TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 27
Number 3 *Annual New York State Constitutional Issue*

Article 18

October 2011

City Court of New York, City of Watertown: People v. Carreira

Michael J. Puma
michael-puma@tourolaw.edu

CITY COURT OF NEW YORK
CITY OF WATERTOWN

People v. Carreira[1]
(decided January 12, 2010)

Raven Carreira was arrested and charged with driving while intoxicated and aggravated driving while intoxicated.[2] Carreira contended that her Confrontation Clause rights under the United States and New York Constitutions[3] were violated when the People failed to "produce the authors of [breathalyzer certification records] for cross-examination."[4] Therefore, the record's "admission and the . . . evidence [the records] support[ed]" should have been precluded.[5] The court granted the defendant's motion to preclude the evidence and held that the "simulator solution and calibration records [were] testimonial for Sixth Amendment purposes and . . . inadmissible absent live testimony by those who prepared them."[6]

The prosecution sought to prove Carreira's intoxication by using the evidence taken from the breathalyzer[7] administered to Carrei-

---

[1] 893 N.Y.S.2d 844 (Watertown City Ct. 2010).

[2] *Id.* at 844. *See also* N.Y. VEH. & TRAF. LAW § 1192(2)-(2-a) (McKinney 2010).

[3] The Sixth Amendment to the United States Constitution states, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Article I, section 6 of the New York Constitution states, in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her."

[4] *Carreira*, 893 N.Y.S.2d at 845.

[5] *Id.*

[6] *Id.* at 846, 851.

[7] *See* People v. Serrano, 539 N.Y.S.2d 845, 847 (Kings Cnty. Crim. Ct. 1989).

> The Smith & Wesson Model 900A breathalyzer uses a photometric system which traps a measured sample of deep lung air from the suspect's breath and runs that sample through a . . . chemical solution . . . [which causes] a light-sensitive meter to move proportionately, thereby producing a result which . . . [is converted] into a BAC reading by a fixed scientific ratio.

Id.

ra, which registered a blood alcohol level of .23%.[8] In order to substantiate these results, the prosecution provided a lab analyst's written certification of the breathalyzer's proper functioning instead of his live testimony.[9] The certification stated that the breathalyzer had been inspected, maintained, and calibrated properly.[10] The People attempted to submit this evidence under New York's business records hearsay exception.[11] Under New York's business records exception, "[a]ny writing or record . . . made as a memorandum or record of any act . . . shall be admissible in evidence in proof of that act, transaction, occurrence, or event, if the judge finds that it was made in the regular course of any business."[12]

Mrs. Carreira filed a motion to preclude the analyst's affidavit and the breathalyzer results from evidence.[13] Carreira asserted, the evidence was subject to the Confrontation Clause because of its testimonial nature, and the failure to provide the authors of the certificates for cross-examination violated her right to confront the witnesses against her.[14]

The majority of New York State courts, post-*Crawford*, have held that certificates establishing the reliability of a breathalyzer "are nontestimonial [and not subject to confrontation] because they are not prepared specifically for use in court or in gathering incriminating information against a particular individual."[15] The courts explained that the records were created to ensure reliability, were neutral because they were not tested by law enforcement, and the results were recorded prior to an individual being charged with a crime.[16] In addition, the records are classified as "business records [because they are]

---

[8] *Carreira*, 893 N.Y.S.2d at 844.

[9] *Id.*

[10] *Id.* at 845.

[11] *Id.* (noting that the business records exception allows counsel to circumvent hearsay rules and submit evidence maintained in the regular course of business). *See* N.Y. C.P.L.R. 4518(a) (McKinney 2010).

[12] N.Y. C.P.L.R. 4518(a). The regular course of business is defined as "routine reflections of day-to-day operations [conducted]." People v. Rawlins, 884 N.E.2d 1019, 1028 (N.Y. 2008).

[13] *Carreira*, 893 N.Y.S.2d at 845.

[14] *Id.*

[15] *Id.* at 846-47.

