IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0562

STATE OF MONTANA

Plaintiff and Appellee,

v.

ROBERT EARL STAUDENMAYER,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, the Honorable Kim Christopher, Presiding

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(*testimonial vs. non-testimonial*)

In *Melendez-Diaz v. Massachusetts*, the Court found certificates from a laboratory that confirmed the presence of cocaine were **testimonial**. 557 U.S. 305, 311, 129 S. Ct. 2527, 2532 (2009). The argument that declarants were not subject to confrontation because they were not "accusatory" witnesses found no support in the Sixth Amendment. *Melendez-Diaz*, at 313. They were not business records, but even if they were, the certificates would still be subject to confrontation. *Melendez-Diaz*, at 321. The absence of interrogation was irrelevant. *Melendez-Diaz*, at 316. The Confrontation's requirements may not be relaxed because they make the prosecution's task burdensome. *Melendez-Diaz*, at 325.

In *Davis v. Washington*, the Supreme Court held that statements made in the course of police interrogation are **non-testimonial** when made under circumstances that indicate that the primary purpose was to enable police assistance to meet an ongoing emergency. 547 U.S. 813, 822, 126 S. Ct. 2266, 2273 (2006). In *Michigan v. Bryant*, the Court established that it should look to all of the relevant circumstances. 562

U.S. 344, 369, 131 S. Ct. 1143, 1162 (2011). The "informality of the situation" contributed to the Court finding the statements **non-testimonial** because formality would have alerted the declarant to the possible prosecutorial use of the statements. *Bryant*, 562 U.S. at 377, 131 S. Ct. at 1166. In *Ohio v. Clark,* the Court found a child's statements **non-testimonial**, noting that "[f]ew preschool students understand the details of our criminal justice system." 576 U.S. 237, 247, 135 S. Ct. 2173, 2181 (2015). "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Clark*, 576 U.S. at 249, 135 S. Ct. at 2182.

INTRODUCTION

The State argues these minute entries are not testimonial because they were created to make an independent record of court occurrences as part of the clerk's statutory duty and not in preparation for a criminal prosecution. (Appellee's Br. at 22.) The State misstates the test for testimonial vs. non-testimonial. The question is whether the court clerk would have reasonably believed her written statements

could be used at a future trial. (Appellant's Br. at 14.) The State also argues the minute entries were reliable and therefore admissible. (Appellee's Br. at 24.) In this respect, the State makes the same mistake the U.S. Supreme Court warned against in *Crawford v. Washington.* The confrontation clause 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, 1370 (2004). Furthermore, the State completely neglects to address whether the statement made by Robert's previous defense attorney in court to the Judge was testimonial or not. (Appellant's Br. at 17.)

Alternatively, the State argues the district court did not abuse its discretion in denying defense counsel's motion for a continuance. Notwithstanding the extremely short period of time between appointment of counsel and trial, just 40 days, the State believes this urgency was needed to preserve Robert's speedy trial rights. (See Appellee's Br. at 28.) This argument fails to acknowledge that Robert was making the request for a continuance, thereby attributing any further delay to himself instead of the State.

I. Denial of Robert's right to confrontation requires a remand for a new trial.

A. The State asks the wrong question for determining whether statements are testimonial.

The State argues that the minute entries written by the court clerk are non-testimonial because they are prepared as part of the clerk's duties, for the administration of the court, and not prepared for use in a criminal proceeding. (Appellee's Br. at 22.) This argument fails to acknowledge that regardless of whether minute entries are part of a clerk's regular duties and for the administration of the court, they still can be a solemn declaration made to establish or prove some fact. *Crawford v. Washington*, at 51. Here, the minute entries were indeed made to establish or prove some facts, specifically that Robert was told to appear at specified time and place and that he failed to appear without a lawful excuse.

