The Confrontation Clause & Our Expert Witnesses

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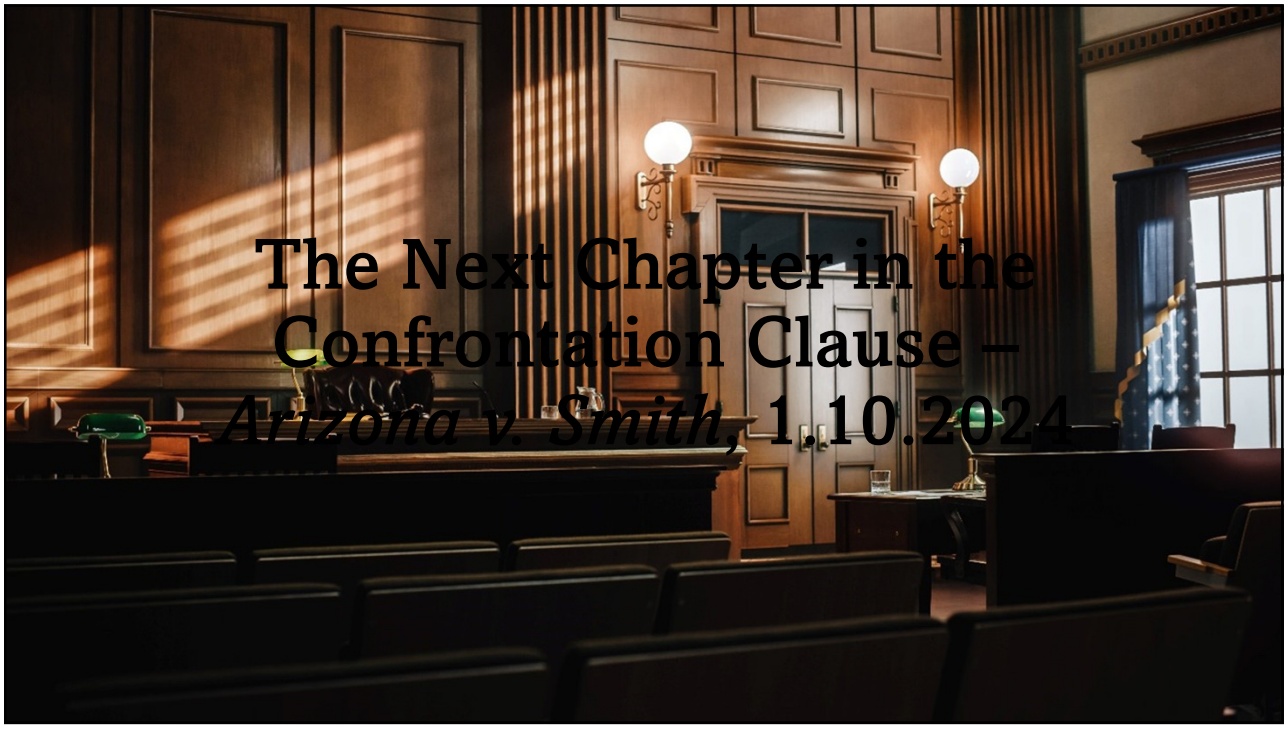

The Next Chapter in the Confrontation Clause – *Arizona v. Smith*, 1.10.2024

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Who do I subpoena?

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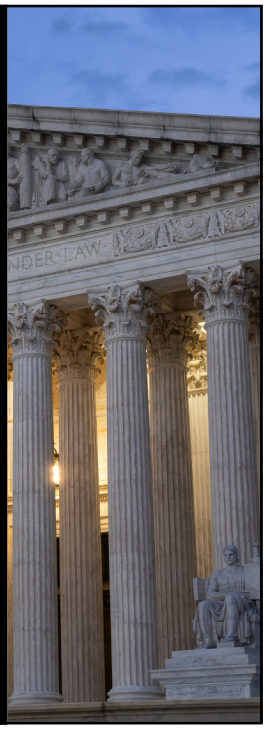