[16] *See, e.g.*, People v. Brown, 918 N.E.2d 928, 931-32 (N.Y. 2009) (explaining that cross-examination of technicians on how they used typing machines to create reports would not provide any more "subjective analysis" than already provided).

created systematically pursuant to state statute . . . [and] are not aimed at a particular individual or prosecution."[17] Finally, the courts believe that "the records provide only indirect or foundational evidence against defendants; that is, evidence is only testimonial if it goes directly to establishing a fact used to prove [a] defendant's guilt, not indirectly to establish the reliability of the [breathalyzer]."[18] After the Supreme Court's most recent decision in *Melendez-Diaz v. Massachusetts*,[19] New York courts have produced starkly different results on this question. The courts have failed to reach a consensus as to whether breathalyzer certification records constitute testimonial evidence.[20]

After careful consideration, the court in *Carreira* granted the motion to exclude the evidence of the lab analyst's affidavit certifying the breathalyzer's proper functioning, reasoning that the records violated the Confrontation Clause.[21] The records were testimonial because the certification was " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use later at trial.' "[22] Also, the records in question were not atypical business records.[23] Although the certification of the breathalyzer was done in the regular course of business, the purpose of the certificates was "expressly for use in litigation" and lacked the "neutrality typical business records enjoy because they are created by law enforcement[,] . . . for law enforcement[,] . . . [and] not . . . by a third party truly indifferent to the outcomes of criminal prosecutions."[24] Although the court recognized that the creation of the certificates was mandated by law, the court believed "[t]hese records [were] not created for their own sake; rather, their entire purpose [was] to help provide reliable evidence for prosecuting DWI suspects."[25] The records were quintessential to establishing

---

[17] *Carreira*, 893 N.Y.S.2d at 847.

[18] *Id.*

[19] 129 S. Ct. 2527 (2009).

[20] *See, e.g.*, People v. DiBari, 2010 WL 432361 (N.Y. Just. Ct. Feb. 8, 2010).

[21] *Carreira*, 893 N.Y.S.2d at 846.

[22] *Id.* (citing *Melendez-Diaz*, 129 S. Ct. at 2532).

[23] *Id.* at 848-49.

[24] *Id. See* Palmer v. Hoffman, 318 U.S. 109, 111-13 (1943) (holding an accident report provided by a railroad company did not qualify for the business exception because the report was prepared specifically for litigation and not for the efficient and useful operation of the railroad).

[25] *Carreira*, 893 N.Y.S.2d at 848.

proof of DWI in court, and if they were not, then the records would not be necessary.[26] Lastly, the judge was concerned with fraudulent and inaccurate analysis and believed his decision would help maintain scientific integrity by holding incompetent or fraudulent analysts accountable to the court.[27] Therefore, the court granted the defendant's motion to preclude, and required the prosecution to produce the analysts who prepared the "simulator solution and calibration records."[28]

An exploration of the historical roots and underpinnings of the Confrontation Clause is a vital exercise into understanding how the Clause has evolved into its current state and how it is applied in the federal and New York State court systems. The concept of confronting one's accusers pre-dates colonization and stretches "back to Roman times."[29] "The Roman Governor Festus . . . [once] stated: 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.' "[30] Even during the most historically powerful reign of Churches and the Papacy, the right to face one's accuser remained intact.[31] More importantly, shortly after the ratification of the Constitution, one court held that "no man shall be prejudiced by evidence which he had not the liberty to cross[-]examine."[32] Furthermore, courts at times have granted criminal defendants even greater rights. For example, one such court went as far as preventing the admission of prior testimony, even after the party had an opportunity to cross-examine the witness.[33] This brief anecdotal account of the historical birth and development of the Confrontation Clause portrays a strong historical foundation, which

---

[26] *Id.*

[27] *Id.* at 849-50 (citing *Melendez-Diaz*, 129 S. Ct. at 2536).

[28] *Id.* at 846, 851.

[29] *See Crawford*, 541 U.S. at 43.

[30] Francis Hermann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 482 (1994). *See* Coy v. Iowa, 487 U.S. 1012, 1020 (1988), *superseded by statute*, 18 U.S.C.A. § 3509 (2010) (holding a screen placed in front of child abuse victims violated the confrontation clause because it prevented a face to face encounter with the accused).

[31] Hermann & Speer, *supra* note 30, at 522-23.

[32] State v. Webb, 2 N.C. 103, 104 (1794) (per curiam).

