63442-9 63442-9

No. 63442-9-I

THE COURT OF APPEALS OF 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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT.

1. THE STATE VIOLATED JASPER'S RIGHT TO CONFRONT WITNESSES AGAINST HIM BY RELYING ON AN EXPARTE AFFIDAVIT

The Sixth Amendment commands that testimonial statements be subject to cross-examination. Davis v. Washington, 547 U.S. 813, 827-28, 126 S.Ct. 2266, 165 L.Ed.2d 224, 237 (2006). The affidavit in this case, stating that a diligent search of the Washington State Department of Licensing (DOL) records had been made and that as of February 14, 2005, Jasper's driver license was suspended in the third degree, was created for the purpose of establishing a fact at trial and submitted in lieu of live testimony. Ex. 16.[1] The submission of this testimonial statement at trial by way of an *ex parte* declaration deprived Jasper of the opportunity to cross-examine the person who actually performed the data search, and violated the Sixth Amendment.

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[1] In case there is any confusion about the scope of Jasper's arguments, the testimonial document is the first page of Ex. 16, which explains the "diligent search" conduct and claims that the status of Jasper's driver's license status is "suspended in the third degree." Jasper does not contend that the letters DOL sent to Jasper in 2007 are "testimonial" and require confrontation.

a. The State offers a misguided analysis of *Melendez-Diaz* and an irrelevant discussion of hearsay rules. The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits. Melendez-Diaz v. Massachusetts, __ U.S. __, 129 S. Ct. 2527, 2542, 174 L.Ed.2d 314 (2009). In Melendez-Diaz, the United States Supreme Court held that the introduction of a forensic analyst's laboratory report, prepared for use in a criminal prosecution to prove that bags seized by police and connected with the defendant contained cocaine, violated the Sixth Amendment. Id. The Court reasoned that the certificates were sworn declarations of fact made for the purpose of establishing or proving some fact—namely, that the substance found was cocaine. Id. at 2532.

Here, the certificate was admitted in lieu of the affiant's live testimony. The affiant with respect to the certificate is the person who actually performed the data search and who found that the record indicated that the status of Jasper's driver license was suspended in the third degree. The fact in question is whether Jasper's driver license was suspended in the third degree—the precise testimony the DOL witness would be expected to provide if called at trial. Instead, the certificate was admitted to prove that

fact. This fact was then used by the government as evidence against Jasper. While it may be more convenient for the government to produce this testimony by way of certificate, the Sixth Amendment demands more, even if the certificate is reliable. 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." Crawford v. Washington, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The State's business or public record analysis is flawed for a number of reasons. See Br. of Resp. at 11-14. First, to call the affidavit a business record rests on hearsay-evidentiary rules that are of no moment in a Confrontation Clause context. See Davis, 547 U.S. at 821 ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."); see also Crawford, 541 U.S. at 51 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.)."

Second, the affidavit is not a document that DOL keeps in the course of its regular business activity. It was not created for

DOL's records; rather, it was created at the government's request for use at trial to prove a necessary element of the offense of driving with a suspended license in the third degree. Although the Washington Supreme Court held that the type of records at issue are akin to business records, 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 U.S. Supreme Court's decision in Melendez-Diaz supersedes Kirkpatrick and Kronich. See Appellant's Opening Brief (AOB), at 11-12 (discussing Washington Court's concern with lack of guidance from United States Supreme Court in Kirkpatrick and Kronich).

In Melendez-Diaz, the Court concluded that a clerk could not create a record for the sole purpose of providing evidence against a defendant without an opportunity for confrontation by the defense. 129 S.Ct. at 2539. It placed its holding in a historical context:

> [f]ar more probative here are those cases in which the prosecution sought to [introduce] into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate

> would qualify as an official record . . . the clerk was nonetheless subject to confrontation.

Melendez-Diaz, 129 S.Ct. at 2539 (citing People v. Bromwich, 200 N.Y. 385, 388-89, 93 N.E. 933, 934, 25 N.Y. Cr. 340 (1911); People v. Goodrode, 132 Mich. 542, 547, 94 N.W. 14, 16 (1903); 5 J. Wigmore, Evidence § 1678 (3d ed. 1940)).

