTY

The State of Washington, Plaintiff in King County District Court, Respondent in King County Superior Court, and Respondent herein does not oppose discretionary review of the lower courts in this matter because this case **does**, satisfy the requirements of RAP 2.3(d) for granting review.

B. DECISION

Petitioner Moimoi seeks review of the RALJ decision of King County Superior Court Cause 08-1-07953-4 SEA that affirmed the King County District Court's ruling on the admissibility of a certified document from the Department of Labor and Industries regarding the absence of any record indicating that Mr. Moimoi was a registered general contractor in the State of Washington.

C. ISSUE PRESENTED

Does the United States Supreme Court ruling in Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), overrule Washington State caselaw regarding the Sixth Amendment right to confrontation and the admissibility of certified

public records routinely maintained by a government agency?

The State does not oppose discretionary review pursuant to RAP 2.3(d)(2), and (3). This case presents an alleged conflict between decisions of the Washington Supreme Court and the United States Supreme Court on the scope of the Confrontation Clause of the Sixth Amendment. Superior Court decisions on this point conflict, and the issue arises in many cases. A ruling from an appellate court is needed.

D. FACTS RELEVANT TO MOTION

The State of Washington charged Laki Moimoi with the crime of Unregistered Contracting pursuant to RCW 18.27010 and RCW 18.27.020, on January 19, 2000. CP, Docket at 1, CP, Compliant. Mr. Moimoi was tried by jury on February 14, 2007. CP, Docket at 14. At trial, Mathew Jackson, an investigator from the Department of Labor and Industries (DLI) testified that there is a computer database that he uses to look up the licensing status of a contractor. RP Vol. I, 46-48.

During his testimony the State offered into evidence a copy of a certified letter from Pamela Bergman, the supervisor of records

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at DLI, which stated:

I further certify that we have searched all records from January 1980 to present and are unable to locate a previous or current registration for Laki Moimoi under that specific name located at 10118 Des Moines Memorial Drive, Seattle, Washington, 98168 doing business as L and L Concrete, Seattle Concrete and Landscape as being registered with this section as specialty or general contractor.

RP Vol. I, 52-55. The trial court admitted the document over Mr.

Moimoi's objection. RP Vol. I, 53-54.

On February 15, 2007, the jury found Mr. Moimoi guilty of Unregistered Contracting. RP Vol. II, 47. Mr. Moimoi filed a notice of appeal on July 24, 2008. CP, Docket at 19. On September 8, 2009, the parties appeared before the Honorable Palmer Robinson for oral argument of the RALJ appeal. CP, Appendix A, Decision on RALJ at 1. Mr. Moimoi argued that the certified record from DLI is plainly testimonial in nature and falls within the purview of Melendez-Diaz. Br. of App. at 7.

In response, the State argued that Melendez -Diaz was not applicable because the certified document admitted at trial was only
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a recitation of the fact that there was no contractor's license of record for Mr. Moimoi. Regarding the admissibility of the certified record from DLI, the Superior court found: "This case, like Kirkpatrick,¹ deals with records which are routinely maintained by a governmental agency, and is distinguishable from Melendez-Diaz v. Massachusetts, which deals with results of a test which was performed specifically for that litigation." CP, Appendix A, Decision on RALJ, at 1. Following this decision, on October 14, 2009, Mr. Moimoi filed a notice for discretionary review. CP, Notice of Discretionary Review.

D. GROUND FOR RELIEF AND ARGUMENT

- 1. THE COURT SHOULD GRANT REVIEW UNDER RAP 2.3(d) (2) and (3) BECAUSE THE DECISION BELOW PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS, AND IS AN ISSUE OF CONTINUING PUBLIC INTEREST.**

The State of Washington seeks review of the Superior Court decision discussed below. Pursuant to RAP 2.3(d), this Court will accept discretionary review only:

¹ 160 Wn.2d 873, 161 P.3d 990 (2007).
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- (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
- (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
- (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d).