[33] State v. Houser, 26 Mo. 431, 440-41 (1858). *See* Finn v. Commonwealth, 26 Va. 701, 707-08 (1827) (holding prior testimony was inadmissible in criminal cases even if there was a previous opportunity to cross-examine).

exemplified the significance of the right to confrontation and the distrust for testimonial hearsay.[34]

Hearsay evidence[35] is limited by state rules and exceptions, which can be juxtaposed with the Confrontation Clause.[36] There are numerous types of hearsay evidence and their respective exceptions.[37] Generally, the hearsay rule requires that "no assertion offered as testimony can be received unless it is or has been open to test by cross-examination or an opportunity for cross-examination."[38] If the Confrontation Clause was read literally, every time hearsay evidence was admitted, cross-examination would be required; however, this is not the case.[39] While hearsay rules vary among jurisdictions,[40] they provide numerous exceptions, which allow for the admission of hearsay and enable parties to circumvent confrontation concerns.[41] In an attempt to redefine or restore rights granted to criminal defendants under the Confrontation Clause, the Supreme Court divided hearsay evidence into two distinct classifications—testimonial and non-testimonial.[42] Testimonial hearsay is governed by the Confrontation Clause, whereas non-testimonial hearsay evidence circumvents the clause.[43] This decision was cast down in the landmark case *Crawford v. Washington*.[44]

In *Crawford*, the United States Supreme Court attempted to

---

[34] *See Crawford*, 541 U.S. at 53-54.

[35] Hearsay evidence "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). *See* BLACK'S LAW DICTIONARY 327 (3d ed. 2006) (defining hearsay as "testimony that is given by a witness [putting forth] not what [they] know[] personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness").

[36] Ohio v. Roberts, 448 U.S. 56, 66 (1980) (citing California v. Green, 399 U.S. 149, 155 (1970)).

[37] *See* DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE FROM THE FEDERAL RULES TO THE COURTROOM 699 (2009) (stating the rules of evidence provide for "thirty different hearsay exceptions").

[38] BLACK'S LAW DICTIONARY 327 (3d ed. 2006).

[39] *Roberts*, 448 U.S. at 63. *See Green*, 399 U.S. at 166-67 (concluding the confrontation clause is not violated from out of court statements as long as the declarant was cross-examined); *see also* Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (recognizing that competing interests may warrant dispensing with confrontation at trial).

[40] *Roberts*, 448 U.S. at 62.

[41] BLACK'S LAW DICTIONARY 327 (3d ed. 2006).

[42] MERRITT & SIMMONS, *supra* note 37, at 723.

[43] *Id.*

[44] 541 U.S. at 34.

revive the Confrontation Clause's original intent and dispensed with twenty-five years of precedent by overturning *Ohio v. Roberts*.[45] The Court attempted to redefine the previous standard by holding that evidence which was testimonial was subject to the Confrontation Clause and evidence which was non-testimonial was admissible subject only to state or federal hearsay exceptions.[46] If a court determines that the evidence was an out of court statement "made for the purpose of establishing or proving some fact," then this may constitute testimonial evidence, thereby triggering the Confrontation Clause.[47] After establishing that an out of court statement has been made, the evidence is inadmissible unless the proponent can show that the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness.[48] The courts were no longer able to consider whether testimonial statements were admissible absent confrontation. However, the Court failed to provide a comprehensive definition of testimonial evidence by only listing examples 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."[49] The facts of this case provide interesting insight into the importance of the Confrontation Clause to criminal defendants.

In this watershed case, the defendant, Mr. Crawford, was arrested and charged with assault.[50] The police interrogated both him and his wife, an alleged accomplice to the assault.[51] The police were trying to determine whether Mr. Crawford's actions were truly moti-

---

[45] *See Roberts*, 448 U.S. at 65 (holding the Confrontation Clause did not bar admission of testimonial statements against a defendant if the statement bore significant "indicia of reliability"). Indicia of reliability is established when the "evidence falls within a firmly rooted hearsay exception [in the state]" or the hearsay is deemed to be "trustworthy." *Id.* at 66. The Court believed that the *Roberts* test led to unpredictable results and was too amorphous. *Crawford* 541 U.S. at 63. *See, e.g.*, Nowlin v. Commonwealth, 579 S.E.2d 367, 371-72 (Va. Ct. App. 2003) (holding the statement was reliable because it was made in police custody and against the defendant's interest). *But see* State v. Bintz, 650 N.W.2d 913, 918 (Wis. Ct. App. 2002) (holding a statement was reliable because the witness was not in custody and not a suspect).