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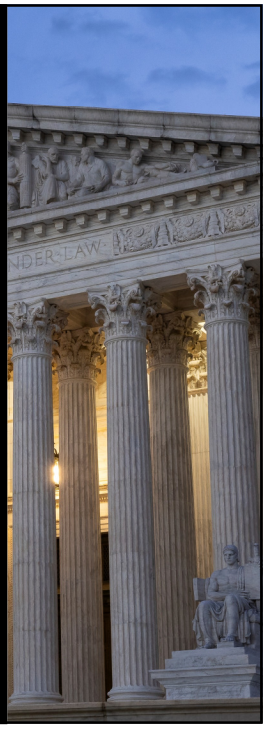
It Depends…

1) The nature of the testimony
2) The flavor of the witness
3) The type of proceeding



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THREE FLAVORS OF CONFRONTATION CASES:

1. General *Ex Parte* statements used for prosecution (*Crawford Doctrine*)
2. Emergency out-of-court statements (*Davis v. Washington Doctrine)*
3. Forensic out-of-court testimonial statements (*Melendez-Diaz Doctrine)*

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Let's talk about the Melendez-Diaz Doctrine

Laboratory and forensic reports are inadmissible and offend the Confrontation Clause where:

1) The declarant is unavailable for testimony or cross-examination
2) The contents of the declaration are "testimonial"

What did the *Melendez-Diaz* Court think was "testimonial??

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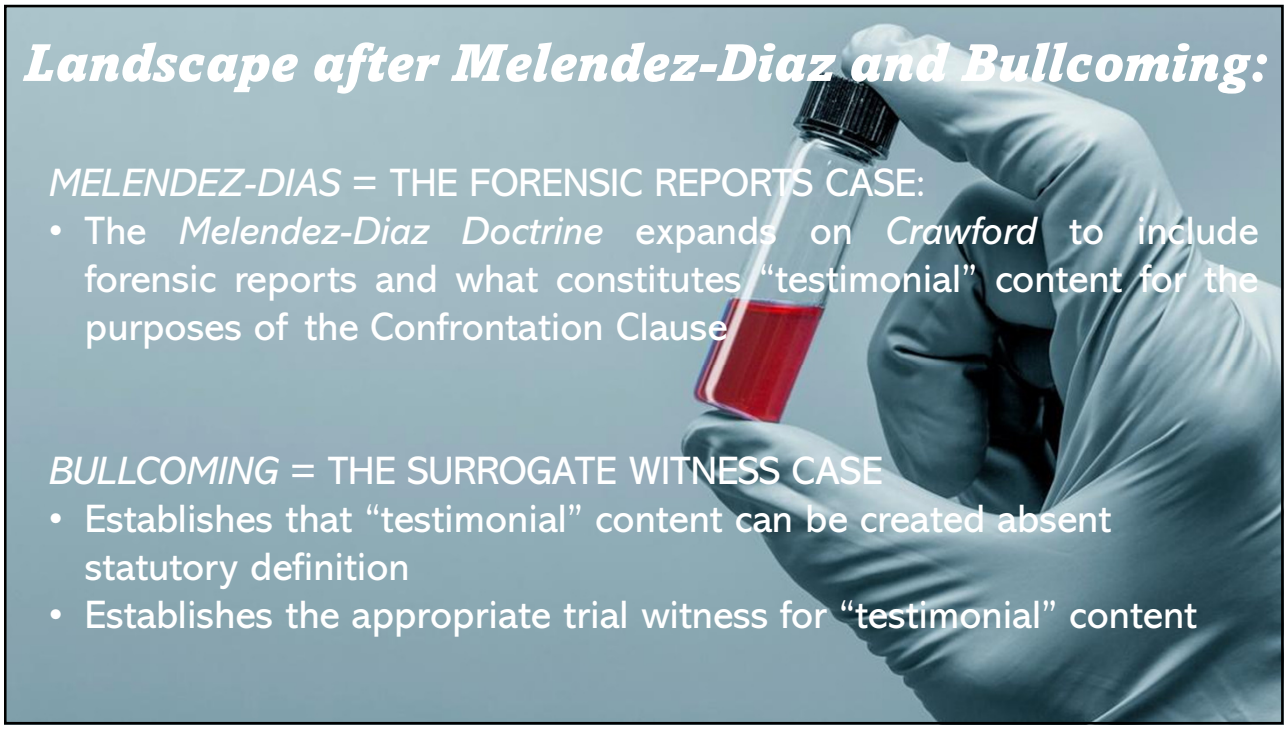
Landscape after Melendez-Diaz and Bullcoming:



