Supreme Court Copy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	Supreme Court No. S180567
v.	)	Court of Appeal No. G040808
DANNY LEE SKILES, Defendant and Appellant.	)	Superior Court Case No. 08HF0799

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
Honorable Dan McNerney, Judge

AFTER THE PARTIALLY PUBLISHED OPINION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, AFFIRMING THE JUDGMENT AS MODIFIED

APPELLANT'S OPENING BRIEF ON THE MERITS

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By appointment of the Supreme Court

August 2010

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QUESTION PRESENTED

Are faxed copies of certified court records admissible to establish that a prior conviction qualifies as a serious or violent felony for purposes of the three strikes law?

STATEMENT OF APPEALABILITY

This appeal is from a final judgment following a trial and is authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF THE CASE

On May 19, 2008, appellant Danny Lee Skiles ("Mr. Skiles") was charged by information filed in Orange County Superior Court with the following: count 1, first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a)); and count 2, receiving stolen property (Pen. Code, § 496, subd. (a)). (C.T. pp. 105-108.) The information further alleged that Mr. Skiles had suffered a serious felony conviction and strike prior within the meaning of the three strikes law, Penal Code sections 667, subdivisions (d) and (e)(1) and 1170.12, subdivisions (b) and (c)(1). (C.T. pp. 106-107.)[1]

On July 17, 2008, a jury found Mr. Skiles guilty of both counts. (C.T. pp. 167-168; 3 R.T. pp. 267-269.) In a bifurcated proceeding, the

[1] The information also alleged that Mr. Skiles committed the felony offenses while he was released from custody on bail pending final judgment on an earlier felony offense, within the meaning of Penal Code section 12022.1, subdivision (b). (C.T. p. 106.) The trial court dismissed that enhancement allegation at the prosecution's request. (3 R.T. p. 272.)

trial court held a two-day bench trial, on July 17, 2008, and August 1, 2008, and found true the prior conviction allegation. (3 R.T. pp. 272-297.)

On August 1, 2008, the trial court sentenced Mr. Skiles to the low term of two years for the burglary conviction (count 1), doubled as a result of the strike prior, and five years added as a result of the prior serious felony, for a total term of nine years in state prison. (3 R.T. pp. 300-302.) The sentence for receiving stolen property (count 2) was stayed.[2]

On August 12, 2008, Mr. Skiles filed a notice of appeal. (C.T. pp. 186-187.)

The Court of Appeal affirmed the judgment as modified in a partially published opinion dated January 11, 2010. The Court of Appeal modified its opinion, with no change in the judgment, with an order dated January 21, 2010. On February 26, 2010, Mr. Skiles filed a petition for review. On April 28, 2010, this Court granted the petition.

STATEMENT OF THE FACTS[3]

Mr. Skiles was convicted of residential burglary and receiving stolen property in connection with the theft of jewelry and other items from a room at the Motor Inn in Costa Mesa, California. (1 R.T. pp. 26-29, 32-37, 53-61, 68-70, 76-77, 105, 111-144, 152.)

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[2] The trial court sentenced Mr. Skiles to two years on count 2, to run concurrent with count 1. (3 R.T. p. 300.) The Court of Appeal, recognizing that the sentence on count 2 should have been stayed, modified the judgment to correct the trial court's error. (C.O.A. Opinion pp. 3, 8.)

[3] Stated herein are only those facts relevant to the issue on review.

The evidence for the prior conviction allegation under the three strikes law consisted of documents which were purported to be certified copies of court records from the Circuit Court of Lauderdale County, Alabama, relating to State v. Danny Lee Skiles, Case No. CC-95-133 (Exhibit Nos. 16-18), as well as a LexisNexis printout of the Code of Alabama, § 13A-6-3, Manslaughter (Exhibit No. 19). (C.T. pp. 191-209.) A records custodian did not testify. (3 R.T. pp. 272-297.)

Exhibit 18 did not bear an original certification. Rather, Exhibit 18 was a facsimile or photographic copy of what purported to be a certified copy of one page of the above-referenced Alabama indictment. (C.T. pp. 206-207; 3 R.T. pp. 278, 287, 289.)

ARGUMENT

THE TRIAL COURT PREJUDICIALLY ERRED IN FINDING THE SENTENCING ENHANCEMENT ALLEGATION TRUE BECAUSE, WHEN PURPORTED COPIES OF OFFICIAL RECORDS ARE ADMITTED AT A CRIMINAL TRIAL WITHOUT THE TESTIMONY OF A RECORDS CUSTODIAN, EVIDENCE CODE SECTION 1530 AND THE CONFRONTATION CLAUSE REQUIRE THAT AN ORIGINAL CERTIFICATION BE AFFIXED TO THE PRECISE COPIES THAT THE CUSTODIAN IS CERTIFYING AS GENUINE, ACCURATE, AND COMPLETE.

A. Introduction

Evidence Code section 1530 provides that a purported copy of an official record is prima facie evidence of the existence and content of the record provided that the copy is certified as a correct copy. Official records admitted under Section 1530 can significantly affect trial results. Here, the

trial court found true a prior conviction allegation under the three strikes law on the basis of a faxed or photographic copy of what purported to be a certified court record. Based on that finding, a low-term sentence of two years became a nine-year deprivation of liberty. (See Argument, *post*, section B.)

Appellate review in this case is de novo because the issue presented is one of statutory and constitutional construction. (See Argument, *post*, section C.)

The certification requirement of Section 1530 is not a minor technicality. Certification resolves important evidentiary and constitutional problems, including those of secondary evidence, authentication, hearsay, and the right to confrontation. (See Argument, *post*, section D.)

The plain language of Evidence Code section 1530 requires an original certification. To "certify" means to compare the copy with the original and to attest that the copy is genuine, accurate, and complete. By definition, a records custodian cannot certify a copy the custodian did not produce and has never seen. Thus, a facsimile or photographic copy of a certified copy is not admissible under Section 1530. (See Argument, *post*, section E.)

Furthermore, a non-original certification cannot be admitted as secondary evidence under the Secondary Evidence Rule (Evidence Code section 1521), for a number of reasons. Evidence Code section 1530, as a

specific provision relating to the admission of public records, prevails over the more general Secondary Evidence Rule. Accordingly, the Secondary Evidence Rule cannot be used to circumvent Section 1530's requirement of an original certification. In addition, a certification is not a "writing" for purposes of the Secondary Evidence Rule; and a copied certification does not provide the authentication required under Evidence Code sections 1400 and 1401. (See Argument, *post*, section F.)

A copied certification is inadmissible even if the defendant can raise no apparent issues of authenticity or accuracy. To shift the burden of proof from the proponent to the opponent of the evidence is unfair because modern technology makes it difficult to uncover potential errors in copies. A per se rule requiring an original certification would not be unduly burdensome. In view of the important interests at stake and the possibility for error, the supreme courts of at least four other states have established such a rule. (See Argument, *post*, section G.)

A records custodian's certification is testimonial hearsay subject to Confrontation Clause scrutiny. While the United States Supreme Court has suggested (though not decided) that a records custodian need not appear to testify in most cases, the constitutional status of the certification suggests that, at the very least, the certification should be original. (See Argument, *post*, section H.)

Mr. Skiles suffered prejudice from the trial court's error because if the record in question had been excluded, the prior conviction allegation would not have been proven. The decision of the Court of Appeal affirming the judgment of the Superior Court must be reversed. (See Argument, *post*, section I.)

B. Background Information

The disputed piece of evidence in this appeal is Exhibit 18. The exhibit consists of a facsimile or photographic copy of what purports to be a certified copy of one page of the indictment in State of Alabama v. Danny Lee Skiles, Circuit Court of Lauderdale County, Case No. CC-95-133. (C.T. pp. 206-207.)

Immediately following the jury's verdict on July 17, 2008, the trial court held a bench trial on the prior conviction allegation. (3 R.T. p. 272.) The prosecutor introduced, without objection, Exhibits 16 and 17. (3 R.T. pp. 272-273.) These were certified copies of court records from Alabama. (C.T. pp. 191-205.) According to the records, in 1995, at the age of 18, Mr. Skiles pled guilty to manslaughter, count 1 of an indictment. (C.T. pp. 193-195.)

The list of felonies that qualify as "serious" for purposes of the three strikes law is set forth in Penal Code section 1192.7, subdivision (c). (See Pen. Code, § 667, subd. (d)(2).) In the current case, the trial court ruled that there was only one viable way to show that Mr. Skiles's Alabama

manslaughter conviction was "serious": the prosecution had to prove that Mr. Skiles had personally inflicted great bodily injury on a person other than an accomplice within the meaning of Penal Code section 1192.7, subdivision (c)(8).[4] (3 R.T. pp. 275-277, 288.) The records in Exhibit 16 and 17, however, contained no factual basis for the plea, and also omitted the page of the indictment relating to count 1. (C.T. pp. 191-205; 3 R.T. pp. 274-277.) The trial court gave the prosecutor time to obtain additional evidence. (3 R.T. p. 277.)

That same day, after the lunch break, the prosecutor introduced Exhibit 18. (3 R.T. pp. 278-279.) This was a copy of what purported to be a certified copy of the page of the indictment relating to counts 1 and 2. (C.T. pp. 206-207.) Count 1 alleged that Mr. Skiles had recklessly caused the death of another by running a red light, thereby causing his motor vehicle to strike another motor vehicle. (C.T. p. 207.)

The trial court, the prosecutor, and defense counsel all agreed that Exhibit 18 did not bear an original certification. The prosecutor referred to Exhibit 18 as "a copy of a certified copy." (3 R.T. p. 278.) Defense counsel objected to Exhibit 18 on "foundational" grounds "since it is a

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[4] This was so because the list of "serious" felonies includes voluntary manslaughter, but not involuntary manslaughter, and Mr. Skiles's Alabama manslaughter conviction was more akin to the involuntary form of that offense. (See Pen. Code, § 1192.7, subd. (c)(1); 3 R.T. pp. 277, 283-285.)

photocopy." (3 R.T. pp. 287, 289.) The trial court said, "I agree it is a photocopy," but overruled the objection. (3 R.T. pp. 287, 289.)

The record implies that the Exhibit 18 "photocopy" resulted from an electronic transmittal from Alabama to the Orange County prosecutor, by facsimile or perhaps via the emailing of a scanned document. (See 3 R.T. p. 278.) After the prosecutor failed to prove the prior conviction allegation using Exhibits 16 and 17, the court took a recess and then reconvened later that same day. (3 R.T. pp. 276-277.) The prosecutor introduced Exhibit 18 by stating: "Over the break, I contacted the state of Alabama and the clerk's office. I obtained a certified – I have a copy of a certified copy which includes count 1 and count 2 of the indictment in – which we have only count 2 of in People's Exhibit 16." (3 R.T. p. 278.)