The State of Washington does not oppose review by this court under RAP 2.3(d)(2) and (3). The State believes that the Superior Court's finding that certified public records maintained routinely by DLI are admissible and do not trigger the Sixth Amendment right to confrontation was correct.

However, this case merits review because this issue raises a potential conflict on a significant question of constitutional law in light of the recent U.S. Supreme Court decision in Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (holding that certificates made under penalty of perjury stating the results of

forensic analysis of seized evidence in a criminal drug case were affidavits subject to Crawford analysis), and the current line of Washington cases which permit the admissibility of Certified DOL records in the prosecution's case in chief. State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007), State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007).

The DOL records referenced in Kronich and Kirkpatrick are analogous to certified documents from the Washington Department of Labor and Industries (DLI). Both of these records are maintained by a government agency that deals with distribution of licenses to eligible members of the public and are used to track the absence or existence of proper licenses.

This issue also involves continuing public interest because contractors are involved in a vast array of projects affecting people state-wide from the common homeowner to municipalities and corporations. If an individual is charged as an unregistered contractor, the parties and the trial court need to know whether -- or to what extent -- the Sixth Amendment extends to those records.

2. **THE SUPERIOR COURT WAS CORRECT IN FINDING, THAT MELLENDEZ-DIAZ V. MASSACHUSETTS WAS DISTINGUISHABLE FROM CURRENT WASHINGTON CASELAW REGARDING THE ADMISSIBILITY OF A CERTIFIED PUBLIC RECORD**

a. **Standard of Review**

Review on appeal in the superior court is governed by the standards contained in RALJ 9.1. State v. Ford, 110 Wn.2d 827, 829, 755 P.2d 806 (1988). "The superior court shall review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law." RALJ 9.1. The standard of review for an alleged violation of the Confrontation Clause of the Sixth Amendment to United States Constitution is de novo. Lily v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887 (1999).

b. **Melendez-Diaz does not overrule current Washington State case law permitting the admissibility of certified public records without the corroborating testimony of a "live witness."**

The Sixth Amendment to the United States Constitution provides every criminal defendant the right "to be confronted with the witnesses against him..." U.S. Const. Amend. VI. This right is

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binding on the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065 (1965). Under the Sixth Amendment, admissibility of testimonial evidence at trial absent proof of the declarant's unavailability and prior opportunity for cross-examination of the declarant by the accused is prohibited. State v. Kirkpatrick, 160 Wn.2d 873, 876, 161 P.3d 990 (2007).

However, the right of confrontation under the Sixth Amendment does not extend to certified DOL documents. State v. Kronich, 160 Wn.2d 893, 905, 161 P.3d 982 (2007). In Kronich, a driving while license suspended (DWLS) case, the Washington State Supreme Court found that DOL certifications were non-testimonial stating: "The present case requires this court to resolve the question of the testimonial nature of a particular type of extant public record, namely, a DOL certification describing the status of a person's driving privilege. We hold that such a record is not testimonial for the purpose of Crawford analysis." Kronich, at 902. The court reasoned that "Washington courts have long recognized the inherent reliability and admissibility of driving records from

DOL." Kronich, at 903 (citing State v. Monson, 113 Wn.2d 833, 784

P.2d 485 (1989).

Similarly, the Washington State Supreme Court has found that a DOL certification as to the *absence* of a DOL driver's record was not a violation of the Confrontation Clause stating: "neither certification of DOL driver's records nor certifications as to the absence of such records are testimonial for the purposes of Crawford." State v. Kirkpatrick, 160 Wn.2d 873, 884, 161 P.3d 990 (2007). The same reasoning applied to certified DOL records should be applied to certified records from DLI regarding the existence or absence of a general contractor's license. Public records maintained by DLI are non-testimonial in nature.

