

68846-4

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No. 68846-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RICKEY RAINEY,

Appellant.

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

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

**1. The State properly concedes the admission of certified copies of Mr. Rainey’s driving records violated his Sixth Amendment right to confrontation.**

The Sixth Amendment’s Confrontation Clause dictates the procedure by which the prosecution must prove its case and it is rooted in long-standing common law tradition. *Crawford v. Washington*, 541 U.S. 36, 43-50, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). The Supreme Court has concluded that certified copies of driving records “are plainly affidavits, falling within ‘core class of testimonial statements’ described in *Crawford* and *Melendez-Diaz*.” *State v. Jasper*, 174 Wn.2d 96, 115, 271 P.3d 876 (2012). Because it is testimonial, the certificate is only admissible if the person who prepared it is first subject to cross-examination. *Id.* Because that did not occur and as the State concedes, Brief of Respondent at 12-15, Mr. Rainey was denied his right to confrontation.

**2. The trial court denied Mr. Rainey of his right to a public trial.**

Article I, sections 10 and 22 guarantee the public’s right to open court proceedings and a defendant’s right to a public

trial. Because the closing of a courtroom for even a portion of trial implicates these rights, a trial court must first comply with the requirements of *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). *State v. Bone-Club*, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995). The court’s consideration of these criteria must occur on the record. *State v. Easterling*, 157 Wn.2d 167, 175-76, 137 P.3d 825 (2006). Further, the court must enter specific findings regarding its consideration of the *Ishikawa* criteria. *Bone-Club*, 128 Wn.2d at 260.

To determine when a closure violates constitutional protections a court must ask whether the by “experience and logic” the substance of the hearing should be open to the public. *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). The Court explained:

The first part of the test, the experience prong, asks whether the place and process have historically been open to the press and general public. The logic prong asks whether public access plays a significant positive role in the functioning of the particular process in question. If the answer to both is yes, the public trial right attaches and the *Bone-Club* factors must be considered before the proceeding may be closed to the public.

*Id.* at 73 (internal quotations and citations omitted.)

The State, pointing to *State v. White*, 152 Wn. App. 173, 215 P.3d 251, (2009), argues that this Court has previously held that a hearing

to assess the validity of a witness's claim of privilege does not implicate the right to a public trial. Brief of Respondent at 8-10. The portion of *White* on which the State relies, however, is dicta. As the Court observed "no hearing occurred. [The witness] immediately withdrew her claimed Fifth Amendment privilege, thus eliminating the need for the in camera proceeding." *White*, 152 Wn. App. at 182. Because no *in camera* hearing occurred in *White*, any analysis of *Bone-Club's* application to such hearings was dicta. The Court, nonetheless, went on to opine that *Bone-Club* does not apply to *in camera* hearings because *in camera* hearings have always been closed to the public. *Id.* at 182-83. That is less a conclusion than a recognition of the definition of the *in camera*.

Simply concluding that *in camera* hearings do not violate the right to an open court room because they are *in camera* is extraordinarily circular and begs the question whether the hearing was properly conducted *in camera*. Answering that question is precisely the purpose of the experience and logic test employed by *Sublett*. Relying on cases that have failed or refused to apply the *Bone-Club* analysis as evidence that such hearings have historically been closed is of no value at all in applying *Sublett's* experience prong.

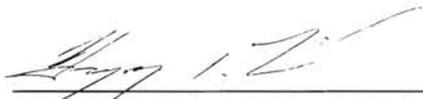
Here, the trial court did not believe that was not subject to *Bone-Club*. Instead, the court concluded that *Bone-Club* permitted the *in camera* hearing. 8/27/10 RP 2(sealed). But the court reached that conclusion without an on-the-record analysis of the *Bone-Club* factors, as illustrated by the above citations to the sealed proceeding. Thus, the trial court understood that *Bone-Club* was implicated but failed to properly apply the analysis.

As set forth in Mr. Rainey's initial brief, the assertion of the Fifth Amendment privilege is question specific. *See Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Questioning of witnesses is by experience and logic something that is at the core of the right to an open courtroom.

B. CONCLUSION

For the reasons above, this Court should reverse Mr. Rainey's convictions.

Respectfully submitted this 22<sup>nd</sup> day of August, 2013.

  
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	)	
RICKEY RAINEY,	)	
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Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF AUGUST, 2013, 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:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF AUGUST, 2013.

X \_\_\_\_\_ 

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