[46] *See Crawford*, 541 U.S. at 59, 68.

[47] *Id.* at 51.

[48] *See id.* at 68.

[49] *Id.* at 51.

[50] *Id.* at 38, 40.

[51] *Crawford*, 541 U.S. at 38-39.

vated by self-defense.[52] Mr. and Mrs. Crawford provided differing stories on that point, raising the question of Mr. Crawford's guilt.[53] At trial, the State attempted to enter Mrs. Crawford's testimony describing the events which transpired during the assault.[54] Subsequently, Mr. Crawford objected, claiming Mrs. Crawford's testimony was forbidden without her husband's permission under Washington State Law; therefore, her testimony violated his Sixth Amendment right to confront the witnesses against him.[55] However, the court admitted the testimony, resulting in Mr. Crawford's conviction.[56]

On appeal, the Supreme Court reversed the state court, and held that testimonial evidence may only be admitted in accord with the Confrontation Clause, which requires that the witness appear at trial, or "the declarant [must be] unavailable [to testify], and only where the defendant has had a prior opportunity to cross-examine."[57] The Court felt the two opposing statements made by the Crawfords made it even more important that statements be tested because the "Clause's ultimate goal is to ensure reliability of evidence, [not discretionally or substantively] but . . . procedural[ly]" through cross-examination.[58]

Chief Justice Rehnquist, joined by Justice O'Connor, con-

---

[52] *See id.* at 39.

[53] *Id.*

[54] *Id.* at 40.

[55] *Id.* at 39-40. *See* WASH. REV. CODE ANN. § 5.60.060(1) (LexisNexis 2010) (stating a spouse or domestic partner cannot testify or be examined without the consent of the other).

[56] *Crawford*, 541 U.S. at 40-41.

[57] *Id.* at 59.

[58] *Id.* at 61. The Court explained that when statements are "interlocking" or ambiguous from a party or parties it is the process of cross-examination through which the truth can be pulled out. *Id.* at 65-67. The Framers of the Constitution would not have left cases up to open-ended balancing tests which can be subject to a lack of impartiality. *Id.* at 53-54, 67. Chief Justice Rehnquist questioned the belief that the Confrontation Clause barred testimonial statements, arguing that fluctuation in case law makes it hard to determine the framers original intent. *Crawford*, 541 U.S. at 72 (Rehnquist, J., concurring). *Compare* State v. Atkins, 1 Tenn. 229 (1807) (per curiam) (holding testimony was prohibited even after the witness was subjected to cross-examination), *with* King v. Eriswell, (1790) 100 Eng. Rep. 815, 819 (K.B.) (allowing the admission of ex parte testimony when the declarant was not available). Rehnquist also believed the Framers never intended for a hard and fast rule, explaining there were always exceptions to exclusion of hearsay and "[i]t is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled." *Crawford*, 541 U.S. at 73.

curred with the judgment.[59] Rehnquist's main concerns were that the new test would provide unnecessary benefits to the accused, prolong litigation, and fail to provide a specific definition of testimonial evidence which would cause problems with interpretation.[60]

To further illustrate Justice Rehnquist's concerns with *Crawford's* failure to provide a specific definition for testimonial evidence, just two years later, in *Davis v. Washington*,[61] the Court addressed whether statements made to a police officer were testimonial.[62] Although the Court in *Crawford* already established that the Confrontation Clause only applied to testimonial statements, *Davis* set the boundaries of statements made in emergency situations.[63]

During an assault, the victim contacted a 911 operator seeking emergency assistance.[64] Shortly thereafter, the assailant fled the home in anticipation of police support.[65] After the assailant fled, the victim provided additional information to the operator about the assailant and the events that transpired.[66] Before long, the police arrived at the victim's home and documented the events that occurred.[67] At trial, the officers took the stand and recounted the events which they witnessed at the scene of the alleged crime.[68] The victim failed to appear at trial and prevented the defendant from having an opportunity for cross-examination.[69] The Court held that "[statements made to police] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to [a] later criminal prosecution."[70]

---

[59] *Crawford*, 541 U.S. at 69.