As to the State's argument that the minute entries were not prepared for use in a criminal proceeding, we must clarify that the established test is whether the "statements were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Crawford v. Washington, at 51-53. The minute entries in question were written by a clerk employed by the District Court, to be submitted as part of the court record. The fact that they were made as part of the clerk's official court duty makes them more likely to be testimonial rather than less, since the formality or informality of a situation is a significant factor in determining whether the declarant was alerted to possible prosecutorial use of the statement. See *Michigan v. Bryant*, 562 U.S. at 377, 131 S. Ct. at 1166. The officiality of the minute entries would alert a reasonable person in the clerk's position that these minute entries could be used in a later trial.

Additionally, the minute entries are distinguishable from the statements in *Ohio v. Clark* that were made by a preschool student to a teacher. Here, the written statements were made by an employee of the District Court in her official capacity as District Court Clerk, someone who is extremely familiar with the details of our criminal justice system. One recipient of the minute entries is the county attorney, since the minute entries are provided directly to the county attorney's office when they are filed. Unlike the schoolteacher in *Clark*, a county attorney is absolutely someone who is "principally charged with

uncovering and prosecuting criminal behavior." *Clark*, 576 U.S. at 249, 135 S. Ct. at 2182. Lastly, the present situation is distinguishable from *Davis v. Washington* because there was no ongoing emergency that required immediate police assistance. *Davis*, 547 U.S. at 827, 126 S. Ct. at 2276. Minute entries are typically written soon after the conclusion of a hearing and would not be done under duress or in a hurried manner. (Appellant's Br. at 16.)

B. Business records are not necessarily non-testimonial

The State alludes to the argument that business records are not testimonial and that these minute entries are business records. (Appellee's Br. at 21-22, and 24-25.) In *Crawford,* the U.S. Supreme Court touched on business records when discussing hearsay exceptions that existed at the time of the Sixth Amendment's creation. The Court noted that "Most of the hearsay exceptions covered statements that by their nature were not testimonial--for example, business records or statements in furtherance of a conspiracy." *Crawford*, at 56. This was also addressed in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009) (Appellee's Br. at 22.) However, neither *Crawford* nor *Melendez-*

Diaz draw the conclusion that business records are always non-testimonial. *Melendez-Diaz*, at 321, *Crawford*, at 56.

In *Melendez-Diaz*, the Court ruled that the affidavits in question were not business records but even if they were they would still be subject to confrontation. *Melendez-Diaz*, at 321. The Court emphasized that even if records were kept in the regular course of business, if they were calculated for use essentially in court, not in the business, then they would not qualify as business records. *Id*., (citing *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 477, 87 L.Ed 645 (1943).) Whether or not they qualify as business records, the statements were testimony against the petitioner and subject to confrontation. *Melendez-Diaz*, at 324.

The *Crawford* opinion specifically uses the clause "for example" to describe business records as an example of statements that "by their nature were not testimonial", not to make it a blanket rule. To accept the conclusion that business records are non-testimonial would be to ignore the core question that *Crawford* and the Sixth Amendment require — whether these minute entries, by the nature of their content and purpose, are testimonial. Almost any document can be made into a

"business record", because the foundational requirements for establishing a "business record" have nothing whatsoever to do with the actual content or purpose of the document, but rather on the manner in which the document is generated and kept. *See* MCA § 26-10-803(6). Police reports containing the results of custodial interrogation can easily meet the technical "business records" requirement if they are prepared and kept in a manner meeting the rule's foundational requirements. However, these statements nevertheless fall squarely within the definition of "testimonial" under *Crawford,* which stated that whatever else the term testimonial covers, it applies at minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to ***police interrogations***. *Crawford*, at 68.

Furthermore, the broader implication of *Crawford* dismantles the rationale for treating business records as admissible non-testimonial hearsay. The business records clause is an exception to the general rule prohibiting hearsay evidence. The reason for accepting this form of evidence is that "business records are presumed reliable." *State v. Dodge*, 2017 MT 318, ¶ 14, 390 Mont. 69, 408 P.3d 510 (quoting *Bean v. Mont. Bd. of Labor Appeals*, 1998 MT 222, ¶ 20, 290 Mont. 496, 965

P.2d 256). But *Crawford* expressly held that 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 . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford*, at 61-62. Thus, the U.S. Supreme Court's observation that most "business records" are not testimonial in nature should not be taken as some sort of blanket rule.