Similarly, DOL conducted a "diligent" search of the official records for the status of Jasper's personal driver license. Ex. 16. The outcome of that search—that Jasper's license was suspended in the third degree—was then used at trial to prove one element of the crime of driving with a suspended license in the third degree. Like the clerk's testimony in the Melendez-Diaz Court's analogy, the affidavit in this case served as substantive evidence against Jasper whose guilt depended on the status of his driver license for which the affiant searched. Therefore, although the DOL certificate would qualify as an official record under the State's definition, the affiant must nonetheless be "subject to confrontation." 129 S.Ct. at 2539.

The State argues that the analyst's laboratory report in Melendez-Diaz, is fundamentally different from the DOL records at issue here. Response Brief. at 15. The State suggests that "[t]he

analyst's report attests to actions taken wholly after commission of the defendant's crime, whereas the DOL certification letter and attached documents simply attest to the state of the defendant's driving record at the time of the offense." Id. However, this characterization is inaccurate. Contrary to the State's argument, the first page of Ex. 16, the affidavit itself, *does* attest to action taken after the time of the offense. The action taken after the offense is the "diligent search" of the record.[2] Therefore, the DOL affidavit does not merely attest to the state of Jasper's driving record at the time of the offense; rather, it attests to the search itself, which took place *after* the offense.

Furthermore, the relevant inquiry is whether DOL produced the certificate for the purpose of litigation. See Crawford, 541 U.S. at 56 n.7 (basing its distinction between testimonial and nontestimonial evidence in part on skepticism of government officers' involvement in preparing evidence "with an eye toward trial"). Although the State is correct that some of the DOL records existed independently of the prosecution, it incorrectly includes the affidavit in that category. Unlike the copies of notices previously

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[2] Ex. 16 (affidavit produced on April 14, 2008, 29 days after the incident).

mailed to Jasper to warn him of the need to pay fines or risk a suspended license, the affidavit did not exist independently of the prosecution. It was prepared 29 days after the incident and was prepared specifically in contemplation for litigation at the request of the prosecution.

The Sixth Amendment guarantees an accused the right "to be confronted with the witnesses *against him*." U.S. Const. amend. 6 (emphasis added). The Supreme Court has interpreted this right to apply to out-of-court statements as well as in-court testimony. Crawford, 541 U.S. at 50-51. To the extent the person who prepared the affidavit was a witness, he or she certainly provided testimony *against* Jasper, proving one fact necessary for his driving with a suspended license in the third degree conviction—that his personal driver license was suspended in the third degree. Therefore, the affidavit is testimonial and should have been excluded absent the opportunity for Jasper to confront the witness.

In addition, the State argues that the affidavit admitted in Jasper's trial is fundamentally different from the laboratory report in Melendez-Diaz, because a laboratory report "involves the exercise of scientific expertise, judgment and discretion." Response Brief at 21. Contrary to what the State implies, Melendez-Diaz does not

stand for the proposition that in order for a certificate to qualify as testimonial it must involve "the exercise of scientific expertise, judgment and discretion." And the State offers no authority for such a requirement. To the contrary, the Supreme Court's conclusion in Melendez-Diaz that a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it would constitute testimonial evidence subject to confrontation resolves the issue whether scientific expertise or discretion is required. Melendez-Diaz, 129 S. Ct. at 2539. The answer is clearly no.

Finally, the State argues that DOL records are different from laboratory reports because DOL records are available to defendants upon request from either the prosecution or DOL. Br.of Resp. at 21. The State suggests that a defendant can dispute information contained in a DOL certification, challenge the completeness of the search, and supplement the trial record with additional information. Br. of Resp. at 22. But those options are no substitute for the right of confrontation. The Confrontation Clause categorically requires the prosecution, at the defendant's insistence, to introduce the testimony of available witnesses as part of its case-in-chief before the jury. Melendez-Diaz, 129 S.Ct. at