MELENDEZ-DIAS = THE FORENSIC REPORTS CASE:

- The *Melendez-Diaz Doctrine* expands on *Crawford* to include forensic reports and what constitutes "testimonial" content for the purposes of the Confrontation Clause

BULLCOMING = THE SURROGATE WITNESS CASE

- Establishes that "testimonial" content can be created absent statutory definition
- Establishes the appropriate trial witness for "testimonial" content

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Williams v. Illinois, 567 U.S. 50 (2012)

FACTS:

- Defendant charged with sex assault
- 3 Analysts performed DNA testing
  - One developed profile from evidence semen
  - One developed profile post-arrest blood sample
  - One used both as an expert witness at trial

AT TRIAL:

- Witness testified that there was a "computer match generated by Cellmark (Co) between the two profiles and that it implicated defendant"
- Nobody from Cellmark testified

HOLDING:

- No Confrontation clause violation because Cellmark report was NOT testimonial

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Williams v. Illinois, 567 U.S. 50 (2012)

WHY WAS THE CELLMARK REPORT NON-TESTIMONIAL?

1) What did the analyst know at the time they generated their report?
2) What was that analyst's "primary purpose"?
3) Was there "formality" and "solemnity" in the report?

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Williams – The Fractured Opinion

WILLIAMS GAVE US 3 TESTS SPLIT ACROSS THE US

1) Targeted Individual Test – Statements are testimonial if they're prepared with the "primary purpose" of accusing a targeted individual
2) Formality Test – Statements are testimonial if they bear "sufficient formality or indicia of solemnity"
3) Evidentiary Purpose Test – Statements are testimonial if they "have an evidentiary purpose and would lead an objective witness to believe they'd be use in prosecution

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The Stage is set for *Smith v. Arizona* …

Courts across the country started making decisions on which test they would adopt to determine which forensic report was "testimonial" based on:

1. Whether the test "targeted" a suspect
2. Whether the reports were "formal", and
3. Whether the reports could have been foreseen to have an evidentiary purpose

HOWEVER

Bigger Question - What if SCOTUS decides underlying data on which experts are basing "independent conclusions" require the "crucible of cross-examination???

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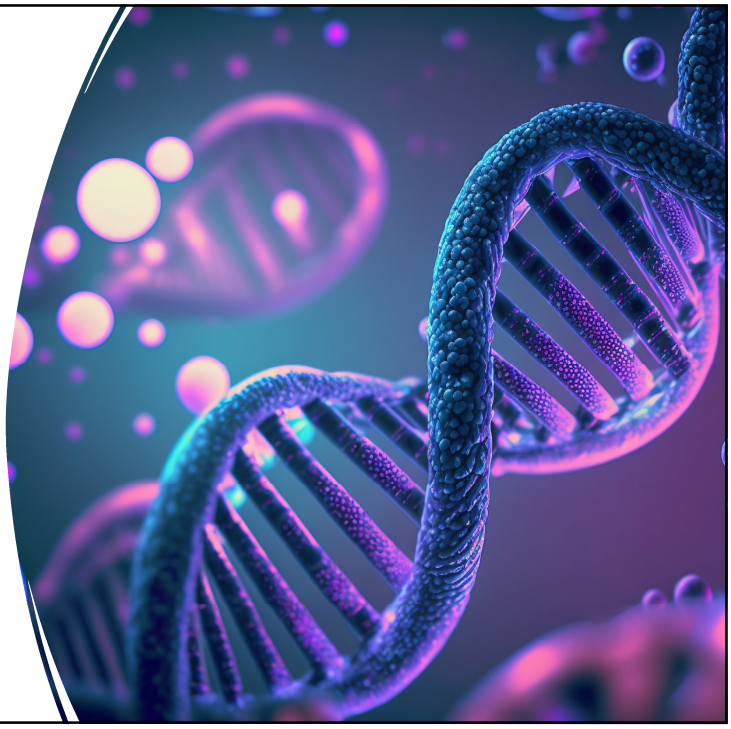
Meanwhile back in Washington State…

