

64203-1

64203-1

NO. 64203-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN MARES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY ROBERTS

BRIEF OF RESPONDENT

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2010 JUL 16 PM 4:45

COURT OF APPEALS
STATE OF WASHINGTON

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A. ISSUE

1. Is a certified copy of a driver's license non-testimonial evidence under Confrontation Clause analysis?

B. STATEMENT OF THE CASE

On April 29, 2009, Brian Mares assaulted Brittany Knopff outside the Central Pub in Kent, Washington. CP 6-7. Sarah Winnick, the bartender at the pub, happened to be outside calling 911 because an intoxicated patron had left the bar, gotten into his car, and started to drive away. RP (7/27/09) 26-27. As Winnick was talking to the 911 operator, she witnessed Mares struggling with Knopff over a baby wrapped in a blanket. RP (7/27/09) 28-31. During this struggle, Mares struck Knopff several times in the midsection. RP (7/27/09) 34-35. Winnick told the 911 operator what she was seeing and police responded. RP (7/27/09) 42-43.

Knopff was questioned by police at the scene. Officers took photographs of her and her injuries, and collected a blood-stained shirt for evidence. RP (7/23/09) 89, 96. Winnick confirmed that the person photographed at the scene -- as depicted in exhibit 2 -- was the person Mares assaulted. RP (7/27/09) 40.

The next day, Detective Burnside of the Kent Police Department was interviewing Knopff in the parking lot of her apartment when the detective saw Mares enter the apartment, then flee out a back window. RP (7/23/09) 122-25. Det. Burnside pursued Mares who jumped over several fences before he was eventually caught and arrested. RP (7/23/09) 122-25, 134. He took several photographs of the injuries to Knopff. RP (7/23/09) 128-29.

The prosecutor obtained a certified copy of Knopff's driver's license from the Washington Department of Licensing. RP (7/23/09) 98-99; Ex. 4 (attached as Appendix A). The letter of certification established that the document was an accurate copy of the agency's record, and a copy of the actual driver's license was attached to the letter. Ex. 4.

When Knopff failed to appear for trial, the prosecutor showed the certified copy of Knopff's driver's license to Officer Shirey and Det. Burnside who confirmed that the person pictured on the license was the person assaulted at the tavern on the night in question. RP (7/23/09) 109-10 (Shirey); RP (7/27/09) 115, 119 (Burnside). Knopff timely objected to the driver's license on Confrontation Clause grounds. RP (7/23/09) 99-101. The trial

court overruled the objection, finding that the document was a self-authenticating public record that was admissible. RP (7/23/09) 103. Officer Shirey compared exhibit 4 with exhibit 2 – a photograph he had taken of Knopff on the night in question – and confirmed that the photograph showed the same person. RP (7/23/09) 110. Witnesses Cline and Winnick identified the victim by reference to exhibit 2. RP (7/23/09) 70; RP (7/27/09) 40. Det. Burnside also noted that exhibit 10 – the no contact order – listed “Brittany N. Knopff” with a date of birth of 7/27/85, as the respondent. RP (7/23/09) 134. This is the name and date of birth listed on exhibit 4.

Mares was charged in an amended information with felony violation of a no contact order with aggravating circumstances because the assault was a crime of domestic violence. CP 28-29. He was charged in a second count with reckless endangerment because Ms. Knopff was holding their child during the assault. Id. A jury convicted Mares on the first count with the aggravating circumstance. CP 63, 64. The jury was unable to reach a unanimous verdict on the second count. CP 62. The court rejected the State’s request for an exceptional sentence and, based on the

offender score of six, imposed a 23-month sentence. CP 77-86.

Mares has filed this timely appeal. CP 76.

C. ARGUMENT

1. A CERTIFIED COPY OF A DRIVER'S LICENSE IS A PUBLIC RECORD, ADMISSIBLE IN CRIMINAL PROSECUTIONS UNDER THE EVIDENCE RULES AND THE CONSTITUTION.

The copy of a driver's license admitted in this case was a certified public record admissible under well-established rules and appellate court decisions in Washington. The Confrontation Clause is not violated when such documents are admitted into evidence.