2532; U.S. Const. amend. VI. This simple, fundamental principle has guided criminal trial for centuries, and, as the experience of states other than Washington shows, there is no practical need—much less theoretical justification—for abandoning this principle here. Allowing the prosecution to present its case through extra-judicial declarations—subject only to defendants' ability to dispute the information contained therein and supplement the trial record with additional information—deprives defendants of the ancient right to stand "face-to-face" with adverse witnesses.

b. The State inexplicably ignores all post-*Melendez-Diaz* cases, even those cited in Appellant's Opening Brief. The prosecution's brief contains no pertinent cases decided after Melendez-Diaz and disingenuously relegates the Supreme Court's express explanation that an affidavit of the non-existence of a record to "non-binding dicta." Response Brief at 22 n.12. This purported *dicta* is central to the Supreme Court's analysis of the case before it, holding that under the Sixth Amendment dictates that a clerk "could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." 129 S.Ct. at 2539 (emphasis in original).

The State ignores other cases discussed Melendez-Diaz, even those cited in Appellant's Opening Brief. The Ninth Circuit addressed a similar issue in United States v. Norwood, 595 F.3d 1025 (9th Cir. 2010). In Norwood, the defendant alleged that his Sixth Amendment right to confront his accusers was violated when the district court admitted into evidence a written affidavit without requiring the affiant to testify at the defendant's trial. The government conceded that the affidavit, prepared for use at trial to prove the absence of any record of defendant having legitimate employment, should not have been admitted without the affiant presenting herself at trial for examination. Id. at 1030.

The affidavit in this case is analogous to the affidavit in Norwood. Only after a "diligent" search of the record did the affiant in Norwood certify that the department's files failed to disclose any record of wages during a certain period of time. Although the affiant did not appear in person to testify, the trial court admitted her affidavit as circumstantial evidence that Norwood had no legal source for the large amounts of cash that were found on his person and in his car. Here, too, only after a "diligent" search of the record did the affiant certify that the record indicated that Jasper's license was suspended in the third degree. In addition, although the affiant

did not appear in person to testify, the trial court admitted the affidavit as evidence that Jasper's license was suspended in the third degree. Thus, the affidavit should not have been admitted without giving Jasper the opportunity to cross-examine the affiant.

Several other courts have considered similar issues and have reached the same results. In United States v. Martinez-Rios, the court held that the admission of a Certificate of Non-existence of Record (CNR) violated the defendant's Sixth Amendment rights in view of Melendez-Diaz. United States v. Martinez-Rios, 595 F.3d 581, 585-86 (5th Cir. 2010) (overruling United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. 2005)). The court concluded that Melendez-Diaz spoke directly to the issue of whether a CNR qualified as testimonial evidence. Id. at 586 (citing Melendez-Diaz, 129 S. Ct. at 2539). The court noted that important to the rational in Melendez-Diaz, is the fact that the affidavits in question were used to establish a necessary fact to convict: that the bags contained cocaine. Id. (citing Melendez-Diaz, 129 S. Ct. at 2533). The court reasoned that the CNRs serve a comparable purpose in illegal reentry cases: they establish that there is no record indicating that the alien had obtained government consent to reapply for admission—a fact necessary to convict. Martinez-Rios,

595 F.3d at 586. Here, the DOL affidavit serves a comparable purpose in a driving with a suspended license in the third degree case: it establishes that the record indicates that the individual's driver license is suspended in the third degree—a fact necessary to convict.

Similarly, in Tabaka v. District of Columbia, the court determined that the Supreme Court's analysis in Melendez-Diaz conclusively showed that the CNR in Tabaka's case was inadmissible over objection without corresponding testimony by the DMV official who had performed a search of the records and did not find a valid license for the defendant. Tabaka v. District of Columbia, 976 A.2d 173, 175-76 (D.C. Ct. App. 2009). The court reversed Tabaka's conviction for driving without an operator's permit because it rested on the clerk's affidavit. In addition, the court concluded that an earlier holding by a division of the court in an analogous setting could not survive the holding and analysis of Melendez-Diaz. Tabaka, 976 A.2d at 176 (citing Millard v. United States, 967 A.2d 155, 163 (D.C. 2009) (CNRs attesting to no record of license to carry a pistol or registration of firearm not "testimonial").