Undoubtedly, most business records will not be testimonial because most businesses do not keep records with an eye toward prosecuting criminals. However, one of the reasons a clerk reporter creates a minute entry is to document who appeared at a hearing and what information was conveyed by and to the court. This evidence clearly can later be used for charging a defendant with bail jumping. To prove the elements of bail jumping the State must document what occurs during these hearings, since to prove the elements of bail jumping the State must show that a person was set at liberty by a court order under a condition to appear at a specified time and place and that

the person purposely failed without lawful excuse to appear at that time and place. *See* MCA. § 45-7-308(1). The simplest manner to prove these elements is to document what happens at these court hearings, which is precisely the role that minute entries perform.

C. The question is not whether the statements are reliable, but how reliability is assessed.

The State believes the district court provided sufficient justifications for admitting the minute entries by noting that they were reliable and that the actual custodian of the records would authenticate the documents (Appellee's Br. at 24.) Both the district court and the State make the same mistake here that was specifically warned against in *Crawford v. Washington,* at 61-62. It is not up to the court to determine if evidence is reliable because the confrontation clause requires reliability be assessed through cross-examination. "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Crawford*, at 61.

Robert's defense counsel objected to the admission of the minute entries by stating:

> They're not self-authenticating documents and they're hearsay and they're testimonial. The woman that took these sitting there in the court that might have a personal memory of what happened

> that day is not here. Ms. Fricker was not there, she did not take these down.

(7/13/20 Tr. at 107.) Robert's counsel was correct because the only way the reliability of the minute entries could be assessed is to cross-examine the individual that created those minutes, Krisstyn Leiter. The court believed the minutes were reliable, stating "while I will agree that there have been errors in minute entries, quite frankly in the Court's experience that doesn't happen often," (7/13/20 Tr. at 108.) However, this is not a question about typos or incorrect dates, it is question of trustworthiness. Reliability can only be assessed by confronting the specific individual that is making the allegation against the defendant. The framers of the Constitution would not have been content to assume that courts were acting in good faith when they found reliability. *Crawford*, at 67. They knew that judges could not always be trusted to safeguard the rights of the people. *Id.*

D. The cases cited in the state of Washington are not binding on this court, nor persuasive.

In support of its argument, the State cites two Washington Court of Appeals decisions, one published and one unpublished, *State v. Hubbard* and *State v. Phipps* respectively (Appellee's Br. at 22-23.)

They are outside of Montana's jurisdiction and not binding on this Court. Additionally, a close examination of these decisions reveal that they relied on a misunderstanding of *Melendez-Diaz v. Massachusetts.*

The *Phipps* decision relies on the *Hubbard* decision, which ruled that a certified record is not testimonial if it was not prepared for use in a criminal proceeding. *State v. Hubbard*, 169 Wash. App. 182, 185, 279 P.3d 521, 532 (2012.) *Hubbard* adopted this rule by citing a previously unreferenced Washington Supreme Court decision, *State v. Jasper*, 174 Wash. 2d 96, 721 P.3d 876 (2012), which in turn quoted the U.S. Supreme Court opinion *Melendez-Diaz v. Massachusetts*. The language that *Hubbard* relies on came from *Melendez-Diaz*, which reads:

> The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record—or a copy thereof—for use as evidence. See *post,* at 2552 – 2553. But a clerk's authority in that regard was narrowly circumscribed. He 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." *State v. Wilson,* 141 La. 404, 409, 75 So. 95, 97 (1917). See also *State v. Champion,* 116 N.C. 987, 21 S.E. 700, 700–701 (1895); 5 J. Wigmore, Evidence § 1678 (3d ed.1940).