The certification stamp on Exhibits 16, 17, and 18 reads as follows:

CERTIFIED TRUE COPY
STATE OF ALABAMA
LAUDERDALE COUNTY
I certify that the above is a true and correct
copy of the original on file in this office.
SEAL
__[/s/]_____
MISSY HOMAN HIBBETT, CLERK

(C.T. pp. 194, 196, 197, 199, 207.) On the signature line is what appears to be a stamped signature of "Missy Homan Hibbett," though it is unclear if the signature is part of the overall certification stamp, or if the signature is on a separate stamp. (See C.T. pp. 194, 196, 197, 199, 207.) On Exhibit

18, but not on the other exhibits, appear the initials "DM" under the stamped signature. (C.T. p. 207.) The "DM" appears to have been added by hand. (See C.T. p. 207.)

On August 1, 2008, the trial court ruled that the facts alleged in count 1 of the indictment (Exhibit 18), together with other court records showing that Mr. Skiles pled guilty to count 1 (Exhibits 16 and 17), were sufficient to prove beyond a reasonable doubt that Mr. Skiles had suffered a serious felony for purposes of the three strikes law, pursuant to Penal Code section 1192.7, subdivision (c)(8). (3 R.T. pp. 295-297.) As a result, Mr. Skiles's low term sentence of two years for burglary was doubled, and five years were also added, for a total term of nine years in state prison. (3 R.T. pp. 300-302.)

C. Standard of Review

The issue presented is a question of statutory and constitutional construction: whether a copy of a public record is properly certified within the meaning of the California Evidence Code if the certification is itself a copy, and whether the constitutional right to confrontation is violated when a non-original certification is admitted against a criminal defendant. Appellate review of a pure question of law is de novo. (*People ex rel. Locyker v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

D. Certification Under Evidence Code Section 1530 Addresses Multiple Evidentiary and Constitutional Issues, Including Secondary Evidence, Authentication, Hearsay, And the Right to Confrontation.

1. A Prior Conviction May Be Proven With Certified Court Records Under Evidence Code Sections 1530 and 1531.

Evidence Code section 1530 provides that "[a] purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry" provided that two safeguards are met. (Evid. Code, § 1530, subd. (a).)[5] To ensure the trustworthiness of the "purported copy," the rule insists that "[t]he copy purports to be published by the authority of" the public entity, and that "the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing." (*Ibid.*)

Evidence Code section 1531 further requires that "[f]or the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be."

As was the case here, certified copies of official records are commonly the sole evidence presented to prove a prior conviction

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[5] While the trial court did not mention Evidence Code section 1530, the Court of Appeal assumed that Exhibit 18 was admitted under that section. (C.O.A. Order Modifying Opinion p. 1; 3 R.T. pp. 287, 289.)

allegation under the three strikes law. (See, e.g., *People v. Delgado* (2008) 43 Cal.4th 1059, 1065-1066.) The truth of the enhancement allegation must be proven beyond a reasonable doubt. (*Ibid.*) Thus, certification plays an important role in ensuring that a defendant who faces a sentencing enhancement receives a fair trial.

2. Certification Is a Vital Evidentiary Device That Resolves Problems of Secondary Evidence, Authentication, and Hearsay.

Section 1530 resolves three evidentiary problems. (See Cal. L. Revision Comm'n com. to Evid. Code, § 1530, 1965 amend.) These are: (1) the admissibility of duplicates under the Best Evidence Rule; (2) the need for authentication of both the original document and the copy under Evidence Code section 1400 et seq.; and (3) the hearsay rule, Evidence Code section 1200, in that a records custodian's signed certification is an out-of-court statement offered to prove the truth of the matter, namely that the copies are true and complete copies of original documents. (See *ibid.*; see also *In re Shannon C.* (1986) 179 Cal.App.3d 334, 341-342 [describing Section 1530 as the codification of "an exception" (for public records) to the Best Evidence Rule].)[6]

[6] The Best Evidence Rule (the former Evidence Code section 1500) has been replaced with the Secondary Evidence Rule (Evidence Code section 1521). (See Stats 1998, ch. 100, § 2 (SB 177) [repealing Evidence Code, §§ 1500-1511 and adding §§ 1520-1523].) Evidence Code section 1530, which predates the Secondary Evidence Rule, remained unchanged. (*Ibid.*; see Argument, *post*, section F.1.)

Certification is the traditional hallmark of authenticity for copies of public records. (See *In re Kirk* (1999) 74 Cal.App.4th 1066, 1073-1076; *In re Shannon C.*, *supra*, 179 Cal.App.3d at pp. 341-343.) If the copies are not properly certified, they will not be admitted, absent testimony of a qualified records custodian. (See *People v. Martinez* (2000) 22 Cal.4th 106, 112, 120-121; *People v. Matthews* (1991) 229 Cal.App.3d 930, 936-941.)

3. Certification Also Helps Assure the Reliability of the Hearsay Statements Contained in the Underlying Public Records.

A separate issue not directly addressed by Evidence Code section 1530 is the hearsay problem of using court records to prove the truth of the matter stated therein, in this case, that the defendant has been convicted of a "serious" felony under the three strikes law. (See *In re Shannon C.*, *supra*, 179 Cal.App.3d at p. 342.) Evidence Code section 1280, in combination with the device of judicial notice, will generally resolve this hearsay issue. (See *id.* at pp. 341-343; *People v. Abelson* (1980) 104 Cal.App.3d Supp. 16, 19-20.)

However, the certification requirement of Evidence Code section 1530 is also implicated, because the safeguard of certification helps to ensure the trustworthiness of the matters asserted in the content of the court records. (See *In re Kirk*, *supra*, 74 Cal.App.4th at p. 1075.) Indeed, if an "official record of conviction" is used to prove a prior conviction,

certification under Evidence Code section 1530, subdivision (a), may in itself satisfy the requirements of Evidence Code section 1280. (See Evid. Code, § 452.5, subd. (b).)

4. Certification Is Testimonial Hearsay Subject to Confrontation Clause Scrutiny.

Finally, "certification operates to protect the rights to confrontation and cross-examination possessed by individuals facing a deprivation of liberty . . . ." (*In re Kirk*, *supra*, 74 Cal.App.4th at pp. 1075-1076; see also *Matthews*, *supra*, 229 Cal.App.3d at pp. 936-941.) The United States Supreme Court has recently suggested that a records custodian's certification – as a solemn out-of-court declaration – is testimonial hearsay protected by the Sixth Amendment. (See *Melendez-Diaz v. Mass.* (June 25, 2009) 129 S. Ct. 2527, 2538-2539, 2552-2553 [-- U.S. --; 174 L. Ed. 2d 314]; Argument, *post*, section H.)

In sum, certification is not a minor technicality. Without proper certification, copies of public records lack adequate authentication, violate the Secondary Evidence Rule and the hearsay rule, and impermissibly impinge the constitutional right to confrontation. (See Evid. Code, § 1530; *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2538-2539, 2552-2553; *In re Kirk*, *supra*, 74 Cal.App.4th at pp. 1075-1076.)

E. The Plain Language of Evidence Code Section 1530 Requires an Original Certification.

The Evidence Code clearly allows copies of public records to be admitted without the testimony of a records custodian provided that the copies are certified or attested as correct copies. (See Evid. Code, § 1530.) The Evidence Code, however, explains the certification process only indirectly, by mandating that "the attestation or certificate must state in substance that the copy is a correct copy of the original." (See Evid. Code, § 1531.) The Evidence Code does not define "certified" or "certification." (See Evid. Code, §§ 1530, 1531; see also Evid. Code, Div. 2 ["Words and Phrases Defined"].) Where a statute does not specifically define a term, the common meaning applies. (*William Lyon Co. v. Franchise Tax Bd.* (1992) 4 Cal.App.4th 267, 276.) A dictionary may provide the appropriate common meaning. (*Ibid.*; see *Melendez-Diaz*, *supra*, 129 S. Ct. at p. 2532 [using Black's Law Dictionary to define the term "affidavit"].)

Black's Law Dictionary, like Evidence Code section 1530, uses "certified copy" and "attested copy" interchangeably. (See Cal. L. Revision Comm'n com. to Evid. Code, § 1530, 1965 amend.; Black's Law Dictionary 127-128, 228 (6th ed. 1990).[7] Black's Law Dictionary provides

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[7] "Certify" means "to authenticate or vouch for a thing in writing; to attest as being true or as represented." (Black's Law Dictionary, *supra*, at p. 228). "Certified copy" means "a copy of a document or record, signed and certified as a true copy by the officer to whose custody the original is entrusted." (*Id.* at p. 228.) "Attest" in its technical sense means "a

the most complete definition in its entry for "attest," stating that "[a]n 'attested' copy of a document is one which has been examined and compared with the original, with a certificate or memorandum of its correctness, signed by the persons who have examined it." (Black's Law Dictionary, *supra*, at pp. 127-128.)

Thus, "[b]y definition, an official cannot 'attest' to the accuracy or completeness of a copy that the official has never seen and that the official's agency did not produce. . . . Merely making a copy of the original attestation along with a copy of the underlying record does not serve the purpose of the attestation requirement, as the copied attestation no longer signifies that the official in question is vouching for the authenticity of the copy that has just been made." (See *Comm. v. Deramo* (2002) 436 Mass. 40, 48 [762 N.E.2d 815, 821], internal quotation marks omitted.)

In Mr. Skiles's case, the clerk or clerk's deputy who applied the certification stamp to Exhibit 18 was presumably the same clerk who made the copy, either by printing out the document from a computer or by photocopying a piece of paper from the case file. (See C.T. p. 207; 3 R.T. pp. 278-279, 287, 289.) By affixing the certification stamp, the clerk was attesting that the copy that came off the computer printer or out of the photocopy machine was "a true and correct copy of the original on file in

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certifying officer gives assurance of the genuineness and correctness of a copy." (*Id.* at p. 127.)

this office." (See C.T. p. 207; Evid. Code, § 1531.) The clerk in Alabama, however, never saw the copy that came off the facsimile machine in the Orange County district attorney's office and therefore could not have attested to its accuracy. (See C.T. p. 207; 3 R.T. pp. 278-279, 287, 289.)

In sum, the only "copy" authorized by Evidence Code section 1530 is the copy of the actual public record. Nothing in the rule allows the certification to be a copy. Indeed, the common meaning of "certified copy" or "attested copy" forecloses the use of a copied certification or attestation. Evidence Code section 1530 requires that an original certification be affixed to the precise copy that the custodian is certifying as genuine, accurate, and complete.