Similarly, in Washington v. State, the Florida Court of Appeals held that the "certificate of non-licensure," prepared by a state-employed clerk attesting that a search of its records revealed that the defendant lacked a valid license, is testimonial. Washington v. State, 18 So.3d 1221, 1123-24 (Fla. App. 2009). Based on Melendez-Diaz, the court concluded that the certificate was introduced to establish an element of the crime, was prepared as part of the prosecution's investigation of the case and "is evaluative in the sense that it represents not simply the production of an existing record, but an assertion regarding the results of an individual's search of a database or databases. Admitting the certificate without giving the defendant an opportunity to cross-examine the clerk violated Jasper's Sixth Amendment rights.

c. The prosecution downplays its burden of proving the error did not effect the verdict. Harmless error analysis following confrontation violation requires the reviewing court to assess whether it is possible jury relied on the testimonial statement when reaching verdict. United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5th Cir. 2008); Fields v. United States, 952 A.2d 859 (D.C. 2008) (finding improperly admitted drug

analysis not harmless when government could not prove it did not contribute to the verdict obtained).

The effect of the affidavit's allegation that Jasper had committed the charged offense of driving with a suspended license in the third degree carried beyond that charge. The prosecution expressly used the improperly admitted evidence to construct its theory of why Jasper should be convicted not only of the suspended license offense, but also the hit and run. The prosecution argued that Jasper's failure to comply with his obligations to DOL demonstrated that he was the type of person who did not fulfill obligations such as those required under the hit and run statute. The prosecution proclaimed that the DOL documents "establish" the elements of the charge that Jasper was driving with a suspended license and that he does not want to "face consequences" or fulfill "his responsibilities. 3/12/09RP 10-11. The prosecution made an emotional appeal to the jury that Jasper's failure to fulfill his responsibilities to DOL showed that he was more concerned about avoiding his responsibilities as a driver than helping injured people and it is "time for him to face those consequences and be accountable." 3/12/09RP 11.

The prosecution mistakenly rests its argument on sufficiency of the evidence standard of review. This Court does not take each shred of evidence in the light most favorable to the prosecution when the State violates the confrontation clause. It does not parse all the pieces of evidence and devine how the jury could have put them together. The State must prove this error did not "contribute" to the verdict, and this it simply cannot do and has not done. Alvarado-Valdez, 521 F.3d at 342.

2. THE COURT IMPROPERLY RESPONDED TO JUROR QUESTIONS WITHOUT CONSULTING WITH JASPER OR HIS ATTORNEY

The State surmises that the court actually consulted with Jasper's attorney before responding to the jury's questions, but ignores the lack of any record of such discussion and consultation.

In fact, the jury gave two questions to the court at 1:42 p.m., and the court returned both answers to the jury at 1:50 p.m. CP 49, 51, 110. The clerk's minutes offer detailed notes about the presence and involvement of the parties in matters conducted both on and off the record throughout the case. The minutes contain no indication that the court discussed the jury's questions with counsel or Jasper. CP 110-11.

The jury received pre-printed forms to use for questions it had during deliberations. Even before the jury asked any question, the pre-printed form included the words: "Court's Response: (after affording all counsel/parties opportunity to be heard)." CP 50, 52. Boilerplate language on the form that pre-existed the jurors even asking any questions does not show that the court actually consulted with anyone before responding. Far more insightful are the clerk's minutes, which show the court sent written responses to the jury within minutes of receiving the separate questions and show no effort to consult with any party before responding. CP 110-11.

CrR 6.15, the court rule directing courts to consult with "the parties" and "provide them an opportunity to comment upon an appropriate response," does not suggest to courts that they need not appraise an accused person of a jury's question, as the State contends. Response Brief at 29. The court rule does not say "attorneys" are the only people who should be notified or consulted.

Furthermore, CrR 3.1 requires the state to provide a lawyer to an accused person "at every stage of the proceedings, including sentencing, appeal, and post-conviction review." The court rules mandate the involvement of counsel in a broader array of

proceedings than the federal constitution requires, and shows that the court is never free to confer with the jury without counsel's direct involvement.