In contrast, the issue in Melendez-Diaz had nothing to do with certifications of driving records or other routine public records. Luis Melendez-Diaz was arrested and charged with distributing cocaine and trafficking in cocaine. Id. at 2530. The Supreme Court in Melendez-Diaz held that a lab analyst's certificate of analysis -- stating that evidence submitted to the lab for analysis in preparation for trial contained illegal drugs -- fell within the purview of the Confrontation Clause.

At trial, the State admitted into evidence bags seized during the arrest as well as three certificates of analysis performed on the seized substances. Id. at 2531. The certificates stated the weight of the bags and stated that the substance in the bags "was found to contain cocaine." Id. Melendez-Diaz objected asserting that the Confrontation Clause required the analysts to testify in person, but the objection was overruled, and the certificates were admitted into evidence. Id. The jury found Melendez-Diaz guilty and he appealed, claiming among other things, a violation of his Sixth Amendment right to be confronted with the witnesses against him. Id.

In finding that the affidavits supplied by the lab analysts were testimonial statements and the analysts were in fact witnesses for the purposes of the Sixth Amendment, the court stated:

The Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. The documents at issue here, denominated by Massachusetts law "certificates," are quite plainly affidavits: "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." Black's

Law Dictionary, 62 (8th ed. 2004)...The certificates are functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination." Davis v. Washington, 547 U.S. 813, 830, 126 S.Ct. 2266 (2006).

Melendez-Diaz, at 2532. The court emphasized the fact that the affidavits in question were made for use at trial stating, "[U]nder Massachusetts law the sole purpose of the affidavits was to provide "prima facie evidence of the composition, quality, and net weight" of the analyzed substance." Id. (citation omitted).

The holding of the United States Supreme Court in Melendez-Diaz, is distinguishable from the line of Washington cases that address the admissibility of public records such as a Certified Copy of Driving Record (CCDR). Washington law requires the DLI to maintain the licensing records on all contractors registered within the State. This is a purely administrative and regulatory function and the records are maintained whether or not the defendant commits a crime. The attestation to those records is wholly dissimilar to the analysts' certificates in Melendez-Diaz, which identified the substances found on Melendez-Diaz after he

was arrested.

The Superior Court was correct in finding that certified public records from the DLI were distinguishable from the analysts certificates admitted in Melendez-Diaz. The certified record from DLI is non-testimonial and is not subject to the restrictions prescribed by the Sixth Amendment to the United States Constitution. Although the State's position is that Melendez-Diaz is distinguishable from the present case, it is subject to varying interpretations of a constitutional magnitude. In order to resolve this issue and resolve any conflict between the United States Constitution and Washington Caselaw, this court should grant review.

3. **THE STATE DOES NOT OPPOSE REVIEW PURSUANT TO RAP 2.3(d)(3) BECAUSE THERE IS A SIGNIFICANT PUBLIC INTEREST IN RESOLVING THE CONFLICTING INTERPRETATIONS OF MELENDEZ-DIAZ**

Pursuant to RAP 2.3(d)(3), this court should only take review where a case presents a continuing public interest. To determine whether there is sufficient public interest to merit granting review this court must examine three criteria: "(1) the public or private

nature of the question presented; (2) the desirability of an authoritative determination which will provide further guidance to public officers; and (3) the likelihood that the question will recur." In re Dependency of A.K., 162 Wn.2d 632, 643, 174 P.3d 11 (2007) (quoting Dunner v. McLaughlin, 100 Wn.2d 832, 838, 676 P.2d 444 (1984)). All three criteria have been met in this case.

First, the nature of this issue is public as it has the potential to affect the entire population of Washingtonians both people who seek out contractors for work and those people who provide such services.

