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NO. 63442-9-1

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS JASPER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF AMICUS CURIAE OF THE WASHINGTON DEFENDER
ASSOCIATION AND THE WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

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APPELLANT'S BRIEF

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INTEREST OF AMICUS CURIAE

The Washington Defender Association (“WDA”) is a statewide non-profit organization with 501(c)(3) status. The membership of WDA has more than a thousand members and is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense.

One of the important purposes of WDA is “to improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.” WDA advocates on behalf of issues of constitutional importance, including the right of an accused person to confront the evidence used by the state to convict that person. WDA and its members have previously been granted leave to file amicus briefs on issues relating to these and other issues relating to criminal defense and procedure.

The Washington Association of Criminal Defense Lawyers (“WACDL”) is an association made up of attorneys practicing criminal defense law in Washington State. WACDL is a not-for-profit corporation, with 501(c)(3) tax-exempt status. The

association's objectives and purposes are defined in its bylaws as follows:

Washington Association of Criminal Defense Lawyers was formed to improve the quality and administration of justice. The objectives and purposes of this organization shall be as follows:

- A. To protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights;
- B. To improve the professional status of all lawyers and to encourage cooperation between lawyers engaged in the furtherance of our objectives through publications, education, and mutual assistance; and
- C. To engage in all activities on a local, state and national level that will advance the purposes for which this organization is formed in order to promote justice and the common good of the citizens of the United States.

WACDL representatives frequently testify at Washington House and Senate Committee hearings on proposed legislation affecting criminal defendants. WACDL has been granted leave on numerous occasions to file amicus briefs in the Washington appellate courts.

WACDL contains over 1100 attorneys. The WACDL amicus committee has approved the filing of this brief.

This Court's decision in this case has potentially far-reaching implications to criminal practice in this State.

ISSUES TO BE ADDRESSED BY AMICUS

I. Whether the fundamental right to confront evidence presented against a person accused of a criminal offense extends to all reports prepared in anticipation of trial, including Department of Licensing Records prepared by the state to prove that the accused had a suspended driver's license.

II. Whether when a hearsay exception applies to a document prepared in anticipation of trial, the court may find that the accused's 6th Amendment right to confront the evidence offered against him is satisfied.

STATEMENT OF THE CASE

This brief relies upon the petitioner's statement of the case, which appears to be supported fully by the record of the proceedings below.

ARGUMENT

It is the position of WDA and WACDL that the principals set out by the United States Supreme Court in Melendez-Diaz v.

Massachusetts make clear that the inability to cross examine a clerk statement's concerning a search through records is a violation of the fundamental right to confront witnesses bearing testimony, guaranteed by the Sixth Amendment. *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2530-32, 174 L.Ed.2d 314 (2009). In fact, *Melendez-Diaz* is an opinion in a long series of cases that mandates that all testimonial evidence presented at trial must be subject to cross-examination. These cases make it clear that testimonial statements by clerks and analysts in any profession are subject to cross-examination regardless of any hearsay exceptions. Because confrontation is a fundamental right and an important tool in criminal defense, Amice ask the court to recognize that Mr. Jasper's right to confrontation was violated and to clarify that the testimony of all analysts, including Department of Licensing (DOL) employees, are subject to cross-examination at trial.

I. THE FUNDAMENTAL RIGHT TO CONFRONT
EVIDENCE PRESENTED AGAINST A PERSON ACCUSED
OF A CRIMINAL OFFENSE EXTENDS TO ALL REPORTS
PREPARED IN ANTICIPATION OF TRIAL

A. *Melendez-Diaz* looks to the purpose of why a report is prepared to determine whether it is testimonial.

The Confrontation Clause of the U.S. Constitution requires that defendants be able to confront the evidence against them. This

principal applies to all evidence that is testimonial, including laboratory reports and other evidence that the state will rely upon to prove its case. See Melendez-Diaz, _ U.S. __, 129 S.Ct. 2527, 2530-32, 174 L.Ed.2d 314 (2009) (sworn report from analyst stating that suspicious white powder was cocaine does not satisfy a defendant's right to confront and cross examine evidence presented against him).