State v. Lui, 179 Wash.2d 457 (2014)

The "witness against" Test:

1) A "witness" - Statement of Fact (not just processing evidence)
2) "Against" - Statement bears some inculpatory character

"merely laying hands on evidence, DNA or otherwise, does not a "witness" make—something more is required"



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Smith v. Arizona, 602 U.S.___, 144 S. Ct. 1785, ___ L Ed 2d ___ (2024)

FACTS:

- VUCSA case – drugs tested at the state lab
- Crime lab chemist, Rast, performed the testing, but Chemist, Rast, resigns from the lab prior to trial.

AT TRIAL:

- State called surrogate toxicologist, Longoni, who testified that the seized drugs were meth, cannabis, and wax
- Longoni did not test any items and performed no analysis.
- Longoni reviewed the testing request form, intake records instruments, chemicals used, testified that he's trained in the testing methods used, he reviewed the analysis conducted by Rast including graphs, results, and protocols.
- Longoni testified that he was "testifying as to his own independent conclusions"

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Smith v. Arizona, 602 U.S.___, 144 S. Ct. 1785, ___ L Ed 2d ___ (2024)

HOLDING:

- The State had not offered Rast's statements for their truth but rather only to explain the bases of Longoni's opinions
- Longoni presented his independent expert opinions permissibly based on his review of Rast's work and was subject to cross, thus, Longoni wasn't a "mere conduit" for Rast's conclusions.
- *Melendez-Diaz Doctrine* does NOT apply because those cases involved testimony of absentee witnesses
- *"Had Smith sought to challenge Rast's analysis, he could have called her to the stand and questioned her, but he chose not to"*

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Checking Back in on WA:
State v. Hall-Haught
(May 29, 2025 No. 102405-3)

- Primary analyst who created the toxicology report was a "witness against" defendant for purpose of confrontation clause
- Laboratory report is testimonial in nature and implicates confrontation clause
- Report was admitted to prove truth of the matter asserted at trial, violated confrontation clause when reviewing toxicologist testified instead of primary analyst
  - *Lui* is no longer good law
  - Prosecutors are not permitted to rely on reviewing toxicologist
  - Bench scientist / Primary analyst relationship not before court … yet