Second, there is a need for clarity on this issue. Recently, two different King County Superior Court judges in two similar cases involving certified public records have come to opposite conclusions about their admissibility. One judge has interpreted Melendez-Diaz, as not prohibiting the admissibility of certified public records without live testimony, (i.e., Mr. Moimoi's case) and the other judge ruled that Melendez-Diaz did apply to certified driving

records from DOL (CCDRs). State of Washington v. Cienfuegos². In Cienfuegos, a driving while license suspended case, the Superior court found:

While the Washington Supreme Court previously held, pursuant to Crawford, that the admission of a CCDR does not violate the confrontation clause, the United States Supreme Court's decision in Melendez-Diaz, effectively overturns Kirkpatrick and is binding on all Washington courts on this point of federal constitutional law...Under the Court's analysis in Melendez-Diaz, the CCDR is a testimonial affidavit, and the DOL official is a "witness" for purposes of the Sixth Amendment. Therefore, the CCDR was inadmissible without corresponding testimony from the DOL official who performed the diligent search, interpreted what was found, and opined as to its effect. Even particularized guarantees of trustworthiness do not get the CCDR past the Sixth Amendment

Exhibit 10 was the only direct evidence that Mr. Cienfuegos' Habitual Traffic Offender revocation was still in effect on April 15, 2005...Without this improperly admitted exhibit, the evidence is likely insufficient to support his conviction. The conviction must be vacated and the case remanded for dismissal.

² The State has filed a Motion Discretionary Review which is currently pending. COA No. 64437-8-I.

Appendix B, Decision on RALJ Appeal at 4.

Finally, this question is likely to recur not only in unregistered contracting cases, but also any case where the State seeks to admit a certified public record declaring the existence or absence of a fact to be found in those records. For example, this could include records maintained by DOL regarding whether a person has a concealed weapons permit, has failed to register his vehicle, or is DWLS as in Cienfuegos. The current state of the law on this issue is conflicting and review is necessary to provide finality to this issue.

E. CONCLUSION

The Washington State Supreme Court has already determined that the admission of certified DOL records (CCDRs) does not violate the confrontation clause under Crawford because it is not testimonial in nature. The certified record from DLI regarding contractor licensing is fundamentally the same as a CCDR, maintained by a government agency for administrative purposes, and not drafted for litigation.

Moreover, the kind of documents at issue in Melendez-Diaz are distinguishable from those in the present case because the certificates challenged in Melendez-Diaz were specifically drafted for litigation and contained the results of forensic tests performed on evidence. The certified record in the present case is a public record that DLI is required to maintain for the protection of the public.

The Confrontation Clause prohibits *testimonial* evidence from being offered against a defendant in a criminal case without being subject to challenge via cross-examination. A statement indicating a fact i.e., the non-existence of a license is non-testimonial for purposes of the Sixth Amendment.

This court should grant review pursuant to RAP 2.3(d)(2) and (3) because this issue does raise a significant constitutional issue and is of continuing public interest that must be resolved by the Court of Appeals.

Submitted this 7th day of December, 2009.

DANIEL T. SATTERBERG
Prosecuting Attorney



JERRY L. TAYLOR JR. WSBA #40739
Deputy Prosecuting Attorney
Attorneys for Respondent

Certificate of Service by Mail

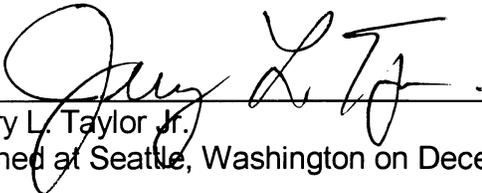
Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to CHRISTINE JACKSON, attorney for Respondent Cienfuegos, at

**The Defender Association
810 Third Avenue, Suite 800
Seattle, Washington 98104**

The envelope contained a copy of the State's Response Not Opposing Motion for Discretionary Review to the Court of Appeals, Division One, in STATE OF WASHINGTON v. LAKI MOIMOI COA No. 64327-4-I.

In addition, I faxed a copy of the same to Ms. Jackson at her fax number (206) 447-2349.

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



Jerry L. Taylor Jr.
Signed at Seattle, Washington on December 7, 2009

APPENDIX A

FILED
KING COUNTY, WASHINGTON

SEP 16 2009

SUPERIOR COURT CLERK
BY Melissa Ehlers
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

Laki Moi Moi

Appellant,

NO. 08-1-07953-4 SEA

VS.