When the Supreme Court examined the right to confrontation with respect to reports generated in anticipation of trial, it examined the purpose rather than the nature of the reports in determining whether the Confrontation Clause applied to the evidence. Id. at 2530-32, 2536-38. In Melendez-Diaz, the Supreme Court found that a defendant has the right to confront the author of the report in order to be able to scrutinize and challenge the evidence. Id. at 2532. The Court ruled that these statements were testimonial because the statements were created solely for use in a criminal prosecution. Id. The same is true of the reports generated for use by the state in this case to prove the elements of the offense.

This analysis is consistent with the Supreme Court's confrontation clause analysis since Crawford v. Washington. In that case, the Supreme Court held that a criminal defendant has

the right to cross-examine the testimony of all witnesses before or during trial. Crawford v. Washington, 541 U.S. 36, 57-59, 124 S.Ct. 1354, 1367-69, 158 L.Ed.2d 177 (2004). While not defining what is testimonial, the Court has applied a test of whether “pretrial statements that declarants would reasonably expect to be used prosecutorially” in other cases. Id. at 51 (citation omitted). The Court applied this test when the police were responding to an on-going emergency as well as when acting in their capacity as evidence gatherers for the prosecution. See Davis v. Washington, 547 U.S. 813, 822-830, 126 S.Ct. 2266, 2273-79 165 L.Ed.2d 224 (2004). In both circumstances, the Court looked to why the police or prosecution was taking the statement to determine whether the Confrontation Clause applied. Id.

Melendez-Diaz makes clear that this test also applies to reports generated by the state to aid in prosecution. Melendez-Diaz, 129 S.Ct. at 2532 (laboratory test certificates were created solely for use at trial they were testimonial and subject to cross-examination). In Melendez-Diaz, the court held that a sworn certificate offered by the lab analyst who tested a controlled substance was insufficient to satisfy the confrontation clause. Id. Like Crawford and Davis, the court looked to the purpose of evidence in order to determine

whether the confrontation clause applied. This is the same standard that should be applied to reports generated by the State for prosecution, including the reports about the contents of the DOL's records.

B. Melendez-Diaz applies to all analyst testimony, including reports that are not scientific in nature.

The right to confront the evidence against a defendant applies to analytical testimony, including non-scientific reports prepared in anticipation of trial. The state errs in arguing that Melendez-Diaz applies only to forensic and scientific evidence. See State's Brief at 21. This analysis ignores the fundamental logic of Melendez-Diaz, which is based upon the purpose of the statement and not its substance. Whether a report is of a scientific nature is not the question that defines the scope of the right to confrontation. The question that the court asks is whether the pretrial statements were such that the "declarants would reasonably expect to be used prosecutorially." Crawford, 541 U.S. at 51.

Whether a clerk could testify via a sworn certificate was specifically addressed by Melendez-Diaz. 129 S.Ct. at 2539. In Melendez-Diaz, the Supreme Court gave guidance for this court to follow. This ruling is not limited to scientific testimony but instead

looked at the question of whether a report generated in anticipation of trial should be subject to cross examination. Specifically, the Melendez-Diaz Court found that a sworn statement by a clerk about the results of a search of records violates the Confrontation Clause. Id. This is exactly the type of testimony the DOL provided in its affidavit in Mr. Jasper's case.¹

The resolution of the question of whether Melendez-Diaz should apply to DOL records is clear. Like other records and reports prepared in anticipation of prosecution, an accused person has the right to confront the evidence that the state presents. This standard means that the submission of a report in lieu of the opportunity to cross-examine the witness violated the defendant's right to confront the evidence present against him.

¹ In addition to those cited in the appellants reply brief, many courts have applied this logic to require an analyst testify at trial about a records search. See e.g., United States v. Madarikan, 356 Fed. Appx. 532, 535 (2d Cir. 2009) (holding that a sworn statement certifying that a search of records had determined that there was no applicable immigration document in the Department of Homeland Security's records violated the Confrontation Clause); United States v. Orozco-Ascosta, __ F.3d __, 2010 U.S. App. LEXIS 10733 (9th Cir. May 26, 2010); United States v. Martinez-Rios, 595 F.3d 581, 586 (5th Cir. 2010); Little v. United States, 989 A.2d 1096, 1105 (D.C. 2010).