State v. Jasper, at 112, (quoting Melendez-Diaz v. Massachusetts, at 322.) From this language, the Washington Court of Appeals determined that a minute entry fits the exception described above as a certified record that is not prepared for use in a criminal proceeding. However, this is a plainly incorrect interpretation of *Melendez-Diaz v. Massachusetts*. The example of a clerk's certificate that the dissent uses is the work of a copyist, which the State used to convict men of bigamy in the 1800s when the original record could not be taken from the archive, therefore necessitating the need for copies of those records. *Melendez-Diaz*, at 347.

Furthermore, the *Melendez-Diaz* decision took pains to explain that this exception was "narrowly circumscribed" and that the clerk was permitted to certify to the correctness of a copy of a record but had no authority to furnish his interpretation of what the records contains or shows. *Id*., at 322. The use of a copy of a marriage record to prove that a marriage record exists is clearly distinguishable from a minute entry that is used to describe the events that occurred during a court hearing. We are not arguing here that the minute entry is not authentic, we are insisting that the reliability of minute entry's contents be assessed by

cross-examination of the individual who wrote the minute entry. Lastly, the rule articulated by the Washington Court of Appeals, that certified records not prepared for use in a criminal proceeding are not testimonial, is plainly not equivalent to the rule articulated in *Crawford* that a statement is testimonial if the declarant would reasonably expect it to be used prosecutorially. *Crawford v. Washington*, at 51-52. For the aforementioned reasons, the Court should not allow these Washington Court of Appeals decisions to inform its decision.

E. The State neglects to address the statement made by Defendant's previous attorney Ashley Morigeau.

One of the minute entries entered into evidence paraphrased a statement made by Robert's previous defense counsel, Ashley Morigeau. The statement read: "Mrs. Morigeau has no information on the non-appearance of her client." (See State's Exhibit 3, Appellant's Br. at 17, and at 21.) This is an alleged statement by an attorney in court about Robert's whereabouts and any reasons Robert may have had for not appearing. It is significant to the proceeding because it speaks directly to the last element of bail jumping, that "the person purposely fails without lawful excuse to appear at that time and place." *See* MCA § 45-7-308(1). It is clearly testimonial because it is statement given by an

attorney to a judge in open court where the attorney should clearly know that anything she says may end up being used against her client, especially in a trial over a bail jumping charge.

The State does not even address Ms. Morigeau's statement anywhere in its Response. The State apparently believes its argument that minute entries should be admissible should include any statement that was quoted or paraphrased in the minute entries. This is a flawed argument. The statement by Ms. Morigeau is a distinct and separate statement from the minute entries themselves. The author of the minute entries was Kristtyn Leiter, but the declarant of the paraphrased statement was Ashley Morigeau. For the State to enter the minute entries into evidence, it must allow Robert the right to confront Kristtyn Leiter. If the State intends to also introduce the paraphrased statement into evidence, it must also allow Robert the right to confront Ashley Morigeau.

The statement by Ms. Morigeau was an integral part of the State's case against Robert because it effectively eliminated the possibility that Robert provided an excuse to his attorney for failing to appear. Without allowing Robert to cross-examine Ms. Morigeau to assess the credibility

of this allegation, the statement should not have been allowed into the proceedings. Since the State has not provided any defense for its admission into evidence or why it should not be considered testimonial, this Court must rule that it was a testimonial statement and that its admission was a violation of Robert's right confront witnesses under the Sixth Amendment.

II. The District Court abused its discretion by denying defense counsel's motion continue.

The State fails to articulate a valid reason for the Court to deny a continuance. The State argues that the continuance was necessary to protect Robert's right to a speedy trial. (Appellee's Br. at 28.) However, this is not compelling a reason to deny the continuance when it was requested on behalf of the defendant and further delay did not prejudice him. Additionally, there were sufficient reasons to support the motion to continue, as addressed in Appellant's Opening Brief. (See Appellant's Br. at 21-33.)