DECISION ON RALJ APPEAL
SCOMIS CODE: DCRA
[CLERK'S ACTION REQUIRED]

State of Washington

Respondent.

This appeal came on regularly for oral argument on September 8, 2009, pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

Reasoning Regarding Assignment of Error: The trial court did not err when it admitted State's Exhibit no. 1. *State v. Kirkpatrick*. 160 Wash.2d 873. This case, like *Kirkpatrick*, deals with records which are routinely maintained by a governmental agency, and is distinguishable from *Melendez-Diaz v Massachusetts*, 129 S.Ct. 2527, which deals with results of a test which was performed specifically for that litigation. IT IS HEREBY ORDERED that the above cause is:

AFFIRMED; REVERSED; MODIFIED;

COSTS _____

REMANDED TO _____ Court for further proceedings, in accordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.

DATED: September 11, 2009



JUDGE

ORIGINAL

DECISION ON RALJ APPEAL (DCRA)

APPENDIX B

FILED
KING COUNTY, WASHINGTON
OCT 08 2009
SUPERIOR COURT CLERK
BY JOSEPH MASON
SRP/STY

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

STATE OF WASHINGTON,

Respondent,

v.

CEASAR VALADEZ CIENFUEGOS,

Appellant.

No. 08-1-03760-2 SEA

DECISION ON RALJ APPEAL

CLERK'S ACTION REQUIRED

THIS APPEAL came on regularly for oral argument pursuant to RALJ 8.3 on September 25, 2009, before the undersigned judge of the above entitled Court. The State of Washington, having been represented by Deputy Prosecuting Attorney Peter D. Lewicki; the Appellant represented by his attorney Christine A. Jackson; and the court having considered the written briefs of the parties and having heard oral argument of counsel, now holds the following:

I. Admission of Exhibit 10 (a document called a Certified Copy of Driving Record known as the "CCDR") violated Mr. Cienfuegos' right to confrontation. Exhibit 10 is an affidavit signed under penalty of perjury that contains the kind of statements held to be testimonial in *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314

1 (2009). Certainly, the certification of work by a scientist in a crime laboratory in *Melendez-Diaz*
2 is distinguishable in scale from the affidavit of a licensing official about the status of Mr.
3 Cienfuegos' license. Nonetheless, *Melendez-Diaz* held that statements in affidavits are
4 testimonial when they are "...made for the purpose of establishing or proving some fact[]" and
5 made "...under circumstances that would lead an objective witness to believe that the statement
6 would be available for use at a later trial." 129 S.Ct. at 2532 (quoting *Crawford v. Washington*,
7 541 U.S. 36, 51-52, 124 S.Ct. 1354). Specifically, Exhibit 10 presents the following relevant
8 testimony: (1) that "April 15, 2005" is the "date of arrest," (2) that on April 15, 2005, the
9 defendant "[h]ad not reinstated his/her driving privilege," (3) that the defendant "[w]as
10 suspended/revoked in the first degree," (4) that the defendant "...was not eligible to reinstate
11 his/her driving privilege, and (5) that the defendant "[h]ad not been issued a valid Washington
12 license." See *Exhibit 10*. The Department of Licensing (DOL) official who authored this
13 document declared that she performed "...a diligent search of the computer files..." *Id.* The
14 CCDR therefore presents evidence that April 15, 2005 was the date of arrest, and also that Mr.
15 Cienfuegos was driving while his license was suspended on that very day. The CCDR contains
16 statements that prove facts that constitute elements of driving while license suspended in the first
17 degree. Essentially, the statements in Exhibit 10 are testimonial under *Melendez-Diaz* because
18 they are "a clerk's certificate attesting to the fact that the clerk had searched for a particular
19 relevant record and failed to find it." 129 S.Ct. at 2539.