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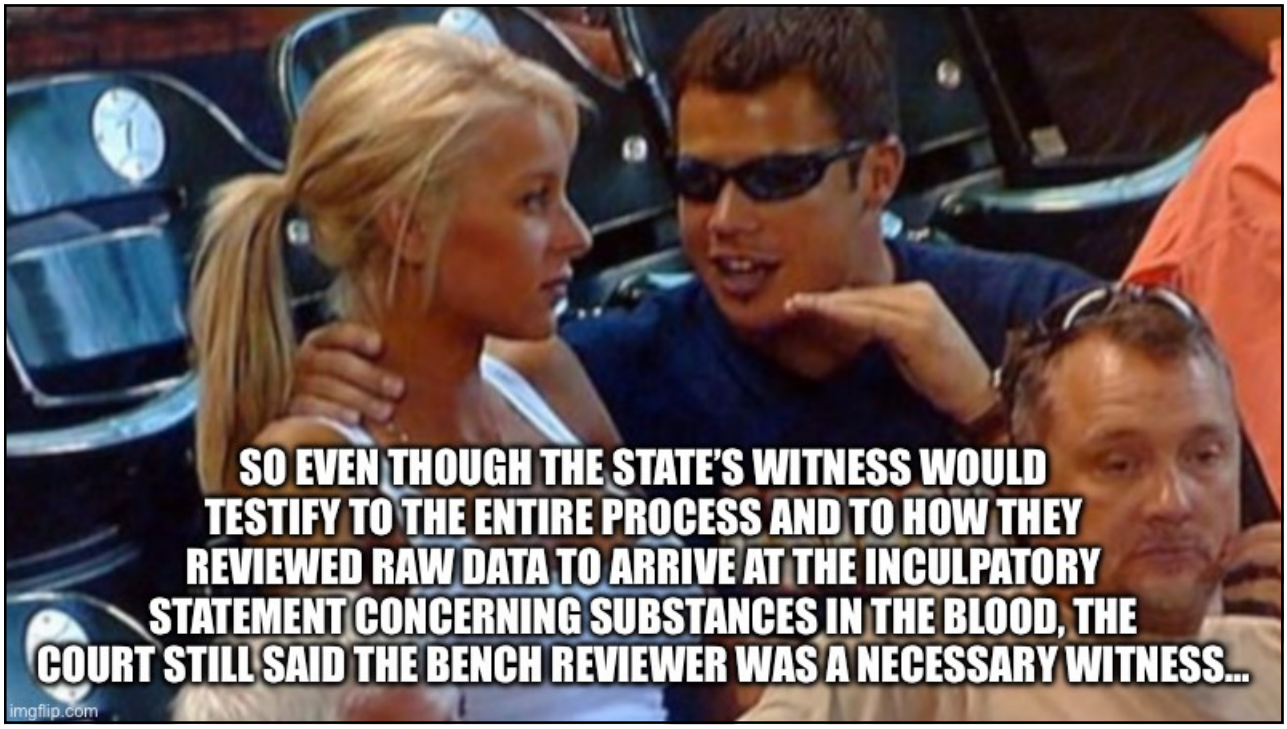

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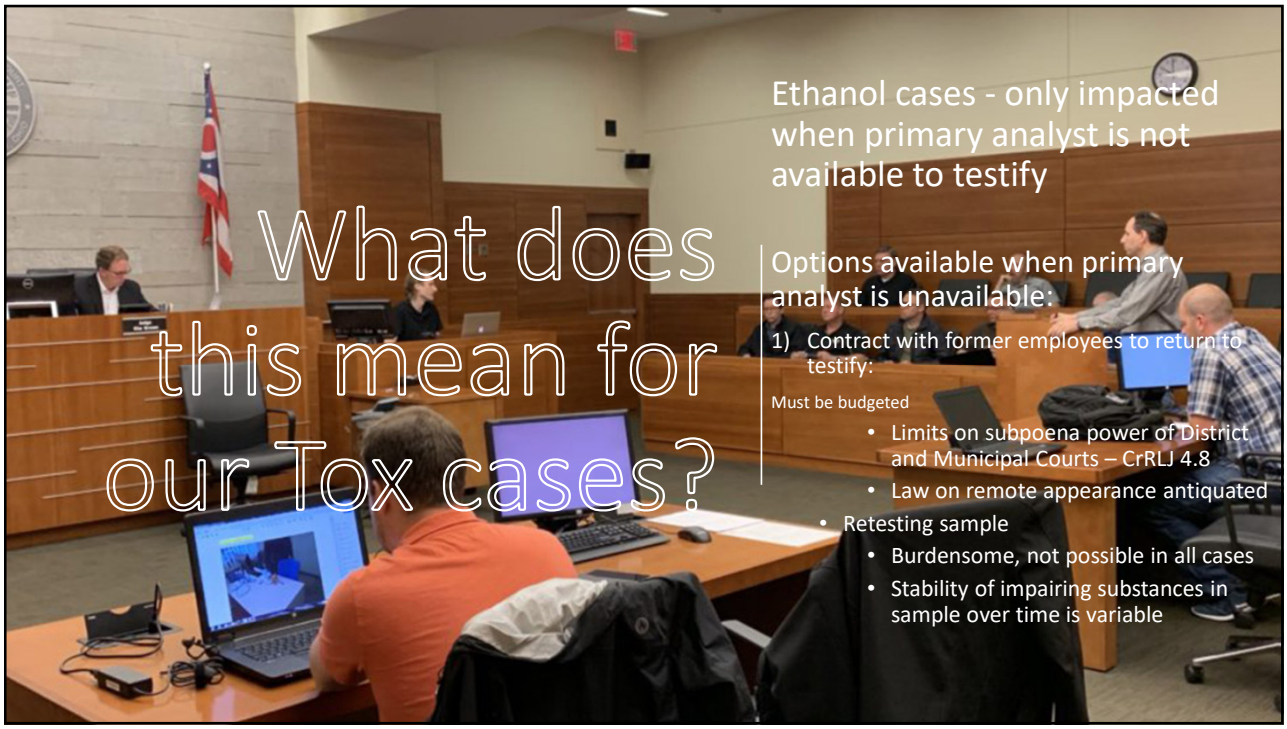