F. A Copy of a Certified Copy of an Official Record Is Not Admissible Under the Secondary Evidence Rule.

In this case, the Court of Appeal held that "a *copy* of a certified copy of an official record is admissible [to prove the contents of the record], unless there is a genuine dispute concerning its terms and justice requires exclusion of the copy, or admission of the copy would be unfair." (C.O.A. Order Modifying Opinion p. 1, italics original, citing Evid. Code, § 1521, subd. (a), and *People v. Atkins* (1989) 210 Cal.App.3d 47, 53-55 [upholding the admission of prison records which were accompanied by a copy of a certification from the custodian of the records].) The Court of Appeal relied on the Secondary Evidence Rule (Evidence Code section 1521) to

hold that the certification required by Evidence Code section 1530 was a "writing" whose content could be proved in this case – as in most cases – by secondary evidence. That type of bootstrapping is inconsistent with the language and purpose of both the Secondary Evidence Rule and Evidence Code section 1530. (See Evid. Code, §§ 1520-1522, 1530; Matthew Bender & Co., Cal. Evidentiary Foundations (2007), Chapter 7 Secondary Evidence Rule, § N[1] [questioning validity of the *Atkins* holding].)

1. Background Information:
The Secondary Evidence Rule
And the Best Evidence Rule.[8]

The Secondary Evidence Rule provides that "[t]he content of a writing may be proved by otherwise admissible secondary evidence," including by duplicates. (Evid. Code, § 1521, subd. (a); *Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118, 1123.)[9] The court, however,

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[8] Mr. Skiles, in a separate motion, has asked this Court to take judicial notice under Evidence Code section 459 of certain legislative history documents. While these documents provide useful background information, as well as support for some of Mr. Skiles's arguments, the documents are not required for discerning the legislative intent behind Evidence Code sections 1530 and 1521. As Mr. Skiles argues, the unambiguous language of Evidence Code section 1530 requires an original certification attached to the precise copy that the custodian is certifying as genuine, accurate, and complete. (See Argument, *ante*, section E.) Moreover, that requirement of an original certification cannot be circumvented by use of the Secondary Evidence Rule. (See Argument, section F.)

[9] A "duplicate" is "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or

"shall exclude secondary evidence of the content of a writing if the court determines either of the following: "(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion. (2) Admission of the secondary evidence would be unfair." (Evid. Code, § 1521, subd. (a)(1), (a)(2).) Moreover, "nothing in this section excuses compliance with Section 1401 (authentication)." (Evid. Code, § 1521, subd. (c).)

The Secondary Evidence Rule, enacted in 1998, replaced the Best Evidence Rule, which was enacted in 1965, when the California rules of evidence were codified. (Stats 1998, ch. 100, § 2 (SB 177); see generally *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369 (1996) [Exh. E-1 to Appellant's Motion for Judicial Notice].) The Best Evidence Rule provided that "[e]xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." (Evid. Code, § 1500 [repealed].)

The old Best Evidence Rule had many statutory exceptions. (See *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at pp. 374-376 [Exh. E-1 to Appellant's Motion for Judicial Notice].) In particular, a "duplicate," as defined in Section 260, was admissible "to the same extent as an original unless (a) a genuine question is raised as to the

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by chemical reproduction, or by other equivalent technique which accurately reproduces the original." (Evid. Code, § 260.)

authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original." (Evid. Code, § 1511 [repealed].) In addition, there were at least 14 other exceptions, including one for certified copies of writings in official custody, as provided for in Evidence Code sections 1530 and 1531. (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at pp. 374-376 [Exh. E-1 to Appellant's Motion for Judicial Notice]; *In re Shannon C.*, *supra*, 179 Cal.App.3d at pp. 341-342.) "Because of the breadth of the exceptions to the Best Evidence Rule, [the Secondary Evidence Rule] [wa]s not a major departure from former law, but primarily a matter of clarification and simplification." (Cal. L. Revision Comm'n com. to Evid. Code, § 1521, 1998 amend.)

The Best Evidence Rule and the Secondary Evidence Rule aim to protect against fraud and misinterpretation of writings. (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at pp. 371, 378-385, 389 [Exh. E-1 to Appellant's Motion for Judicial Notice].) Under the old Best Evidence Rule, secondary evidence was presumptively inadmissible. (Evid. Code, § 1500 [repealed].) Under the Secondary Evidence Rule, such evidence is generally admissible. (Evid. Code, § 1521.) The shift in presumption was appropriate, the Law Revision Commission believed, because the Best Evidence Rule was based on "yesterday's world of manual copying and limited pretrial discovery." (*Best Evidence Rule*, 26

Cal. L. Revision Comm'n Reports, *supra*, at p. 389 [Exh. E-1 to Appellant's Motion for Judicial Notice].)

In particular, the Commission believed that the Best Evidence Rule was "unnecessary in a system with broad pretrial discovery." (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at p. 371; see also pp. 373, 380, 381, 389 [Exh. E-1 to Appellant's Motion for Judicial Notice].) In civil actions, the functions of the Best Evidence Rule "are satisfactorily served by existing pretrial opportunities to inspect original documents, coupled with the proposed Secondary Evidence Rule and the normal motivation of the parties to present convincing evidence," the Commission stated. (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at p. 371 [Exh. E-1 to Appellant's Motion for Judicial Notice].) "Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of trial." (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at p. 381 [Exh. E-1 to Appellant's Motion for Judicial Notice].)[10]

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[10] Echoing the significance of pretrial discovery was the California Department of Justice, which *opposed* the Secondary Evidence Rule. The DOJ cited as its "fundamental" concern with the new rule the fact that, in the DOJ's view, reciprocal discovery was not working effectively in either civil or criminal forums. (See March 6, 1997, letter from California Department of Justice to Senator Quentin L. Kopp opposing Senate Bill

Recognizing that discovery in criminal trials is narrower, the new Secondary Evidence Rule provides a special rule of exclusion for criminal actions. (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at pp. 371, 383-384, 390 [Exh. E-1 to Appellant's Motion for Judicial Notice].) Specifically, "the court shall exclude secondary evidence of the content of a writing if the court determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial." (Evid. Code, § 1522, subd. (a).) That rule, however, does not apply to several categories of writing, including duplicates as defined by Section 260 and copies of writings in the custody of a public entity. (Evid. Code, § 1522, subd. (a)(1)-(4).)

2. Evidence Code Section 1530, as a Specific Provision Relating to the Admission of Public Records, Prevails Over the More General Secondary Evidence Rule.

With the enactment of the Secondary Evidence Rule, the Best Evidence Rule was repealed, along with many of its exceptions. (See Stats 1998, ch. 100, § 2 (SB 177) [repealing Evidence Code, §§ 1500-1511 and adding §§ 1520-1523].) Significantly, the Secondary Evidence Rule did

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177 [Exh. E-9 to Appellant's Motion for Judicial Notice]; see also Office of Criminal Justice Planning, Enrolled Bill Report, OCJP 855 (12/96) regarding Senate Bill 177 [Exh. B-4 to Appellant's Motion for Judicial Notice].)

not repeal or modify Section 1530, which indicates that the Legislature did not intend to alter the existing procedures under Section 1530. (See *ibid.*)

Since its enactment in 1965, Section 1530 has stood apart as a distinct rule that specifically addresses how copies of official records may be admitted into evidence without the testimony of a records custodian. Section 1530 was placed in the division relating to secondary evidence because it was "principally" concerned with using a copy of a writing to prove the content of the original. (Cal. L. Revision Comm'n com. to Evid. Code, § 1530, 1965 amend.) Section 1530, however, also resolves problems of authentication, hearsay, and the Sixth Amendment right to confrontation. (See Cal. L. Revision Comm'n com. to Evid. Code, § 1530, 1965 amendment; Argument, *ante*, section D.)

As a rule of statutory construction, a specific provision prevails over a general provision relating to the same subject. (See *Action Apartment Assoc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1246.) Accordingly, the more general Secondary Evidence Rule cannot be used to circumvent the requirements of Section 1530. (See *ibid.*) One of these requirements is an original certification attached to the precise copy that the custodian is certifying as genuine, accurate, and complete. (See Argument, *ante*, section E.)

3. The Clerk's Certification Is Not a 'Writing' For Purposes of the Secondary Evidence Rule.

Under the Court of Appeal's analysis, the certification required by Evidence Code section 1530 is a "writing" whose content may be proved by secondary evidence under the Secondary Evidence Rule. (See C.O.A. Decision p. 7; C.O.A. Order Modifying Opinion pp. 1-2.) That is incorrect.

Under Evidence Code section 250, a "'writing' is defined very broadly to include all forms of tangible expression." (Cal. L. Revision Comm'n com. to Evid. Code, § 250, 1965 amend.)[11] However, the fact that a clerk's certification falls within Section 250's definition of "writing" does not mean that certification is a "writing" for purposes of the Secondary Evidence Rule. (Cf. *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 976 [the broad definition of "writing" under the Evidence Code does not apply to deposition testimony, which was governed instead by the rules of civil procedure].)

The Secondary Evidence Rule addresses the admissibility of a "writing" that has some substantive relevance to issues in the particular case. (See Evid. Code, § 1521, subd. (a); *Kahn*, *supra*, 109 Cal.App.4th at

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[11] "'Writing' means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." (Evid. Code, § 250.)

p. 1123.) A certification of authenticity, while vital, is not evidence in that sense. Rather, that type of certification is a procedural device that renders the underlying substantive evidence admissible by resolving issues of secondary evidence, authentication, hearsay, and the constitutional right to confrontation. (See Evid. Code, § 1530; cf. *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2538-2539 [contrasting the "narrowly circumscribed" authority of the clerk to certify the authenticity of copies of official records with the "substantive evidence against the defendant" created when a clerk's certificate attested to the fact that the clerk had searched for a particular record and failed to find it].)

In *Kelly v. State*, the Supreme Court of Indiana established a bright-line rule requiring that an original certification be affixed to copies of public records admitted without the testimony of a records custodian. (*Kelly v. State* (Ind. 1990) 561 N.E.2d 771, 772-775.) In so holding, the Indiana high court rejected the state's argument that a non-original certification was admissible so long as the defendant raised no issue as to the authenticity of the originals. (*Id.* at pp. 773-774.) The court acknowledged that Indiana's best evidence rule allowed the admission of duplicates of documents to the same extent as an original, absent any unfairness or questions of authenticity. (*Id.* at p. 774.) The court reasoned, however, that "while copies of public records can themselves be admissible if their authenticity is properly certified, the certifications themselves do

not constitute public records and photocopies are not acceptable." (*Id.* at p. 773.) In sum, a court clerk's certification under Evidence Code section 1530 is not a "writing" that can be proved with secondary evidence under Evidence Code section 1521.