21 Furthermore, Exhibit 10 is neither a business record nor a public record. Pursuant to
22 *Melendez-Diaz*, in determining whether a document is a business record, the inquiry focuses on
23 whether the document was prepared for trial and whether it contains testimony *against* the
24 defendant. Applying this inquiry to this case, it is clear that the CCDR does not qualify as a
25

1 business or public record. First, it was prepared solely for litigation to prove some fact at trial.
2 The Washington Supreme Court recognized that the documents commonly known as CCDRs are
3 "literally prepared for purposes of litigation and [] intended to be relied upon by the State." *State*
4 *v. Kirkpatrick*, 160 Wn.2d 873, 885, 161 P.3d 982 (2007). The database on which the CCDR
5 was based may have been kept in the normal course of DOL business, but the DOL certification
6 describing the results of a diligent search of the database and the effect of what was found was
7 not.

8 Second, in addition to the fact that Exhibit 10 was prepared solely for litigation, it
9 contains testimony *against* the defendant. The CCDR serves as substantive evidence against the
10 defendant whose guilt depended on the nonexistence of a record for which the DOL official
11 searched (i.e. the appellant "[h]ad not been issued a valid Washington license" and he "[h]ad not
12 reinstated his/her driving privilege"). *See Exhibit 10*. The CCDR was made for the purpose of
13 establishing the appellant's driving status on the date of the offense in order to prove a fact
14 constituting an element of the crime charged. In short, it affirms that the primary fact
15 establishing a conviction - whether the appellant was driving while his license was suspended on
16 April 15, 2005 - is true. The "...statements here-prepared specifically for use at [appellant's]
17 trial—were testimony against [appellant], and the [author was] subject to confrontation under the
18 Sixth Amendment." *Melendez-Diaz*, 129 S.Ct. at 2539-40. Moreover, the CCDR includes not
19 just the contents of the DOL records, but also the DOL official's interpretation of what the
20 records contain, and purports to certify to its substance and effect. *See Exhibit 10*.

1 While the Washington Supreme Court previously held¹, pursuant to *Crawford*, that the
2 admission of a CCDR does not violate the confrontation clause, the United States Supreme
3 Court's decision in *Melendez-Diaz* effectively overrules *Kirkpatrick* and is binding on all
4 Washington courts on this point of federal constitutional law. *State v. Radcliffe*, 164 Wn.2d 900,
5 906 (2008). Under the Court's analysis in *Melendez-Diaz*, the CCDR is a testimonial affidavit,
6 and the DOL official is a "witness" for purposes of the Sixth Amendment. Therefore, the CCDR
7 was inadmissible without corresponding testimony from the DOL official who performed the
8 diligent search, interpreted what was found, and opined as to its effect. Even particularized
9 guarantees of trustworthiness do not get the CCDR past the Sixth Amendment.

10 Exhibit 10 was the only direct evidence that Mr. Cienfuegos' Habitual Traffic Offender
11 revocation was still in effect on April 15, 2005. *See Court's Instruction No. 5* ("to convict"
12 instruction). Without this improperly admitted exhibit, the evidence is likely insufficient to
13 support his conviction. The conviction must be vacated and the case remanded for dismissal.
14 *See State v. Smith*, 155 Wn.2d 496, 120 P.3d 559 (2005) ("evidence was insufficient where the
15 only evidence was the factual and legal fiction that the driver's license was 'suspended/revoked
16 in the first degree'").

17
18 2. Mr. Cienfuegos was not deprived due process. The Order on Revocation mailed to him
19 by the Department of Licensing (DOL) satisfied the requirements of RCW 46.20.205, RCW
20 46.65.020 and WAC 308-104-018(b)(ii). The trial court's finding that the address on file with
21

22 1. ¹ *State v. Kronich*, 160 Wn.2d 893, 901-04, 161 P.3d 982 (2007); *State v. Smith*, 122 Wn.
23 App. 699, 703-05, 94 P.3d 1014 (2004), *reversed on other grounds*, 155 Wn.2d 496, 504,
24 120 P.3d 559 (2005); *State v. Kirkpatrick*, 160 Wn.2d 873, 161 P.3d 990 (2007).
25