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What about *State v. Dodson*? (39755-6-III (2026))

- the Dodson court actually fences with the "testimonial" prong of the confrontation analysis.

"[o]ne might wonder if a trained, disinterested, and disinfected rhinoceros could then test blood samples."

- While the panel acknowledged the *State v. Lui* "witness against" standard for testimonial evidence which we've enjoyed in WA for over a decade
- The panel then decided to apply the "primary purpose" test of *Davis v. Washington* which was offered as one mere choice among three possible tests advanced by the plurality Supreme Court in *Williams v. Illinois*.

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Does This Affect Our BrAC Techs?

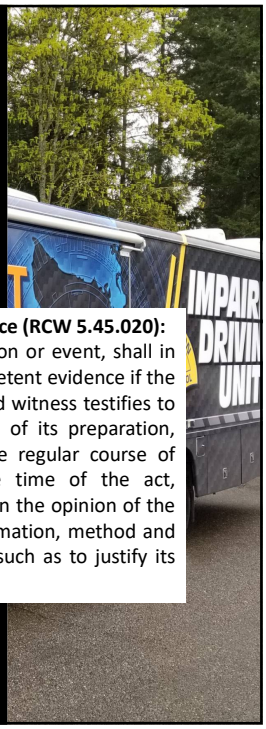
NO – Absolutely not

Quality Assurance worksheets are not confrontation documents. State v. Walker, 83 Wn. App. 89, 920 P.2d 605 (1996)

Maintenance records are not testimonial documents and do not evidence factual assertions. Further, they prepared in advance of defendant identification and do not implicate any "witness against" the defendant. *State v. Federov*, 183 Wn. App. 736 (2014)

Only the Breath Ticket implicates defendant. Any additional maintenance records go to reliability of the instrument itself." *State v. Wittenbarger*, 124 Wn.2d 467, 476 (1994)

Business records as evidence (RCW 5.45.020): A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.



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Does The Nature of the Proceeding Matter?