- a. A Certified Copy Of A Department Of Licensing Record Is Admissible As A Public Record, Without Live Testimony.

RCW 5.44.040 provides that copies of records and documents filed in state departments are admissible if certified under the official seals of the records custodian.¹ A public record certified in this manner is self-authenticated. ER 902(d); State v.

¹“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 or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.” RCW 5.44.040.

Monson, 113 Wn.2d 833, 836-37, 784 P.2d 485 (1989) (certified copy of a driver's record is a public record). To be admissible, certified public records must:

- (1) contain facts, rather than conclusions that involve the exercise of judgment or discretion or express an opinion,
- (2) relate to facts that are of a public nature,
- (3) [are] retained for the benefit of the public, and
- (4) there [is] express statutory authority to compile the report.

State v. C.N.H., 90 Wn. App. 947, 949-50, 954 P.2d 1345 (1998).

Washington appellate courts have repeatedly held that a certification from DOL indicating the status of a defendant's driving privilege is a public record and may be admitted into evidence.

State v. Smith, 122 Wn. App. 699, 94 P.3d 1014 (2004), rev'd on other grounds, 155 Wn.2d 496 (2005).

Three years ago the Washington Supreme Court held that a document containing certified driving records (or the lack of such records) is not testimonial evidence that violates the Confrontation Clause. State v. Kronich, 160 Wn.2d 893, 903-04, 161 P.3d 982 (2007) (certification as to driving records); State v. Kirkpatrick, 160 Wn.2d 873, 886, 161 P.3d 990 (2007) (certification as to the absence of a driving record). Thus, under current Washington law, the driver's license was admissible.

b. Melendez-Diaz v. Massachusetts Does Hold That Public Records Are Testimonial.

After Kronich and Kirkpatrick, the United States Supreme Court decided Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Mares argues that Melendez-Diaz abrogates the Washington Supreme Court's decisions in Kronich and Kirkpatrick, and precludes the use of a certified public record like the letter admitted against Mares because it is a "testimonial" document. This argument should be rejected. An analyst's laboratory report is fundamentally different from the simple licensing record at issue here. A forensic analyst's report attests to actions taken wholly after commission of the crime, whereas the certification letter in this case simply authenticates a public record that existed at the time of the offense.

Melendez-Diaz is the latest effort in the Supreme Court's attempts to explain what it means under the Confrontation Clause to be a witness "who bear[s] testimony" against a defendant. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In Crawford, the Court held that a witness's "testimonial" assertions are admissible only if the witness appears at trial or the defendant has some other opportunity to

cross-examine the witness. Crawford, 541 U.S. at 54. The Court coined the term “testimonial” to describe the class of statements covered by the Confrontation Clause. Testimonial evidence was said to include:

. . . 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,” . . . ; “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 (citations omitted).

Not all out-of-court statements are testimonial. For instance, the Supreme Court suggested that neither business records nor public records are testimonial. Crawford, 541 U.S. at 56 (business records); at 76 (Rehnquist, C.J., concurring) (stating that the majority would find “official records” nontestimonial). Statements made to resolve an ongoing emergency are not testimonial. Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Statements in “medical reports created for treatment purposes” are not testimonial. Melendez-Diaz, at 2533 n.2. And,

dying declarations or statements made as part of an ongoing conspiracy are not testimonial. Crawford, 541 U.S. at 55.

In Melendez-Diaz, the issue was whether an analyst's report of a laboratory drug test was testimonial. A white powdery substance had been found in Melendez-Diaz's possession when he was arrested. Police requested that the substance be tested, it was, and a laboratory analyst found that the substance contained cocaine. The analyst prepared a report that was admitted at trial. Based on this evidence, Melendez-Diaz was convicted of drug possession. Melendez-Diaz, at 2530-31.