1 the DOL was changed by the defendant's insurance company at his "direction" is supported by
2 substantial evidence. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). Mr. Cienfuegos
3 further fails to establish "prejudice" by an improper revocation, as he made no showing to the
4 trial court that a DOL failure in procedure deprived him of notice and opportunity to be heard, as
5 there is no showing that the notice was sent to an incorrect address. *State v. Smith*, 144 Wn.2d
6 665, 678, 30 P.3d 1245 (2001); Without a showing of actual prejudice there cannot be a due
7 process violation. *State v. Storhoff*, 133 Wn.2d 523, 528-29, 946 P.2d 783 (1997).

8 3. Time for trial under CrRLJ 3.3 did not expire. Mr. Cienfuegos' time for trial was
9 properly excluded under CrRLJ 3.3(3)(6) because he was being held "outside the county in
10 which the defendant is charged." There was insufficient evidence in the record to support Mr.
11 Cienfuegos' claim that he was being held on a City of Redmond matter at a time when a timely
12 objection would have allowed the trial court the opportunity to remedy the error. *State v.*
13 *Frankenfield*, 112 Wn. App. 472, 476, 49 P.3d 921 (2002). Furthermore, Mr. Cienfuegos did not
14 make a timely objection pursuant to CrRLJ 3.3(d)(3) within 10 days of being notified of the trial
15 date or the purported expiration date of October 31, 2007, thus any later objection is waived.
16
17 CrRLJ 3.3(d)(4).

18 4. The un-redacted abstract of driving record ("ADR", Exhibit 11) was not admissible as it
19 contained no relevant information and contained a full recitation of Cienfuegos' criminal driving
20 offenses. The document, dated "03-10-08" did not bear on the date of violation of April 15,
21 2005. More importantly, the list of Cienfuegos' criminal history was not admissible under ER
22 404(b) and was highly prejudicial in this prosecution for DWLS First Degree. The district court
23 gave no credible or tenable basis for admission of this document. The jury could well have taken
24 this as propensity evidence as the document clearly lists DOL's actions and convictions for
25

1 "DWLS/R 1st DG." This was not harmless error as it cannot be said that this document did not
2 materially affect the outcome of the case.

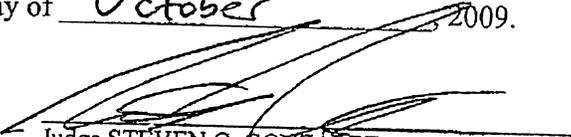
3 5. The phrase "suspended or revoked in the first degree" appearing in the exhibits is a legal
4 and factual fiction which was improperly admitted since it is irrelevant and confusing to the jury.
5 See *State v. Smith*, 155 Wn.2d 496, 503-04 (2005). This was not harmless error because of the
6 similarity of the language with the offense charged, DWLS First Degree.

7 6. Evidence that Mr. Cienfuegos was speeding at the time of the stop and that he was
8 arrested and jailed were improperly admitted as irrelevant and prejudicial. This is not harmless
9 error because it has no probative value, and carries the prejudicial effect of describing Mr.
10 Cienfuegos as a bad or dangerous driver.

11 7. The Court accepts the State's concession of error that the complaint charging the
12 Defendant with Ignition Interlock Violation omitted an "essential element." The remedy for a
13 defective complaint is reversal and vacation of the conviction for this offense, and dismissal
14 without prejudice to the State's right to re-file the charge. *State v. Vangerpen*, 125 Wn.2d 782,
15 791, 888 P.2d 1177 (1995).

16
17 IT IS HEREBY ORDERED that the above cause is reversed and remanded to vacate Mr.
18 Cienfuegos' DWLS First Degree conviction and to vacate his Ignition Interlock Violation, which
19 violation is dismissed without prejudice.

20 Done in Chambers this 7th day of October, 2009.

21
22 
23 Judge STEVEN C. GONZALEZ
24
25