4. The Rationale of the Secondary Evidence Rule Does Not Support Admitting a Copied Certification as Secondary Evidence.

The intended functions of the Secondary Evidence Rule and the Best Evidence Rule are to guard against fraud and to prevent misinterpretation of writings. (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at pp. 371, 378-385, 389 [Exh. E-1 to Appellant's Motion for Judicial Notice].) The major rationale for the shift in presumption under the Secondary Evidence Rule was modern discovery practice in civil actions, under which litigants can inspect original documents before trial. (See *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at pp. 371, 373, 380, 381, 389 [Exh. E-1 to Appellant's Motion for Judicial Notice].) That rationale has much less force in criminal actions, where discovery is narrower. (See *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at pp. 371, 383-384, 390 [Exh. E-1 to Appellant's Motion for Judicial Notice]; see also Evid. Code, § 1522.)

Under either the Best Evidence Rule or the Secondary Evidence Rule, certified copies of official records can routinely be admitted at criminal trials without the defendant necessarily having an advance

opportunity to scrutinize the records. (See Evid. Code, § 1530.) That procedure will generally be sufficient to prevent fraud and misinterpretation of writings when the certification is an original certification attached to the precise copies that the custodian is certifying as genuine, accurate, and complete. (See *ibid.*) When the certification is a copy, however, the possibilities for error mount, because "[t]he cover page of a stack of copied records may bear an original attestation, but that original attestation, once having been copied, can be attached to anything." (*Deramo*, *supra*, 762 N.E.2d at p. 821.) This potential unreliability will not, in a criminal action, be cured by broad pretrial discovery. (See Evid. Code, §§ 1521, 1522, 1530.) In this case, for example, the crucial piece of evidence was hastily obtained over the lunch break in the middle of the trial on the sentencing enhancement. (See 3 R.T. pp. 278-279.) In view of the realities of criminal practice, the rationale of the Secondary Evidence Rule does not support allowing a copied certification under Evidence Code section 1530.

5. A Copied Certification Does Not Provide the Necessary Authentication.

"Nothing in [the Secondary Evidence Rule] excuses compliance with Section 1401 (authentication)." (Evid. Code, § 1521, subd. (c).) In the decision below, the Court of Appeal sought to resolve the authentication issue of Exhibit 18 by pointing to "circumstantial evidence" such as the document's consistency with other, properly certified documents relating to

the same indictment. (See C.O.A. Decision p. 7; C.O.A. Order Modifying Decision pp. 1-2.) The Court of Appeal's analysis is faulty.

"Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) When a copy of an original is proffered, both the original and the copy must be authenticated. (See Cal. L. Revision Comm'n com. to Evid. Code, § 1401, 1965 amend.) Under Section 1530, an original certification may authenticate both the copy to which it is attached and the underlying original. (See *ibid.*)

A copied certification attached to a copy that the clerk did not produce and never saw cannot possibly authenticate the copy as being a "true and correct copy of the original on file in this office." (See C.T. pp. 206-207; 3 R.T. pp. 278-279, 287, 289.) Moreover, when the clerk's certification is itself a duplicate, there is nothing to authenticate the copy of the certification. Circumstantial evidence of authenticity, therefore, cannot replace the requirement of an original certification.

In conclusion, for all the reasons stated here, a copied certification is not admissible as secondary evidence under the Secondary Evidence Rule. Evidence Code section 1530 requires that an original certification be affixed to the precise copy that the custodian is certifying as genuine, accurate, and complete.

G. Copies of Certified Copies Are Inadmissible Even If There Are No Apparent Issues of Authenticity or Accuracy.

The Court of Appeal suggests a fact-specific approach in which copies of certified copies are admissible so long as the opponent of the proffered evidence does not raise some issue of the authenticity, accuracy, or completeness of the copies. (C.O.A. Opinion pp. 6-7; C.O.A. Order Modifying Opinion pp. 1-2.) That does not provide enough protection, particularly for criminal defendants who possess a constitutional right to confrontation. (U.S. Const., 6th Amend; Cal. Const., art. I, § 15.) Mr. Skiles's position is that Exhibit 18, as a copy of what purported to be a certified copy, was inadmissible, even assuming *arguendo* that the record in this case reveals no issues of authenticity or accuracy.

1. The Burden of Proof Should Not Be Shifted From the Proponent to the Opponent the Evidence, Particularly Because Modern Technology Makes It Difficult to Uncover Potential Errors in Copies.

The Court of Appeal's approach shifts the burden of proof from the proponent to the opponent of the evidence. The criminal defendant is left to uncover potential problems with the proffered copies. In many cases that will be prove to be an impossible task, given "the ease with which documents may be made to appear genuine by the use of modern technology." (*Deramo*, *supra*, 762 N.Ed.2d at p. 821, quoting *Mimick v.*

United States (8th Cir. 1991) 952 F.2d 230, 231, internal quotation marks omitted.)

Copies of public records bearing an *original* certification can be scrutinized for potential post-certification irregularities, such as erasures and additions. Multiple staple marks might indicate that pages were removed or added after the custodian certified the records. Such scrutiny cannot occur when the proffered documents are mechanically produced copies of the certified copies. "The cover page of a stack of copied records may bear an original attestation, but that original attestation, once having been copied, can be attached to anything." (*Deramo*, *supra*, 762 N.E.2d at p. 821.) "Whether through inadvertence, mechanical error, or deliberate tampering, another copy of the official record may no longer be identical to the copy that the officer authenticated, and a mere reproduction of the attestation does nothing to confirm the authenticity, accuracy, or completeness of the copy to which it is then attached." (*Ibid.*) In this case, for example, the certification on Exhibit 18 has the initials "DM," while the certifications on Exhibits 16 and 17 do not. (C.T. pp. 194, 196, 197, 199, 207.) It is unclear who added the initials, why the initials were added, and whether the initials were part of the original certified copy or were added to a later copy of the certified copy. (See C.T. p. 207.)

Even where the copies are faxed copies, reliability cannot be assumed. Many if not most fax machines in use today use the same 8 ½- by

11-inch paper used by photocopying machines. Pages taken directly off a fax machine, and photocopies of those faxed pages made by a third party, will generally be indistinguishable. "Even in this day when modern copying equipment can produce copies so speedily, the requirement of attestation still serves a useful purpose in assuring that the copy which comes out of the machine so quickly is complete, legible and unaltered." (*Deramo*, *supra*, 762 N.E.2d at p. 821, citation and internal quotation marks omitted.)

When the California Law Revision Commission proposed replacing the Best Evidence Rule with the Secondary Evidence Rule, both the California Department of Justice and California Attorneys for Criminal Justice opposed the change. (See generally Office of Criminal Justice Planning, Enrolled Bill Report, OCJP 855 (12/96) [supporting the bill and summarizing the principal arguments for and against it] [Exh. B-4 to Appellant's Motion for Judicial Notice].) While the Secondary Evidence Rule did not alter the procedures under Section 1530 for the admission of copies of public records, the DOJ's and CACJ's criticisms of the Secondary Evidence Rule provide some insight into why allowing copied certifications would go too far in the direction of "convenience" at the expense of reliability of evidence.

The DOJ argued that allowing secondary evidence as a primary means of proof, and shifting the burden from the proponent to the opponent

of the evidence, would mean that "the secondary evidence admitted to prove the content of a writing will not be subject to the same scrutiny as it is today." (March 6, 1997, letter from California Department of Justice to Senator Quentin L. Kopp opposing Senate Bill 177 [Exh. E-9 to Appellant's Motion for Judicial Notice].) The DOJ pointed out that the State Bar Committee on Rules and Procedure had commented that the Best Evidence Rule "may be more necessary than ever, since advances in technology have made it easier to forge documents." (March 23, 1997, letter from California Department of Justice to California Law Revision Commission opposing Senate Bill 177 [Exh. E-18 to Appellant's Motion for Judicial Notice].)

The CACJ echoed the DOJ's concerns. (See March 6, 1997, letter and January 7, 1998, letter from California Attorneys for Criminal Justice to Senator Quentin Kopp opposing Senate Bill 177 [Exh. E-10 and Exh. E-20 to Appellant's Motion for Judicial Notice].) So too did Edward J. Imwinkelried, Professor of Law at the University of California, at Davis, and an expert on evidence. He wrote:

> Any questioned document examiner would tell you that it is much easier for him or her to detect forgery when they are provided with the ink or ribbon original. The use of a photocopy makes it more difficult to unmask a forgery. The current provisions of the Evidence Code go far in allowing the proponent to use photocopies, and the proposed bill will make it even easier to do so. By moving in that direction, the bill will make it harder to detect attempted fraud on the court.

(Faxed copy of June 5, 1998, letter from Edward J. Imwinkelried, Professor of Law, to Assembly Committee on Judiciary opposing Senate Bill 177 [Exh. E-24 to Appellant's Motion for Judicial Notice].)[12]

Despite the concerns expressed by the Department of Justice and others, the Legislature did enact the Secondary Evidence Rule, which shifted the burden of proof from the proponent to the opponent of secondary evidence. (See Stats 1998, ch. 100, § 2 (SB 177).) That burden should not be shifted even further by allowing a copied certification of authenticity under Evidence Code section 1530.

2. A Per Se Rule Requiring an Original Certification Would Not Be Impractical or Unduly Burdensome.

The Evidence Code already makes significant concessions to practicality and modern technology. For example, the Evidence Code permits the admission of photographic copies of public records without the testimony of a records custodian. (Evid. Code, §§ 1280, 1530, 1531.) Certification is the device that makes these concessions acceptable by resolving such vital evidentiary concerns as best evidence, authentication, and hearsay. (Evid. Code, § 1530; see Argument, *ante*, section D.) To allow the certification itself to be a copy, in furtherance of still more

[12] The California Law Revision Commission actually believed that modern technology undercut the need to produce original documents, because such technologies "make it easier to fabricate a document that appears to be an original." (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports, *supra*, at pp. 378-380 [Exh. E-1 to Appellant's Motion for Judicial Notice].)

practicality, simply goes too far. It would not be impractical or unduly burdensome to require that copies of public records bearing an original certification be placed in the U.S. mail or delivered by hand. (See *Kelly*, *supra*, 561 N.E.2d at p. 775 ["The resulting burden upon the proponent is minimal."].)

The United States Supreme Court recently addressed – and rejected – arguments that the requirements of the Confrontation Clause must be relaxed to "accommodate the necessities of trial and the adversary process." (See *Melendez-Diaz*, *supra*, 129 S. Ct. at p. 2540, internal quotation marks omitted.) In *Melendez-Diaz*, the Court held that drug-analysis laboratory reports are inadmissible in a criminal proceeding unless the person who created the report is unavailable and the defendant had a prior opportunity to cross-examine the creator. (*Id.* at pp. 2532, 2542.) Under the Court's holding, the state must be prepared to produce a laboratory analyst as a witness in every criminal trial where the nature and weight of a controlled substance is at issue. (See *ibid.*) Mr. Skiles does not even ask that much; he only asks that the clerk's certification be an original.