The Supreme Court concluded there was "little doubt" that the laboratory report was testimonial because it was an affidavit attesting to the results of an analysis that had been conducted after the defendant's arrest, and that "the sole purpose of the affidavit... was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance." Melendez-Diaz, at 2532. The Court noted that it had previously held that similar evidence offended the confrontation clause. Id. at 2538 (citing Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943) (trial court reversed for admitting an accident report

prepared by a railroad company employee describing the accident from the railroad employee's perspective)).

The government argued that the report was a business record, but the Court rejected that argument. It contrasted true business records with the laboratory report: "a clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but [a clerk] could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." Id. at 2539 (emphasis in original). The Court also rejected an argument that cross-examination of the drug analyst would be fruitless; cross-examination could expose or deter incompetent or fraudulent analysts. Id. at 2536-38.

Although the Court found the laboratory report *not* to be a business record, it confirmed that true business or public records are not testimonial. It said that "documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status." Id. at 2538. The Court observed that "a clerk's certificate authenticating an official record – or a copy thereof – was traditionally" admissible. Id. at 2538-39. The clerk was "permitted to certify to the correctness of a copy of a record kept in his office but had no authority to furnish, as evidence for the trial of a lawsuit,

his interpretation of what the record contains or shows, or to certify to its substance or effect.” Id. at 2539 (internal quotation marks and citations omitted). The Court also observed that “documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.” Id. at 2532 n.1. And, the Court noted that a clerk or judge historically could certify to the conduct of a defendant’s prior trial and such certification would not be considered testimonial. Id. at 2539 n.8 (citing Dowdell v. United States, 221 U.S. 325, 31 S. Ct. 590, 55 L. Ed. 753 (1911)).²

The record in this case fits within this historical exception for public records. As discussed above, Washington Courts have repeatedly held that driving records are classic public records because they are maintained for a public benefit and purpose. Kirkpatrick, 160 Wn.2d at 886. The certification simply attests to the authenticity of the document; it offers neither opinion nor the exercise of discretion or judgment. Id. The letter meets the criteria

² Early cases permitted the use of “records prepared for the administration of an entity’s affairs, and not for use in litigation.” Id. at 2538 n.7 (citing King v. Rhodes, 1 Leach 24, 168 Eng. Rep. 115 (1742) (ship’s muster-book was admissible to prove death of a crewman in a will forgery case); King v. Martin, 2 Camp. 100, 101, 170 Eng. Rep. 1094, 1095 (1809) (a vestry book was admissible in a libel case to prove that a person was a duly elected town treasurer); and King v. Aickles, 1 Leach 390, 391-92, 168 Eng. Rep. 297, 298 (1785) (a prison logbook was properly admitted as to the date of a prisoner’s release from custody)).

of Melendez-Diaz: “a clerk . . . by affidavit authenticate[d] [and] provide[d] a copy of an otherwise admissible record.” Melendez-Diaz, at 2539.

Still, Mares argues that exhibit 4 was testimonial because it was prepared *after* the event in question, for the purposes of litigation. This argument confuses the creation of the *certificate* with the creation of the *record*. Any certification authenticating a public record will be created after the fact of the event. Yet, the Supreme Court has clearly held that certifications of clerks attesting to the authenticity of a record are admissible without confrontation.³ The important point, for purposes of determining whether the document is testimonial, is that the certification not authenticate a *record* that was prepared in preparation for litigation, and that the certification contain no opinions or the exercise of judgment. In other words, the certification must simply be a reflection of the “administration of an entity’s affairs” before or on the date of the crime. Melendez-Diaz, at 2538 n.7.

³ “[A] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but [a clerk] could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant.” Melendez-Diaz, at 2539.

Moreover, the document admitted in Mares' trial is fundamentally different from the laboratory report in Melendez-Diaz or the railroad accident report in Palmer v. Hoffman. A laboratory report involves the exercise of scientific expertise, judgment and discretion. It is the product of a scientific testing process where an analyst examines a substance, performs steps to test that substance, and reports his or her results. Similarly, an accident report documents the event in question, not pre-existing records. Laboratory and accident reports both create new evidence.