CrR 3.4 dictates that "[t]he defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict" unless otherwise formally excused by the court. This court rule further demonstrates the importance of the accused person's presence throughout the course of the case. The court rules do not demonstrate a cavalier or lenient approach to the presence of either defense counsel or the accused person throughout the criminal proceedings, as the State implies.

"Once a defendant raises the possibility that he or she was prejudiced by an improper communication between the court and jury, the State bears the burden of showing that the error was harmless beyond a reasonable doubt." State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997). The court improperly communicated with Jasper's jury in a possibly prejudicial fashion and the State has not proven the error harmless.

The court demanded that the jury "continue deliberations," and refused to offer any clarification to the jury's request for

information about whether it could consider Jasper's "mental, emotional, or physical condition." CP 49-50. Urging the jury to "continue deliberations" implicitly pressures the jury when the court did not know the state of deliberations. The jury should deliberate without any pressure from the court. State v. Ford, 151 Wn.2d 530, 539, 213 P.3d 54 (2009); State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978); CrR 6.15(f)(2).

The court never explained that the statute defining hit and run expressly exempts a person's criminal liability if he or she is physically incapacitated, and there was evidence that Jasper was physically incapacitated after the very serious accident that crushed his own car as well. RCW 46.52.020(4)(d); 3/11/09RP 31, 41. A trial court "has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue," and the court made no effort to do so. United States v. Southwell, 432 F.3d 1050, 1053 (9th Cir. 2005). Jasper had no opportunity to ask the court to clarify the mental or physical requirements of the charge when it was not appraised of the jury's confusion on this issue.

For the reasons stated in Appellant's Opening Brief, including its explanation of the prejudicial effect of the court's improper, ex parte communication with the jury and the

seriousness of this error under the Washington Constitution, Jasper is entitled to a new trial.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Jasper respectfully requests this Court reverse his convictions and order a new trial.

DATED this 21st day of April 2010.

Respectfully submitted,

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63442-9-I
v.	)	
	)	
DOUGLAS JASPER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JENNIFER ATCHISON, DPA JAMES WHISMAN, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DOUGLAS JASPER 10724 SUMMIT LAKE RD NW OLYMPIA, WA 98502	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF APRIL, 2010.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

No. 64046-1-I

Whatcom County Cause No. 06-2-02294-3

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION 1

MATTHEW W. GOETTEMOELLER AND LINDSAY E. GOETTEMOELLER, husband and wife, and the marital community composed thereof,

Respondents,

v.

GRAHAM M. TWIST AND SUSAN TWIST, husband and wife and the marital community composed thereof,

Petitioner.

PROOF OF SERVICE OF BRIEF OF RESPONDENTS

ORIGINAL

GREG SAMUELS
CROSS BORDER LAW CORPORATION
W. Mark Belanger, WSBA # 34340
Gregory L. Samuels, WSBA #19497
Attorneys for Respondents

Suite 204, 1730 West 2nd Avenue
Vancouver, B.C. CANADA V6J-1H6
Telephone: 604-742-4242
Email: mark@crossborderlaw.com

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COURT OF APPEALS DIV #1
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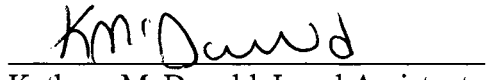
2010 APR 26 PM 9:57

I certify under the penalty of perjury under the laws of Washington State that I am over the age of eighteen (18) years and not a party in this case. On the date given below, I served a copy of the foregoing document as follows:

Washington State Court of Appeals Division I 600 University St One Union Square Seattle, WA 98101-1176	☐ Regular Mail ☐ Fax ☒ Legal messenger ☐ Electronic Delivery
Rory W. Leid, III Midori R. Sagara 1000 Second Avenue, Suite 1300 Seattle, WA 98104-1082	☒ Regular Mail ☐ Fax ☐ Legal messenger ☒ Electronic Delivery

DATED this 23 day of April, 2010



Kathryn McDonald, Legal Assistant
Of Cross Border Law Corporation
Vancouver, British Columbia
E-Mail: kathryn@crossborderlaw.com