The Supreme Court pointed out that, while there are a substantial number of drug analyses performed every year, only some of those tests are implicated in criminal trials. (See *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2540-2542.) For one thing, "nearly 95% of convictions in state and federal courts are obtained via guilty plea." (*Id.* at p. 2540.) For another, defense

attorneys, for strategic reasons, will not necessarily challenge every piece of incriminating evidence. (See *id.* at p. 2542.) "[D]efense attorneys [will not] want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion." (*Ibid.*) That reasoning applies to certified copies of public records as well. (See Evid. Code, § 1530.) Indeed, to the extent the requirement of an original certification would encourage prosecutors to obtain a duly certified copy of court records pior to trial – rather than in the middle of it – the requirement could actually lead to more sentencing-enhancement guilty pleas because defendants and their counsel could examine the properly certified documents and make the strategic consideration that there was no chance to rebut their content.

More fundamentally, the *Melendez-Diaz* Court reminded us that the "Confrontation Clause – like [] other constitutional provisions – is binding, and we may not disregard it at our convenience." (See *Melendez-Diaz*, *supra*, 129 S. Ct. at p. 2540.) Such is also the case here, whether an original certification is viewed as a statutory requirement, see Argument, *ante*, or as a constitutional mandate, see Argument, *post*.

3. Four States Have Established Bright-line Rules Requiring an Original Certification.

In view of the important interests at stake and the possibility for error, the supreme courts of at least four other states have established

bright-line rules requiring that an original certification or attestation be affixed to the precise copy that the records custodian has compared to the original in the custodian's possession. (See *Deramo*, *supra*, 762 N.E.2d at pp. 819-822 [Massachusetts]; *Kelly*, *supra*, 561 N.E.2d at pp. 772-775 [Indiana]; *State v. Stotts* (Ariz. 1985) 144 Ariz. 72, 84 [695 P.2d 1110, 1122] [Arizona]; *Little v. Comm.* (Ky. 2010) 2008-SC-000923-MR, 2010 Ky. Unpub. LEXIS 26 [Kentucky];[13] see also *State v. Everett* (Kan. Ct. of Appeals 2009) 202 P.3d 108, 2009 Kan. App. Unpub. LEXIS 71, pp. 5-8 [reversing defendant's sentence because a copy of a certified copy is inadmissible to prove criminal history by a preponderance of the evidence];[14] *Hawaii Housing Authority v. Castle* (1982) 65 Haw. 465, 466 [653 P.2d 781, 782] ["a photostat of a certified copy is not a certified copy and does not comply with Rule 56(e), HRCP"]; contra *People v. Wall* (N.C. 2000) 141 N.C.App. 529 [539 S.E.2d 692]; *Ex parte Hagood* (Ala. 1999) 777 So.2d 214; *Englund v. State* (Texas 1997) 946 S.W.2d 64; *Rudolph v. N.D. Dep't of Transport.* (N.D. 1995) 539 N.W.2d 63; *People v. Smith* (Wash. 1992) 66 Wn.App. 825 [832 P.2d 1366]; *Town of Hurley v. N.M. Muni. Boundary Comm'n* (N.M. 1980) 94 N.M. 606 [614 P.2d 18].

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[13] A copy of *Little v. Comm.* (Ky. 2010) 2008-SC-000923-MR, 2010 Ky. Unpub. LEXIS 26 is attached to this brief as Appendix A.

[14] A copy of *State v. Everett* (Kan. Ct. of Appeals 2009) 202 P.3d 108, 2009 Kan. App. Unpub. LEXIS 71 is attached to this brief as Appendix B.

In *Deramo*, the Massachusetts Supreme Judicial Court held it error for the trial court to admit photocopies of certified official records against a criminal defendant, though the high court also ruled that the error was harmless under the facts of the case. (See *Deramo*, *supra*, 762 N.E.2d at pp. 822-824.) In *Deramo*, there were some unexplained discrepancies between the original and the copy of the certified copies at issue. (See *id.* at pp. 821-822.) Yet the discrepancies were not crucial to the Massachusetts high court, which cited them only as examples of what can go wrong when the precise requirements of certification are not followed. (See *ibid.*) The court, in fact, issued a broader holding, requiring an original certification in all cases, even where no discrepancies had been raised or discovered. (*Deramo*, *supra*, 762 N.E.2d at pp. 819-822.) "By definition, an official cannot 'attest' to the accuracy or completeness of a copy that the official has never seen and that the official's agency did not produce," the court reasoned. (*Id.* at p. 821.) "Merely making a copy of the original attestation along with a copy of the underlying record does not serve the purpose of the attestation requirement, as the copied attestation no longer signifies that the official in question is vouching for the authenticity of the copy that has just been made." (*Ibid.*)

Indiana, Arizona, and Kentucky have also created such bright-line rules, at least in criminal cases. (See *Kelly*, *supra*, 561 N.E.2d at pp. 772-775; *Stotts*, *supra*, 695 P.2d at p. 1122; *Little*, *supra*, 2010 Ky. Unpub.

LEXIS 26, pp. 4-7.) In *Kelly*, at issue were copies of official records offered to establish a prior felony conviction. (*Kelly*, *supra*, 561 N.E.2d at p. 772.) The Supreme Court of Indiana set forth at length trial counsel's objections to the proffered copies, on which the attached certification of authenticity was itself a photocopy of the original. (*Id.* at p. 774.) Nowhere in the objections is there any indication that counsel had concerns about the genuineness or accuracy of the records. (*Ibid.*) Rather, counsel argued simply that as a matter of law a certification had to be original. (*Ibid.*) The Indiana high court agreed, and reversed the habitual defender determination. (*Kelly*, *supra*, 561 N.E.2d at p. 775.) The court declared: "Our failure to insist upon such original certificate would invite at least carelessness and at worst deceitfulness in the marshalling of evidence with a resulting lack of reliability of judgments and the possibility of substantial injustice." (*Ibid.*)

In *Little*, the Supreme Court of Kentucky reversed a finding that the defendant was a persistent felony offender, where the only proof submitted were copies of certified copies of court and probation records. (*Little*, *supra*, 2010 Ky. Unpub. LEXIS 26, pp. 6-7.) One document had been received by facsimile, while the other was a photocopy, but "[i]n practical effect, both documents are copies of certified copies," the court said. (*Id.* at p. 6.) There was no indication that the *Little* defendant had raised any issues of genuineness or accuracy, but, nonetheless, "'certified copies'

cannot and does not mean copies of certified copies" pursuant to the Kansas rules of evidence, the court ruled. (*Ibid.*, citation and internal quotation marks omitted.) "Allowing the introduction of these documents would invite tampering and alteration, especially through expert use of copying machines or other forms of technology." (*Ibid.*) "Ultimately, we feel that these documents 'lack[] the requisite indicia of reliability necessary to reliably prove a defendant's prior convictions.'" (*Ibid.*, citation omitted.)

H. A Deprivation of Liberty on the Basis of a Copy of a Certified Document Violated Mr. Skiles's Constitutional Rights to Confrontation and Cross-Examination.

The unambiguous language of Evidence Code section 1530 requires an original certification attached to the precise copy that the custodian is certifying as genuine, accurate, and complete. (See Argument, *ante*, section E.) Moreover, that requirement of an original certification cannot be circumvented by use of the Secondary Evidence Rule. (See Argument, *ante*, section F.) However, assuming *arguendo* that Evidence Code section 1530 is susceptible to two reasonable meanings (one that allows a copied certification and one that does not), Section 1530 must be interpreted to require an original certification so as to avoid grave and doubtful constitutional questions. (See *People v. Lee* (2003) 31 Cal.4th 613, 627, citing *People v. Anderson* (1987) 43 Cal.3d 1104, 1146.)

The certification by the Alabama court clerk was a solemn, out-of-court declaration offered against Mr. Skiles at a criminal prosecution to

prove a crucial fact: that the attached court record was "a true and correct copy of the original on file in this office." (See C.T. p. 207.) As such, the certification was testimonial hearsay subject to Confrontation Clause scrutiny. (See *Crawford v. Washington* (2004), 541 U.S. 36, 53-54 [124 S. Ct. 1354; 158 L. Ed. 2d 177].) Because the certification was itself a copy, admission of the certification, as well as the underlying non-testimonial court record, violated Mr. Skiles's right to confrontation under the federal and state constitutions. (See U.S. Const., 6th Amend; Cal. Const., art. I, § 15.)

1. The Focus of the Sixth Amendment Is The Procedural Guarantee of Confrontation, Not a Substantive Guarantee of Reliability.

The Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment, *Pointer v. Texas* (1965) 380 U.S. 400, 403 [85 S. Ct. 1065; 13 L. Ed. 2d 923], provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause guarantees a defendant's right to confront those "who 'bear testimony'" against him. (*Crawford, supra*, 541 U.S. at p. 51, quoting 2 N. Webster, An American Dictionary of the English Language (1828).) "'Testimony'" is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Ibid.*, quoting *Webster, supra.*)

In *Crawford v. Washington*, the United States Supreme Court announced that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford, supra*, 541 U.S. at pp. 53-54.) To date, the Court has declined to set forth the precise contours of when statements are deemed testimonial. At the very least, testimonial statements generally include statements taken by police officers in the course of interrogations, as well as the following:

> 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.

(See *id.* at pp. 51-52.)

Crawford overruled *Ohio v. Roberts* (1980) 448 U.S. 56, which permitted hearsay statements as long as they bore "adequate 'indicia of reliability.'" (See *Crawford, supra*, 541 U.S. at pp. 53-54; *Davis v. Washington* (2006) 547 U.S. 813, 825 fn.4 [126 S. Ct. 2266; 165 L. Ed. 2d 224]; *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S. Ct. 2531; 65 L. Ed. 2d 597].) *Roberts* conditioned the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears

"particularized guarantees of trustworthiness." (*Roberts*, *supra*, 448 U.S. at p. 66.)

The *Roberts* test, the *Crawford* Court said, was too permissive because it "allow[ed] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability."[15] (See *Crawford*, *supra*, 541 U.S. at p. 62.) The high court explained:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

(*Id.* at p. 61.)

2. *Melendez-Diaz* Extended the *Crawford* Rule to Forensic Laboratory Reports.