In contrast, the driver's license of Brittany Knopff was a record that already existed, and for reasons independent of the crime. DOL records are kept for the public benefit and to permit administration of the driving laws of the state of Washington.⁴ The records exist regardless of whether Mares was ever charged with this crime. And, the certification as to the authenticity of that record contained no opinion or exercise of judgment. Cross-examination

⁴ DOL records may be requested by statutorily specified recipients for specific public safety purposes. Those recipients include: an employer or prospective employer for purposes of determining whether the individual named in the record should be permitted to drive a commercial vehicle or school bus; an employee or agent of a transit authority checking prospective vanpool drivers for insurance and risk management purposes; an insurance carrier for underwriting purposes; and an alcohol drug assessment and treatment agency. See RCW 46.52.130(1), RCW 46.52.130(10) and RCW 46.52.130(11).

of the custodian of the driver's license would truly be "an empty formalism." Id. at 2537 n.6. The DOL record in this case is not testimonial under Melendez-Diaz.

c. Decisions From Foreign Courts Are Divided.

Courts from other jurisdictions are split over whether (or which) public records are admissible after Melendez-Diaz.⁵ The Supreme Court of Maine has held that licensing certificates are public records and, thus, *not* testimonial. State v. Murphy, ___ M.E. ___, 991 A.2d 35 (2010) (certificate attesting to authenticity of attached records and to license suspension, notice, and failure to reinstate driving privilege held not testimonial); State v. Gilman, ___ M.E. ___, 993 A.2d 14, 24 (2010). Massachusetts appellate courts have reached similar conclusions. Commonwealth v. Martinez-Guzman, 76 Mass.App.Ct. 167, 920 N.E.2d 322, 325 n.3 (2010) (certificate of authenticity of records and copies of records from Registrar of Motor Vehicles); Commonwealth v. Weeks, 77 Mass.App.Ct. 1, 927 N.E.2d 1023 (2010) (court docket sheets are not testimonial); Commonwealth v. McMullin, 76 Mass.App.Ct. 904,

⁵ Because this is a federal constitutional issue, decisions of the Supreme Court are binding on this court but decisions of federal appellate courts are not.

904-05, 923 N.E.2d 1062 (2010) (admission of court records and record of Registry of Motor Vehicles records did not right of confrontation).

One federal court addressed this issue and held that “Melendez-Diaz did not decide the issue of whether data compiled by a government agency during routine, [matters] conducted pursuant to its duty under the law presented a Confrontation Clause concern.” U.S. v. Huete-Sandoval, 681 F.Supp.2d 136, 139 (D.Puerto Rico, 2010). The court ruled that

Despite his assertions to the contrary, Defendant is actually inviting the Court to extend the Supreme Court's holding in Melendez-Diaz to encompass data compiled as part of a routine exercise by a government agency which was later presented at evidence at a criminal trial. The Court expressly declines this invitation.

Sandoval, 681 F.Supp.2d at 139-40. See also U.S. v. Villavicencio-Burruel, ___ F.3d ___, 2010 WL 2352045 (9th Cir. 2010) (warrants of removal are not testimonial); U.S. v. Mallory, ___ F.Supp.2d ___, 2010 WL 1286038 (E.D.Va., 2010) (tracking record for Federal Express package is not testimonial).

Mares relies on two decisions that have held that licensing records are testimonial. Washington v. State, 18 So.3d 1221 (Fla.App. 4 Dist., 2009) (certificate regarding absence of construction license is testimonial); Tabaka v. District of Columbia, 976 A.2d 173 (2009) (document attesting to absence of driver's license is testimonial).⁶ These two cases are based on a cryptic paragraph in Melendez-Diaz wherein the Supreme Court opined that certificates of the non-existence of a record are testimonial. Melendez-Diaz, at 2539. No such certificate was at issue in Melendez-Diaz, so any comments on that topic should be considered non-binding dicta. State v. Murphy, 991 A.2d at 42. See also Pierre N. Leval, Judging Under The Constitution: Dicta About Dicta, 81 N.Y.U.L.Rev 1249 (2006).