YES

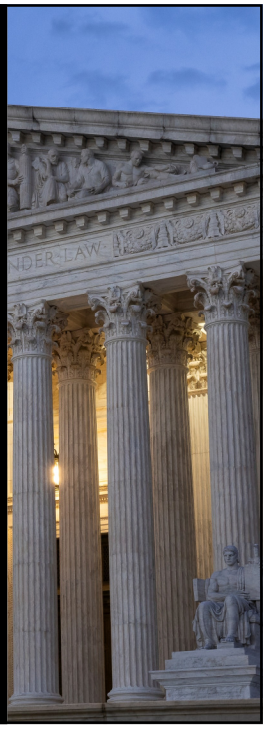
Trial 6th Amend Confrontation Clause

Pre/Post-Trial Hearings

6th Amend Confrontation only applies to trial, not pre-trial hearings – *State v. Fortun-Cebada*, 158 Wa. App. 158 (2010); *In re Barbert*, 58 Wa. 2d 719 (1975); *State v. Neslund*, 50 Wa. App. 531 (1988)

It does not apply to sentencing or post-trial hrgs. *State v. Strauss*, 199 Wa.2d 401 (1992).

ER Rule 104 – Preliminary Questions



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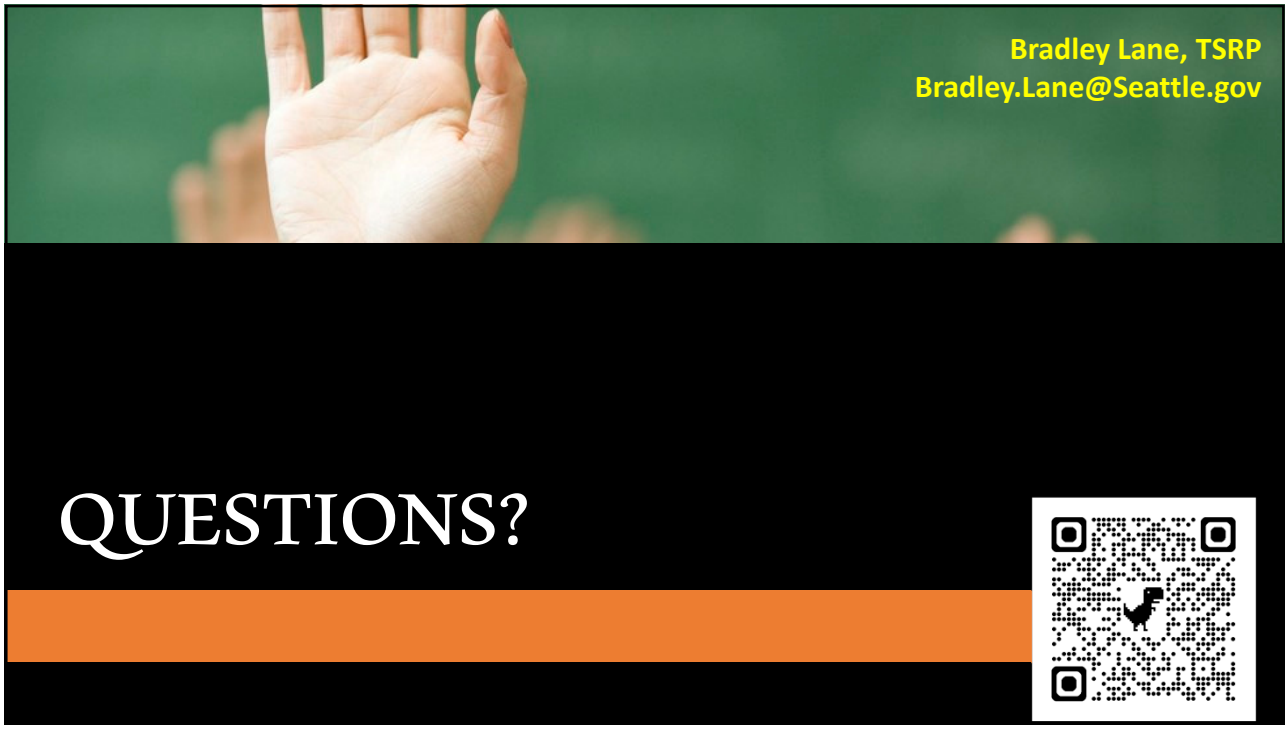

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