In *Melendez-Diaz v. Massachusetts* (2009) 129 S. Ct. 2527, the Supreme Court held that drug-analysis laboratory reports are inadmissible in a criminal proceeding unless the person who created the report is unavailable and the defendant had a prior opportunity to cross-examine the creator. (See *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2532, 2542; see also

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[15] The *Roberts* test was also overly inclusive in that it subjected non-testimonial hearsay to Confrontation Clause analysis. In cases subsequent to *Crawford*, the Supreme Court has made clear that the Confrontation Clause applies only to testimonial hearsay. (*Whorton v. Bockting* (2007) 549 U.S. 406, 420 [127 S. Ct. 1173; 167 L. Ed. 2d 1]; *Davis*, *supra*, 547 U.S. at pp. 821-824.)

People v. Lopez (2009) 177 Cal.App.4th 202, *9 [blood-alcohol report was testimonial hearsay evidence under *Crawford* and *Melendez-Diaz*].) The Court concluded that the certificates of forensic analysis – which it described as "quite plainly affidavits" – were testimonial hearsay statements because they contained the same testimony the analysts would provide if called as witnesses at trial. (*Id.* at p. 2532.)

The *Melendez-Diaz* Court firmly rejected a number of arguments raised by the respondent and the dissent to avoid what the Court called a "rather straightforward application of our holding in *Crawford*." (See *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2532-2533.) The Court said that to constitute testimonial hearsay, the certificates did not have to be directly accusatory; it was sufficient that the certificates provided testimony against or adverse to the defendant in the sense that they proved a fact necessary for the defendant's conviction. (See *id.* at pp. 2533-2534.) In addition, *Melendez-Diaz* rejected arguments that the certificates were not testimonial hearsay because they described nearly contemporaneous observations of the test of the nature of the substances; they contained neither observations of the crime nor any human conduct related to the crime; they were not in response to interrogation; and they constituted "'neutral, scientific testing.'" (See *id.* at pp. 2534-2537.)

Finally, *Melendez-Diaz* also rejected the argument that the certificates were not testimonial hearsay subject to Confrontation Clause

scrutiny because they were types of business records admissible at common law even though hearsay. (See *id.* at pp. 2538-2539.) The Court stated: "The analysts' certificates – like police reports generated by law enforcement officials – do not qualify as business records or public records" because they are produced for use in court, not for the regular business of the entity producing them. (See *id.* at p. 2538.)

Melendez-Diaz greatly extended the reach of the *Crawford* rule despite protestations from the respondent that the Court's holding would seriously hinder criminal prosecutions. (See *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2540-2542.) As such, it "is a poignant and timely reminder of the central importance of confrontation no matter what form evidence may take." (*Gambill v. Shinseki* (Fed. Cir. 2009) 576 F.3d 1307, 1325-1326.)

3. A Court Clerk's Certification Authenticating A Copy of an Official Record Is Testimonial Hearsay Subject to Confrontation Clause Scrutiny.

The court clerk's certification at issue here states: "I certify that the above is a true and correct copy of the original on file in this office." (C.T. p. 207.) In view of the Supreme Court's analysis in *Melendez-Diaz*, the certification from the Alabama court is testimonial hearsay subject to Confrontation Clause scrutiny. (See *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2532-2538; see also *Grant v. Virginia* (Court of Appeals of Virginia 2009) 54 Va. App. 714, 720 [682 S.E.2d 84, 87] [attestation clause

certifying that a breathalizer test was conducted according to proper procedures was testimonial hearsay under *Melendez-Diaz*].)

Indeed, in *Melendez-Diaz*, both the Court and the dissent appeared to agree that such a certification – "authenticating an official record[,] or copy thereof[,] for use as evidence" – was testimonial hearsay. (See *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2538-2539 [majority opinion], 2546-2547, 2552-2553 [dissent].) Discussing the historical role of the "copyist," the dissent stated:

> Because so much depends on [the copyist's] honesty and diligence, the copyist often prepares an affidavit certifying that the copy is true and accurate. [¶] Such a certificate is beyond question a testimonial statement under the Court's definition: It is a formal out-of-court statement offered for the truth of two matters (the copyist's honesty and the copyist's accuracy), and it is prepared for criminal prosecution.

(*Id.* at p. 2553.)[16]

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[16] The *Melendez-Diaz* dissent worried that the Court's opinion would logically require court clerks to appear in person to testify to the genuineness of court records. (See *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2546-2547.) The majority did not dispute the testimonial nature of a clerk's certification, but countered that it was merely "one narrow exception" to the general rule because the clerk's authority was "narrowly circumscribed" in that it did not involve creating a record for the sole purpose of providing evidence against the defendant. (See *id.* at pp. 2538-2539.) The Court, however, suggested that the *Crawford* rule requiring live testimony *would* apply in situations where the clerk attested to the fact that the clerk had searched for a particular record and failed to find it. (See *id.* at p. 2539.) The Supreme Court's distinction is not so clear. (See *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2538-2539.) Here, for example, by producing court records purporting to show that Mr. Skiles had suffered a felony manslaughter conviction, the Alabama clerk was, in effect, also

4. The Confrontation Clause
Requires an Original Certification.

Under *Melendez-Diaz*, a court clerk's certification authenticating purported copies of official records is a category of testimonial hearsay, albeit of a special type that passes Sixth Amendment muster even though the criminal defendant has no opportunity to confront the clerk. (See *Melendez-Diaz*, *supra*, 129 S. Ct. at pp. 2538-2539 [majority opinion], 2546-2547, 2552-2553 [dissent].) The certification, therefore, bears a heavy constitutional burden because it substitutes for cross-examination, the constitution's preferred method of assessing reliability. (See *ibid*; *Crawford*, *supra*, 541 U.S. at pp. 61-62.) Here, Mr. Skiles had no opportunity to pose any questions concerning, for example, the adequacy of the clerk's search of the Alabama records or the accuracy of the original and of the copy of the proffered indictment. The only assurance of trustworthiness was the clerk's certification. (C.T. p. 207; 3 R.T. pp. 278-279, 287, 289.)

The Supreme Court has not addressed whether the clerk's certification must be original. The Court, however, has emphasized that the Sixth Amendment is a procedural guarantee, and has repeatedly rejected the view that testimonial hearsay is admissible so long as it appears reliable.

---

attesting to the absence of any records or information that would show that the conviction had subsequently been reversed on appeal or voided by a pardon. (See C.T. pp. 191-209.)

(See *Crawford*, *supra*, 541 U.S. at pp. 61-62; see also *Melendez-Diaz*, *supra*, 129 S. Ct. at p. 2536; *Whorton*, *supra*, 549 U.S. at p. 414; *Davis*, *supra*, 547 U.S. at p. 825 fn.4.) Accordingly, the Confrontation Clause question cannot be answered by references to the alleged reliability of faxed or photographic copies. (See *ibid.*)

Certification, like the opportunity for cross-examination, is a time-honored procedural device for assuring the reliability of evidence. By definition, as well as historical practice, a "certification" must be an original certification attached to precise copies that the custodian is certifying as genuine, accurate, and complete. The Confrontation Clause does not permit cross-examination to be dispensed with in the name of "reliability" or "convenience." The requirement of an original clerk's certification likewise cannot be discarded. Where certification takes the place of cross-examination at a criminal trial, the Confrontation Clause requires an original certification.

I. Mr. Skiles Suffered Prejudice From the Admission of Exhibit 18.

Exhibit 18 was the only evidence that Mr. Skiles's Alabama manslaughter conviction was "serious" for purposes of the three strikes law. If Exhibit 18 had been excluded, the sentencing enhancement allegation would not have been proven. (See C.T. pp. 191-209; 3 R.T. pp. 275-277, 288, 295-297.) Thus, Mr. Skiles is entitled to a reversal of the

judgment under either the beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension, see *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824]; or, if this Court finds an error of law only, under the standard pronounced in *People v. Watson* (1956) 46 Cal.2d 818, 836.

CONCLUSION

For the reasons argued here, the trial court prejudicially erred in finding true a sentencing enhancement allegation under Penal Code sections 667, subdivisions (d) and (e)(1) and 1170.12, subdivisions (b) and (c)(1), on the basis of a copy of what purported to be a certified copy of a court record. The decision of the Court of Appeal affirming the judgment of the Superior Court of Orange County must be reversed.

Respectfully submitted,

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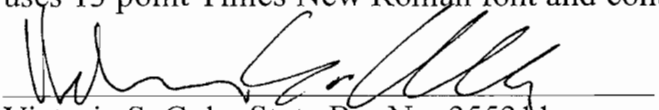
By appointment of the Supreme Court

WORD COUNT CERTIFICATE

I certify in accordance with Rule 8.520(c)(1) that this opening brief uses 13 point Times New Roman font and contains 11,295 words.



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CASE NUMBER:
Supreme Court No. S180567
People v. Danny Lee Skiles
Court of Appeal No. G040808
Fourth Appellate District
Division Three

DECLARATION OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is 2658 Del Mar Heights Rd. #350, Del Mar, California. I served Appellant's Opening Brief on the Merits, of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego, California, on August 26, 2010.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 26 2010, at San Diego, California.

Victoria S. Cole

APPENDIX A

WILLIE L. LITTLE, APPELLANT v. COMMONWEALTH OF KENTUCKY, APPELLEE

2008-SC-000923-MR

SUPREME COURT OF KENTUCKY

2010 Ky. Unpub. LEXIS 26

March 18, 2010, Rendered

PRIOR HISTORY: [*1]
ON APPEAL FROM LETCHER CIRCUIT COURT. HONORABLE SAMUEL T. WRIGHT, III, JUDGE. NO. 07-CR-00208.

COUNSEL: COUNSEL FOR APPELLANT: Thomas More Ransdell, Assistant Public Advocate, Department of Public Advocacy, Frankfort, KY.

COUNSEL FOR APPELLEE: Jack Conway, Attorney General; Gregory C. Fuchs, Assistant Attorney General, Office of Attorney General, Criminal Appellate Division, Frankfort, KY.

JUDGES: All sitting. All concur.

OPINION

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

Appellant, Willie L. Little, was a passenger in a car that was stopped in Norton, Virginia. Officer James McReynolds of the Norton City Police Department detained Appellant during the stop, eventually placing him under arrest. Due to malfunctioning audio equipment in Officer McReynolds' vehicle, Appellant was placed in the unmarked cruiser of Sergeant Grey Mays, another officer who had arrived at the scene. However, Sergeant Mays' vehicle did not have a "cage" for transporting prisoners and, as a result, Appellant was handcuffed behind his back and placed in the front seat of the vehicle on the passenger side.