Moreover, this dictum confuses the creation of a *certification* as to a public record with the creation of the *record* itself. A clerk can certify a pre-existing public record after the crime, but the clerk

⁶ Two federal circuit courts have held that a certificate of non-existence of record (CNR) is testimonial. U.S. v. Norwood, 595 F.3d 1025 (9th Cir. 2010), *Opinion Amended and Superseded on Denial of Rehearing by U.S. v. Norwood*, 603 F.3d 1063 (9th Cir. 2010); U.S. v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010). However, the federal prosecutor conceded the point in each case so the issue was not litigated.

cannot, under the holding of Melendez-Diaz, create and then certify a *record* that was created in the state's attempt to prosecute.⁷

Finally, exhibit 4 in this case attested to the authenticity of a record that was provided in court, not to the absence of a record. Thus, the dictum in Melendez-Diaz and the holdings in Washington and Tabaka are inapposite.

D. CONCLUSION

For these reasons, a certified driver's license is admissible in Washington as a public record, that record is not testimonial evidence under Confrontation Clause analysis, and the recent decision in Melendez-Diaz does not require a change in Washington law. This Court should hold that exhibit 4 was

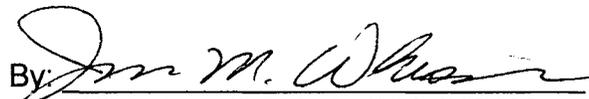
⁷ The dictum in Melendez-Diaz that seems to distinguish CNRs makes little sense. An affiant can certify and authenticate records. Melendez-Diaz, at 2538-39. Such a certification says that the attached document is part of the public record. The certification is, essentially, an attestation about the state of the database of public records at the time of the event. But if the database of public records is devoid of a particular record, it seems logical that the affiant can attest to this fact, too. It seems illogical that a certification would become "testimonial" simply because a database lacks a record as opposed to containing a record. That issue is presented in a case pending in this court. See State v. MoiMoi, No. 64327-4.

nontestimonial. The State respectfully requests that Mares' convictions be affirmed.

DATED this 16th day of July, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

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Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BRIAN MARES, Cause No. 64203-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

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Done in Seattle, Washington

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Date 7/16/10

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Karin,

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APPENDIX A



State Exhibit

4

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
P. O. Box 9030 • Olympia, Washington 98507-9030

June 16, 2009

SC

I, Sodie Chancellor, certify that I have been appointed Custodian of Records by the Director of the Department of Licensing and that such records are official and maintained by the Department of Licensing, Olympia, Washington. I further certify that the attached photocopy of the negative file and/or attached document(s) for KNOPFF, BRITTANY NICOLE, is a true and correct copy(s).

Sodie Chancellor

Sodie Chancellor
Custodian of Records
Place: Olympia, Washington
Date: June 16, 2009

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State of Washington
VS
Brian Christopher Mares

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WASHINGTON DRIVER LICENSE

LIC # KNOPFBN152M7 EXP 07-27-2013

KNOPFF, BRITTANY NICOLE

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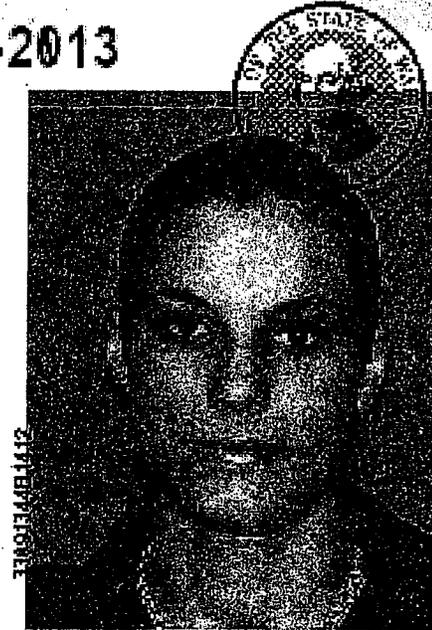
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Brittany Knopf



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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Missing Appendix "A", in STATE V. BRIAN MARES, Cause No. 64203-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

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Name
Done in Seattle, Washington

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Date 7/19/10

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