

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| THE PEOPLE OF THE STATE |) | Supreme Court |
| OF CALIFORNIA, |) | No. S180567 |
| Plaintiff and Respondent, |) | |
| |) | Court of Appeal |
| v. |) | No. G040808 |
| |) | |
| DANNY LEE SKILES, |) | Superior Court |
| Defendant and Appellant. |) | 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 REPLY BRIEF ON THE MERITS

SUPREME COURT
FILED

NOV 10 2010

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By appointment of the Supreme Court

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INTRODUCTION

Appellant submits the following arguments in reply to respondent's answer brief. The absence of any discussion in this reply brief of any specific points raised by respondent should not be viewed as a concession of the merits of respondent's arguments. Rather, it merely reflects appellant's view that the issue was adequately addressed in his opening brief.

ARGUMENT

Respondent contends that Exhibit 18 is an "original" under Evidence Code section 255, and thus is admissible as a certified copy of an official record under section 1530. (R.B. pp. 12-14.) Alternatively, respondent contends that Exhibit 18 is a "duplicate" under Evidence Code section 260, and thus is admissible under the Secondary Evidence Rule (section 1521). (R.B. pp. 14-22.) Both arguments suffer from the same flaws.

I. Respondent Fails to Explain Why This Court Should Ignore the Plain Meaning of 'Certified.'

Evidence Code section 1530 requires an "attested" or "certified" copy. Respondent's reliance on sections 255, 260, and 1521 ignores the plain meaning of "attested" and "certified." That plain meaning requires an original certification attached to the precise copy that the records custodian has examined and compared with the original. Thus, by definition, a custodian cannot certify the correctness of a copy the custodian did not

make and has never seen. (Evid. Code, § 1530; Black's Law Dictionary 127-128, 228 (6th ed. 1990); see A.O.B. pp. 14-16.)

Respondent suggests that adhering to the plain meaning of "certify" would be tantamount to "imply[ing] an exception [to the Secondary Evidence Rule] where the Legislature did not create one." (R.B. p. 21; see also R.B. pp. 26-27.) In fact, section 1530 is indeed an "exception," or, more precisely, a special provision allowing for the admission of official records without the testimony of a records custodian. Section 1530 was one of many exceptions to the old best evidence rule. When the Secondary Evidence Rule was enacted, many of those exceptions were repealed, but section 1530 was not. That indicates that the Legislature wanted the existing procedures under section 1530 to remain intact, including the plain-language requirement of an original certification. (Stats 1998, ch. 100, § 2 (SB 177) [repealing Evidence Code, §§ 1500-1511 and adding §§ 1520-1523]; see A.O.B. pp. 21-22.)

Respondent also argues that "California is uniquely positioned, because there has been a legislative determination" that the Secondary Evidence Rule should apply broadly, including to a copy of a certified copy. (R.B. pp. 26-27.) In fact, the history of section 1530 compels the exact opposite conclusion. Section 1530, having never been modified in any relevant way, resolves issues of secondary evidence, authentication, hearsay, and the right to confrontation under today's Secondary Evidence

Rule, exactly the way it did under the old best evidence rule: with an original certification attached to the precise copy that the custodian is certifying as genuine, accurate, and complete. (Stats 1998, ch. 100, § 2 (SB 177) [repealing Evidence Code, §§ 1500-1511 and adding §§ 1520-1523]; see A.O.B. pp. 17-22.)

Finally, it is not true, as respondent suggests, that “the application of the secondary evidence rule does not undermine, circumvent, or bar enforcement of section 1530.” (R.B. p. 21.) In fact, bootstrapping the Secondary Evidence Rule onto section 1530 eviscerates the meaning of certification because the copy that is being admitted is not the one the custodian compared with the original. For the same reason, section 255 cannot be used to avoid the certification requirement. If the Legislature had wanted to so radically alter the historical practice of “certification,” it would have done so more explicitly. (Stats 1998, ch. 100, § 2 (SB 177) [repealing Evidence Code, §§ 1500-1511 and adding §§ 1520-1523]; see A.O.B. pp. 17-22.)

**II. Evidence Code Sections 255 and 1521
Do Not Apply to the Protective Device of Certification.**

Respondent’s arguments ignore the key distinction between writings that provide substantive evidence (such court records relating to a prior conviction), on the one hand; and the procedural device of certification, on the other. While the Evidence Code does allow the use of modern copying

technologies, such permissiveness does not apply to certification, the protective device that, in the absence of live testimony, ensures reliability of the myriad “originals,” “duplicates,” and other secondary evidence that the Evidence Code makes presumptively admissible. (Evid. Code, § 1530; see A.O.B. pp. 23-25.)

The crucial difference between court records and a court clerk’s certification is further illuminated by the Supreme Court’s recent Confrontation Clause cases. (See A.O.B. pp. 38-46.) The underlying court records are non-testimonial and thus are not subject to Confrontation Clause scrutiny. (See *Whorton v. Bockting* (2007) 549 U.S. 406, 420 [127 S. Ct. 1173; 167 L. Ed. 2d 1].) The clerk’s certification, on the other hand, is testimonial hearsay subject to Confrontation Clause scrutiny because it is a solemn declaration made for the purpose of establishing some fact at a criminal trial. (See *Melendez-Diaz v. Mass.* (June 25, 2009) 129 S. Ct. 2527, 2538-2539 [majority opinion], 2546-2547, 2552-2553 [dissent] [-- U.S. --; 174 L. Ed. 2d 314].) (However, despite being testimonial hearsay, certification is “one narrow exception” to the confrontation requirement because the clerk’s authority is “narrowly circumscribed.” [*Melendez-Diaz, supra*, 129 S. Ct. at pp. 2538-1539.])

Certification, like the right to confrontation, is a procedural rather than substantive guarantee. What the Supreme Court has said about confrontation can be applied to certification as well: it “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.” (See *Crawford v. Washington* (2004), 541 U.S. 36, 61 [124 S. Ct. 1354; 158 L. Ed. 2d 177].) Therefore, the alleged reliability of faxed or photographic copies of certified copies is of no moment where the procedural guarantee of a proper certification has not been met. Where a certification takes the place of cross-examination at a criminal trial, the Confrontation Clause as well as the California Evidence Code requires an original certification attached to the precise copy that the custodian is certifying as genuine, accurate, and complete.

CONCLUSION

For the reasons argued here and in appellant’s opening brief, 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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WORD COUNT CERTIFICATE

I certify in accordance with Rule 8.520(c)(1) that this reply brief uses 13 point Times New Roman font and contains 1,077 words.



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