The officers gathered behind the vehicle to speak to one another. While they were talking, they heard the driver's [*2] side door close and the vehicle pulled away at a high rate of speed. Trooper Jason Nichols got into his own cruiser, activated his emergency lights, and gave chase. Kentucky State Trooper Randy Surber received a dispatch that someone had stolen a police cruiser and was on Highway U.S. 23 headed toward Kentucky. Surber positioned himself on U.S. 23 north of the state line and retrieved a stinger, or spike strip, from the trunk of his car. Appellant appeared to be in the left lane in an attempt to bypass the officer, so Surber stood across the fog line and threw the spike strip. As the spike strip was deployed, Appellant veered to the right to avoid it, missing Surber by "a few feet or inches." Appellant continued driving down U.S. 23.

Sergeant Adam Swindell of the Jenkins Police Department was heading south-bound on U.S. 23 and pulled over to deploy another spike strip. Appellant was in the left turn lane in an apparent attempt to turn onto U.S. 119 toward Whitesburg. Swindell ran across the highway to the center of the road, threw a spike strip in front of Ap-

pellant's vehicle, and ran back toward the left-hand side of the road. Appellant swerved as the spike strip was thrown and came [*3] within five or six feet of Swindell. Approximately a half mile down the road, Appellant's vehicle began to fishtail and was stopped by a large rock.

Appellant was tried in Letcher Circuit Court. After a two-day trial, the jury found Appellant guilty of two counts of wanton endangerment in the first degree, fleeing or evading police in the first degree, criminal mischief in the first degree, and being a persistent felony offender in the second degree. Appellant received a cumulative sentence of imprisonment for twenty years. He now appeals the final judgment entered as a matter of right, *Ky. Const. ß 110(2)(b)*.

Appellant raises multiple issues on appeal: (1) the trial court allowed the introduction of unauthenticated documents during the PFO phase; (2) the convictions for wanton endangerment and fleeing or evading police violated double jeopardy; and (3) the trial court omitted an essential element in the jury instructions for fleeing or evading police in the first degree.

Unauthenticated documents during PFO phase

During the PFO phase of the trial, the Commonwealth sought to introduce two documents to prove a prior felony conviction sufficient to support the charge. *KRS 532.080(2)*. The [*4] first document was a facsimile of a 1970 murder indictment in the Pike Circuit Court. The document contained a certification that it was "an exact photocopy of the original unaltered document," and that the original was "on deposit with the Kentucky Department for Libraries and Archives, Public Records Division." The second document was a photocopy of a certified copy of the original judgment from probation and parole records in Pike County.

Over Appellant's objection, the trial court allowed both documents to be introduced. As to the facsimile, the trial court stated that since the document came from the Kentucky Department for Libraries and Archives and was being produced through the Pike Circuit Clerk's office, the authenticity was sufficiently established. As to the second document, the trial court allowed its introduction because the judgment was a record of a state agency that was kept in the regular course of its business. Appellant moved for a directed verdict on the PFO charge, stating that the documents were not properly authenticated, and that as such, there was insufficient proof to sustain a conviction. The trial court denied Appellant's motion.

The admission of these documents [*5] was error. The Commonwealth concedes as such. [1] *KRS 532.080(2)* requires the Commonwealth to prove, in order to establish guilt as a second-degree persistent felony offender, that the defendant is more than 21 years of age and stands convicted of a felony after having been convicted of one previous felony; that he was more than 18 years of age at the time of the prior offense; and his parole status. The Commonwealth has the burden of proving every element of the charge. *Adams v. Commonwealth, 551 S.W.2d 561 (Ky. 1977)*. However, evidence of a prior conviction "must come from the official court record, or certified copies thereof." *Finnell v. Commonwealth, 295 S.W.3d 829, 835 (Ky. 2009)*. *Finnell* noted that in the case of *Commonwealth v. Mixon, 827 S.W.2d 689, 39 4 Ky. L. Summary 40 (Ky. 1992)*, testimony was given concerning an uncertified document, but stated "that should not be read as an endorsement of using anything other than official records or certified copies thereof." *Id. at 834*.

> 1 In its brief to this Court, the Commonwealth states: "While the circuit court may be correct that considering the source authenticity is sufficiently established, the Commonwealth, in particular this attorney, at this time is [*6] somewhat constrained from arguing that such was not error."

In addition, *KRE 902(4)* provides that certified copies of public records are self-authenticating and admissible into evidence. However, the documents presented to the trial court by the Commonwealth were either a copy of a certified copy or received via facsimile. In practical effect, both documents are copies of certified copies. *KRE 902* does not provide for self-authentication of copies of certified copies, nor does it attach certified copy status to such a document. "'Certified copies' cannot and does not mean copies of certified copies." *State v. McGuire, 113 Ariz. 372, 555 P.2d 330, 333 (Ariz. 1976)* (emphasis in original). Allowing the introduction of these documents would invite tampering and alteration, especially through expert use of copying machines or other forms of technology. Ultimately, we feel that these documents "lack[] the requisite indicia of reliability necessary to reliably prove a defendant's prior convictions." *Finnell, 295 S.W.3d at 835*.

In the instant case, the Commonwealth failed to offer official court records or certified copies of Appellant's prior conviction. Therefore, Appellant's conviction for being a second-degree [*7] persistent felony offender must be reversed. However, on remand, double jeopardy principles will not preclude further proceedings. Here, we are reversing Appellant's PFO conviction not because the Commonwealth failed to present sufficient evidence, but because the evidence introduced was improperly authenticated and, therefore, incompetent. *See Merriweather v. Commonwealth, 99 S.W.3d 448 (Ky.*

2003). There was sufficient evidence to sustain a second-degree persistent felony offender conviction. However, such evidence should have come in the form of official court records or certified copies thereof. As this Court has previously stated:

> [R]eversal for a trial error which incorrectly admitted incompetent evidence does not constitute a decision that the government has failed to prove its case. Rather, it is a determination that although the government did prove its case, it did so by evidence which was incompetent, and defendant is entitled to a new trial free of this procedural defect.

Commonwealth v. Mattingly, 722 S.W.2d 288, 288-89 (Ky. 1986).

Accordingly, Appellant's conviction for being a second-degree persistent felony offender is reversed and the matter is remanded to the Letcher [*8] Circuit Court for a new penalty phase of the trial.

Double jeopardy

Appellant's next assignment of error is that his convictions for first-degree wanton endangerment and first-degree fleeing or evading violate double jeopardy principles. Specifically, Appellant argues that operating a motor vehicle with the intent to elude or flee the police will always manifest extreme indifference for the value of human life. Additionally, Appellant states that the same evidence was used by the Commonwealth to prove both offenses. Appellant concedes that this argument is not preserved for review. Nevertheless, we have held that failure to object on grounds of double jeopardy does not constitute a waiver of the right to raise the issue for the first time on appeal. *Brooks v. Commonwealth, 217 S.W.3d 219, 221-22 (Ky. 2007)*.

Kentucky follows the *Blockburger* rule "as the sole basis for determining whether multiple convictions arising out of a single course of conduct constitutes double jeopardy." *Taylor v. Commonwealth, 995 S.W.2d 355, 358, 46 8 Ky. L. Summary 56 (Ky. 1999)*. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine [*9] whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Id.* (quoting *Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932))*.

We find Appellant's argument to be without merit. This issue was addressed by this Court in *Brown v. Commonwealth, 297 S.W.3d 557 (Ky. 2009)*. In *Brown*, this Court stated:

> [A]s with first-degree wanton endangerment, the three elements of operating a motor vehicle, having intent to elude or flee, and disobeying a police officer's direction to stop are required of the fleeing or evading police charge but not of the wanton endangerment charge. Consequently, each provision requires proof of a fact that the other does not. Thus, Appellant's convictions for first-degree fleeing or evading police and first-degree wanton endangerment do not constitute double jeopardy.

Id. at 563.

Furthermore, it is a well-established principle that "[a]n overlap of proof does not necessarily establish a double jeopardy violation." *Smith v. Commonwealth, 905 S.W.2d 865, 867, 42 10 Ky. L. Summary 42 (Ky. 1995)*. Accordingly, Appellant's convictions for first-degree wanton endangerment and first-degree fleeing or evading do not violate the principles [*10] of double jeopardy.

Jury instructions

Appellant's final assignment of error is that the instructions given to the jury for the first-degree fleeing or evading charge omitted multiple essential elements of the crime. Appellant concedes this argument is not preserved, but nevertheless requests palpable error review under *RCr 10.26*.

The instruction, as given to the jury, states:

> You will find the Defendant guilty of 1st Degree Fleeing/Evading Police under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this County on or about September 16, 2007, and before the finding of the Indictment herein, he operated a motor vehicle with the intent to flee or elude;
>
> AND
>
> B. That his act of fleeing or eluding caused or created a substantial risk of serious physical injury or death to Trooper Randy Durber and/or Officer Adam Swindell.

> If you find the Defendant guilty of Fleeing or Evading the Police 1st Degree under this Instruction, you will so indicate on the Verdict Form provided with these Instructions and nothing more as to this Count of the Indictment.

According to Appellant, this instruction fails to include several key elements [*11] found in *KRS 520.095(1)*. Specifically, Appellant states that the instructions failed to include the requirements that a defendant "knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer." As such, Appellant contends that the jury instruction was so deficient as to deny him his substantial rights. We disagree.

While it is true that any error in jury instructions is presumed to be prejudicial, this presumption can be successfully rebutted upon a showing that the error was harmless. *Harp v. Commonwealth, 266 S.W.3d 813, 818 (Ky. 2008)*. The United States Supreme Court has stated that an erroneous jury instruction that omits an essential element of the offense is subject to the harmless error analysis. *Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)*; *Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)*. This ruling is in accord with a line of cases in which juries were given instructions consistent with the charged crime, yet where error occurred because a necessary element of the offense was omitted. *See Wright v. Commonwealth, 239 S.W.3d 63 (Ky. 2007)*; *Thacker v. Commonwealth, 194 S.W.3d 287 (Ky. 2006)*; *Commonwealth v. Potts, 884 S.W.2d 654 (Ky. 1994)*. [*12] However, due to the fact that this error is unpreserved, harmless error review in this instance is inappropriate. *See Martin v. Commonwealth, 207 S.W.3d 1, 5 (Ky. 2006)* ("(Reviewing courts should endeavor to avoid mixing the concepts of palpable error and harmless error. One is not the opposite of the other."). As such, the proper standard of review in this case is to determine whether an *RCr 10.26* violation occurred.

After reviewing the record in this case, we conclude that the jury verdict would have been the same had the jury been properly instructed on first-degree fleeing or evading. The evidence offered at trial by the Commonwealth showed that Appellant sat alone in an officer's unmarked vehicle, moved into the driver's seat, and then led multiple police cruisers on a high-speed chase through parts of Virginia and Kentucky. This ultimately led to Appellant nearly striking two Kentucky police officers who were attempting to lay down spike strips.