A. The State's speedy trial argument is misguided.

The State argues that the continuance had to be denied to protect Robert's right to a speedy trial. However, the defendant's speedy trial right is for Robert to assert, not the State. Robert was requesting the

continuance to allow his counsel to provide an effective defense. He never made any reference to his right to a speedy trial. The State believes that the Court was obligated to deny Robert's request for a continuance in order to protect Robert's own Sixth Amendment right. This is effectively using a citizen's guaranteed rights against the citizen's interests and should not be permitted. Additionally, Robert's speedy trial rights were not at risk, as the following analysis explains.

The Court considers four factors when presented with a speedy trial claim: the length of the delay, the reasons for the delay, the accused's responses to the delay, and prejudice to the accused. *State v. Hendershot*, 2009 MT 292, ¶ 9, 352 Mont. 271, 273, (citing *State v. Ariegwe*, 2007 MT 204, ¶¶ 106-111, 338 Mont. 442.) The four speedy trial factors are balanced to determine whether the accused has been denied the speedy trial right. *Hendershot*, at ¶ 9. Each factor's significance varies based on the particular case's unique facts and circumstances. *Hendershot,* at ¶9.

i. Length of the Delay

The State argues that Robert minimizes the concern to Robert's speedy trial right by failing to include the time from when the original

charge was filed to when it was originally dismissed. (See Appellee's Br. at 28., citing *State v. Butterfly*). The State is correct that if we include both the time from March 18, 2019 to September 30, 2019 (196 days) and the time from the subsequent re-filing of March 3, 2020 to July 13, 2020 (132 days), the total delay is **328 days**. A speedy trial claim is triggered if the delay is at least 200 days. *Hendershot*, at ¶10. Here, the 200-day trigger date is met, satisfying the first factor.

ii. Reasons for the Delay

The court must then identify each period of delay and attribute each period of delay to either the State or the defendant. *Hendershot*, at ¶11. It is true that the State originally filed charges for bail jumping on March 18, 2019. However, the State was unable to proceed with the case until Robert was found and arrested on June 14, 2019. The time period between the filing and the arrest, 88 days, should therefore be attributed to Robert. This means that trial date was only delayed by 40 days over the 200-day threshold (328 – 88 = 240).

iii. Accused's Responses to the Delay

The third factor serves an important role by providing insight into whether the accused really wanted a speedy trial. *Hendershot*, at ¶ 13.

If the defendant wishes to delay his trial, this factor is weighed against the defendant. *Id.*, at ¶ 13. Here, not only did Robert not object to a continuance of the trial, but the continuance was requested on behalf of Robert, demonstrating that he wished to delay the trial.

iv. *Prejudice to the Accused*

The fourth factor to consider is whether the accused has been prejudiced by the delay. Interests to consider include oppressive pretrial incarceration, the accused's anxiety and concern, and the possibility of diminished defense. *Hendershot*, at ¶ 14. Robert was held in custody since his arrest on June 14, 2019, but not exclusively on the bail jumping charges. He was also held on a $50,000 bond on a different criminal charge in Judge Christopher's court, and a $250,000 bond on a criminal charge in Judge Manley's court. (D.C. Doc. 33.) The fact that he was being held on other charges should mitigate any argument that Robert was being prejudiced by the delay.

Balancing these factors, the Court must find that Robert's right to a speedy trial was not at risk of being deprived and the Court did not need to deny Robert's own request for a continuance to protect this right. Furthermore, the Court should have granted Robert's motion

because his counsel was only appointed to represent him 40 days before trial and had limitations on speaking to Robert and reviewing discovery right up to the day of the trial. (See Appellant's Br. at 21-33.)

CONCLUSION

Robert respectfully requests the Court reverse and remand for a new trial.

Respectfully submitted this 23rd day of August, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbox text typeface of 14 points; is double-spaced expect for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 3,946, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

APPENDIX

CERTIFICATE OF SERVICE

I, Karl Pitcher, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 08-23-2022:

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