II. MELENDEZ-DIAZ MANDATES THAT ALL TESTIMONIAL EVIDENCE IS SUBJECT TO CONFRONTATION, REGARDLESS OF WHETHER A HEARSAY EXCEPTION APPLIES

A. The Supreme Court has rejected the reliability test in ascertaining whether testimonial evidence is admissible without confrontation.

Crawford overturned the rule that allowed hearsay evidence presumed to be reliable to be admitted without cross-examination. Crawford, 541 U.S. at 61, rev'g Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). Crawford rejected this approach and held that it was the testimonial nature and not the reliability of the evidence or a relevant hearsay exception that determined whether the evidence should be subject to cross-examination to satisfy the Confrontation Clause. See Crawford, 541 U.S. at 59, 68. Melendez-Diaz confirmed this rule by recognizing that "business and public records are generally admissible absent confrontation *not* because they qualify under an exception to the hearsay rules, but because . . . [they are] not for the purpose of establishing or proving some fact at trial – they are not testimonial." 129 S.Ct. at 2539-40 (emphasis added). These cases make clear that when determining whether evidence requires cross-examination, testimonial nature is the only factor to consider.

B. Washington law must become consistent with *Melendez Diaz's* requirement that testimonial records be subject to cross-examination.

While Washington courts have not specifically addressed this question since Melendez-Diaz, when deciding whether Department of Licensing records were testimonial, the Washington State Supreme Court remarked that United States Supreme Court “has noted that business records are not ‘testimonial.’” State v. Kronich, 160 Wn.2d 893, 902 (2007) (citation omitted).² After Melendez-Diaz this overly broad statement is incorrect and in violation of the right to confrontation under the Sixth Amendment of the United States Constitution. The prosecution relies upon this outdated and incorrect representation of the Confrontation Clause in claiming that Department of Licensing records are not subject to confrontation. State’s Brief at 11-12. Amice asks this Court to correct these deficiencies in Mr. Jasper’s case and find that Kronich is no longer good law.

The Confrontation Clause analysis of whether a record should be subject to cross-examination requires this Court to ask whether DOL records are testimonial and not whether DOL records fall under the

business records exception. DOL records such as the ones introduced in this case are testimonial. As evidenced by a cover letter stating that after a "diligent" search the Department of Licensing determined that Jasper's license was "suspended in the third degree", these records were clearly created for specific use at Mr. Jasper's trial. Ex 16. This cover letter was in fact required to show that it was proof beyond a reasonable doubt that Mr. Jasper's license was suspended at the time of the accident. The two attached notices of suspension used to support the conclusion that Jasper's license was suspended do not preclude the valid possibility that Jasper's driving privileges had been restored between the time the notices were issued and when the accident occurred. Thus the DOL records created in Mr. Jasper's case were testimonial and subject to cross-examination.

The incorrect date on the cover letter only underscores the necessity of confrontation. The cover letter stating that Mr. Jasper's license had been "suspended in the third degree" incorrectly cited the date of suspension by three years. 3/12/09RP 10. Competent

² Furthermore, RCW 5.44.040 states that "copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state . . . shall be admitted in evidence in the courts of this state" which we believe is also inconsistent with the right to confrontation.

counsel would have wanted to be able to cross examine this evidence is to ensure its reliability. See Crawford 541 U.S. at 62. While Department of Licensing records may seem simple and error-proof, Mr. Jasper's case demonstrates they are not and demonstrates the need for confrontation to correct and prevent such errors.

Mr. Jasper's case highlights the importance of the confrontation clause and why the Supreme Court has specifically rejected the idea that traditionally reliable evidence that meets a hearsay exception satisfies the constitution. Washington courts need to adopt the Supreme Court's standard and find that, regardless of reliability or hearsay exception, all testimonial evidence must be subject to confrontation.

CONCLUSION

For the foregoing reasons, WDA and WACDL respectfully request that this Court find that the DOL records offered at trial against Mr. Jasper without allowing him the right to cross examine the person who created those records violated the Confrontation Clause.

DATED this 16th day of June 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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