We have recently addressed the palpable error standard in *Sanders v. Commonwealth*, No. 2008-SC-000118-MR, 2010 WL 254258 (Ky., January 21, 2010) and *Carver v. Commonwealth*, No. 2007-SC-000428-MR, 2010 WL 274557 (Ky., January 21, 2010). [*13] Those two cases required reversals because the juries found the respective defendants guilty under jury instructions which, on their face, did not constitute a crime, or at least not the crime charged. Such instructions, by their very nature, rise to a manifest injustice and palpable error. Here, however, the elements are consistent with the crime charged, but the error regards a missing element.

Given the evidence introduced at trial, to which Appellant offers nothing to the contrary, we believe that a jury could reasonably find that Appellant "knowingly or wantonly disobey[ed] a direction to stop his . . . motor vehicle, given by a person recognized to be a police officer." Accordingly, we cannot say that the error present in the jury instructions was "so fundamental as to threaten . . . defendant's entitlement to due process of law." *Martin, 207 S.W.3d at 3*. Thus, it does not rise to a manifest injustice or palpable error.

For the reasons stated herein, the judgment and sentence of the Letcher Circuit Court regarding the second-degree persistent felony offender conviction is reversed, and this matter is remanded to the trial court for a new penalty phase trial. We affirm Appellant's [*14] convictions for wanton endangerment in the first degree, fleeing or evading in the first degree, and criminal mischief in the first degree.

All sitting. All concur.

APPENDIX B

STATE OF KANSAS, Appellee, v. VICTOR EVERETT, Appellant.

No. 98,871

COURT OF APPEALS OF KANSAS

202 P.3d 108*; *2009 Kan. App. Unpub. LEXIS 71

March 6, 2009, Opinion Filed

NOTICE: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

PRIOR HISTORY: [*1]
Appeal from Dickinson District Court. BENJAMIN J. SEXTON, judge.

DISPOSITION: Reversed and remanded with directions.

COUNSEL: Carl Folsom, III, of Kansas Appellate Defender Office, for appellant.

Daryl E. Hawkins, assistant county attorney, and Stephen N. Six, attorney general, for appellee.

JUDGES: Before RULON, C.J., GREENE and HILL, JJ.

OPINION

MEMORANDUM OPINION

Per Curiam: Defendant Victor Everett appeals from the sentence imposed for his conviction of possession of marijuana with the intent to sell, deliver, or distribute, challenging the criminal history used by the district court. We reverse and remand for further proceedings.

The State charged the defendant in Dickinson County District Court with one count of possession of marijuana or tetrahydrocannabinol with intent to sell within 1000 feet of a school, in violation of *K.S.A. 2008 Supp. 65-4163(b)*; one count of possession of marijuana, second offense, in violation of *K.S.A. 65-4162(a)(3)*; one count of possession of drug paraphernalia, in violation of *K.S.A. 2006 Supp. 65-4152(a)(3)*; one count of conspiracy to sell marijuana, in violation of *K.S.A. 21-3302(a)* and *K.S.A. 2008 Supp. 65-4163(b)*; and one count of failure to obtain a tax stamp, in violation of *K.S.A. 79-5208*.

Pursuant [*2] to a plea agreement, the defendant entered a guilty plea to possession of marijuana with intent to sell or distribute, in violation of *K.S.A. 2008 Supp. 65-4163(a)(3)*. In exchange, the State agreed to dismiss the remaining charges and to stand silent at sentencing. The district court accepted the defendant's plea and found him guilty of possession of marijuana with intent to sell or distribute.

Prior to sentencing, the defendant lodged an objection to three prior convictions listed in the defendant's presentence investigation report (PSI). The three convictions were from New York and were for attempted sale of marijuana, criminal sale of marijuana, and possession of cocaine.

At sentencing the defendant withdrew his objection as to two of the New York convictions but maintained his objection as to the New York possession of cocaine conviction. The State presented evidence pertaining to the challenged conviction in the form of a sentencing journal entry and PSI from a previous, Geary County conviction. The Geary County PSI listed the three New York convictions, and the Geary County sentencing journal entry indicated there had been no objection to the criminal history in that case.

After [*3] the State offered the above mentioned documents, the defendant stated he had no objection to the introduction and consideration of the Geary County documents, but requested his objection to the challenged prior conviction be noted "for purposes of the record." The defendant asked the district court to proceed with immediate sentencing.

The district court denied the defendant's objection to the challenged prior conviction and found the defendant's criminal history score was "F." The district court then granted the defendant's motion for nonprison sanction and placed him on 18 months' probation to enter into a treatment program. The district court imposed an underlying sentence of 24 months' incarceration in the custody of the Secretary of Corrections.

The defendant timely appealed.

On appeal, the defendant primarily argues the State failed to prove his criminal history was "F," because the faxed copy of the Geary County journal entry and PSI offered by the State to prove the New York conviction challenged by the defendant was not certified and thus constituted inadmissible hearsay. The defendant relies upon *State v. Schow, 287 Kan. 529, 197 P.3d 825 (2008)*.

The *Schow* court held:

> "Pursuant [*4] to the provisions of *K.S.A. 21-4715(c)*, a defendant may file a written objection to the criminal history worksheet included in his or her presentence investigation report and may challenge any prior conviction, including those which may have been listed in a previous criminal history worksheet. The State has the burden to produce further evidence establishing the existence of any challenged conviction by a preponderance of the evidence and a previous criminal history worksheet will not be sufficient to meet that burden." *287 Kan. 529, 197 P.3d 825, Syl. P 1.*

In response, the State first contends this court should not consider the merits of the defendant's argument, because the defendant waived his right to appeal in the plea agreement, and because the defendant waived any objection to the Geary County journal entry and PSI by agreeing at sentencing the district court could take judicial notice of the documents for purposes of calculating his criminal history.

The plea agreement did include the statement "Defendant waives his right of appeal in all matters herein." However, the plea agreement later states:

> "I understand that despite my plea of guilty or nolo contendere (no contest), I [*5] retain a limited right to appeal the sentence which may be imposed. If the sentence imposed is the presumptive sentence, the appellate court will only have jurisdiction to hear appeals based on the accuracy of my criminal history score and the accuracy of the crime severity level determination. If the sentence imposed is not the presumptive sentence, claims of partiality, prejudice, oppression or corrupt motive may be the basis of an appeal. I also understand that if the sentence imposed is that agreed to in the plea agreement, the appellate court will not review my sentence."

Despite the general waiver language, clearly this plea agreement contemplated an appeal in certain specific situations, including the criminal history issue raised on this appeal. The above waiver language does not preclude consideration of this appeal. See *State v. Case, 185 P.3d 326, unpublished opinion filed June 13, 2008* (rejecting the same waiver argument in a similar situation because "[w]e are not inclined to enforce any waiver of appeal unless it has unequivocally and unambiguously been made in writing," and because the specific language regarding limited right to appeal modified the broader waiver).

The [*6] defendant's specific contention is the Geary County documents were inadmissible hearsay because they were not certified as required by *K.S.A. 60-465*. Whether the district court complied with specific statutory requirements for admitting evidence involves interpretation of a statute, which the appellate court reviews de novo. *State v. Gonzalez, 282 Kan. 73, 80, 145 P.3d 18 (2006)*.

If not disputed, a defendant's criminal history summary prepared for the sentencing court satisfies the State's burden of proof of establishing the defendant's criminal history by a preponderance of the evidence. *K.S.A. 21-4715*. When a defendant challenges an alleged error in a criminal history worksheet, the State has the burden of producing further evidence to satisfy its burden of proof regarding the disputed parts of the criminal history. *K.S.A. 21-4715(c)*.

However, as noted by the defendant, this court has held that once a defendant has contested the criminal history and the State then

> "attempts to establish a defendant's criminal history in a hearing pursuant to *K.S.A. 21-4715* using copies of official court documents, those documents must meet the . . . requirements of authentication under *K.S.A. 60-465* [*7] in order to be admissible as an exception to the rule against hearsay under *K.S.A. 60-460(o)*. For copies of documents from *Kansas* courts, certification will suffice to meet the requirement for authentication under *K.S.A. 60-465(3)*." *State v. Strickland, 23 Kan. App. 2d 615, 618, 933 P.2d 782, rev. denied 262 Kan. 968 (1997)*.

K.S.A. 60-465 states, in relevant part:

> "A writing purporting to be a copy of an official record or of an entry therein, meets the requirements of authentication if the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept or evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required if: (1) The office in which the record is kept is within this state and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record[.]"

The Geary County documents at issue here bear a certification by the district court clerk on one of the [*8] pages of the journal entry. However, this certification was not "freshly made" on the copy presented by the State, but is rather part of the copy itself. That is, the copy of the documents here has not itself been certified; it is a *copy of a* certified copy. As such, the Geary County documents do not meet the requirements set forth by *Strickland* and *K.S.A. 60-465*, and constitute inadmissible hearsay. Likewise, we are convinced the challenged Geary County documents do not satisfy the admissibility test required in *Schow*.

The defendant's sentence is vacated and the matter remanded to the district court for a proper determination of criminal history and resentencing, if necessary.

In light of the above discussion, we need not reach the other claimed errors asserted by the defendant on appeal.

We reverse and remand for further proceedings.

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CASE NUMBER:
Supreme Court No. S180567
People v. Danny Lee Skiles
Court of Appeal No. G040808
Fourth Appellate District
Division Three

AMENDED DECLARATION OF SERVICE FOR SERVICE ON APPELLANT

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is 2658 Del Mar Heights Rd. #350, Del Mar, California.

I prepared the following documents, each with a proof of service: (1) Appellant's Opening Brief on the Merits; (2) Appellant's Motion to Take Judicial Notice of Documents Pursuant to Evidence Code Section 459 and Rule 8.252, California Rules of Court, with supporting Memorandum of Points and Authorities, Declaration of Victoria S. Cole, and Exhibits A through E. After preparing these documents, but before depositing them in the U.S. mail, I received a letter from Appellant notifying me of his new address. Therefore, for service on Appellant, I placed the above-referenced documents, as well as this Amended Declaration of Service, in a separate envelope addressed as follows:

Danny Lee Skiles, G-31296
North Fork Correctional Facility South #263
1605 East Main
Sayre, OK 73662

Also, I placed this Amended Declaration of Service, along with the above-referenced documents, in separate envelopes addressed as follows:

Stephanie H. Chow
Deputy Attorney General
Office of the Attorney General
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Court of Appeal
Fourth Appellate District, Division Three
P.O. Box 22055
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Hon. Dan McNerney, Judge
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Central Justice Center
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Susan L. Ferguson
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The envelopes were then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego, California, on August 26, 2010.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 26, 2010, at San Diego, California.

Victoria S. Cole