[60] *Id.* at 75. *See* Mattox v. United States, 156 U.S. 237, 243 (1895) ("[T]he rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."). The Majority acknowledged its failure to provide a specific definition of testimonial, but argued that it was only a temporary problem, whereas the *Roberts* test caused permanent uncertainty. *Crawford*, 541 U.S. at 68 (majority opinion).

[61] 547 U.S. 813 (2006).

[62] *Id.* at 817.

[63] *Id. See also Crawford*, 158 U.S. at 68 (citing police interrogations as testimonial).

[64] *Davis*, 547 U.S. at 817.

[65] *Id.* at 818.

[66] *Id.* at 818.

[67] *Id.*

[68] *See id.* at 818-19.

[69] *See Davis*, 547 U.S. at 819.

[70] *Id.* at 822.

Therefore, after the assailant left the home and the assault ceased, any questions asserted by the 911 operator and answered by the victim were testimonial and inadmissible without an opportunity to cross-examine the victim/declarant.[71] Furthermore, the Court held that statements "are non[-]testimonial when made in the course of [a] police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[72]

Although the Court answered questions resolving problems associated with emergency situations, it failed to address statements made by laboratory personnel regarding evidentiary testing. In *Melendez-Diaz*, police officers, operating on a tip, detained and searched the defendant in a Kmart parking lot.[73] Their search revealed twenty-three bags of a substance resembling cocaine.[74] In order to identify the substance, the police department sent it to a lab for chemical analysis.[75] After chemical analysis, the lab confirmed the substance as cocaine.[76] At trial, the court allowed into evidence the forensic reports connecting the defendant to the cocaine seized by police officers.[77] The defendant objected to the admission of this evidence at trial, arguing that the Confrontation Clause "required the analysts [of the substance] to testify in person."[78] The Massachusetts court overruled the objection and admitted the evidence.[79] Subsequently, the defendant was convicted of distributing and trafficking cocaine.[80] The Appeals Court of Massachusetts affirmed and the Supreme Court granted certiorari.[81]

The majority of the Court believed that the documents in question "f[e]ll within the 'core class of testimonial statements' [described in *Crawford*]."[82] The Court provided two main arguments

---

[71] *Id.* at 828-29.
[72] *Id.* at 822.
[73] 129 S. Ct. at 2530.
[74] *See id.*
[75] *Id.*
[76] *Id.*
[77] *See id.* at 2531.
[78] *Melendez*-Diaz, 129 S. Ct. at 2531.
[79] *See id.*
[80] *Id.* at 2530.
[81] *Id.* at 2531.
[82] *Id.* at 2532 (quoting Crawford, 541 U.S. at 51).

for its conclusion. First, the documents were clearly affidavits used for "establishing or proving some fact."[83] The evidence from the laboratory identifying the substance and the weight of the cocaine were necessary for establishing a prima facie case against the defendant.[84] Second, it was reasonable to assume the analysts knew the production of the laboratory results were for prosecution "at a later trial," and therefore were testimonial.[85]

Justice Scalia, writing for the majority, furthered this analysis and retorted the dissent's main concerns. First, he explained that confrontation was necessary to weed out incompetent and fraudulent analysts because scientific testing was not always neutral or reliable.[86] In addition, the majority disagreed that these results could be admitted under the business records exception, arguing that the exception was inapplicable because the business activity performed was producing evidence for use at trial.[87]

Although the majority addressed some concerns, it once again would leave courts wrestling with interpretation. The Court refused to provide a bright line rule in determining who during the analytical process may be subject to cross-examination.[88] The implications of

---

> [These statements include] 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 . . . [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51-52 (internal quotations omitted) (citations omitted).

[83] *Melendez-Diaz*, 129 S. Ct. at 2532 (citing *Crawford*, 541 U.S. at 51).

[84] *Id.* at 2531.

[85] *Id.* at 2532.

[86] *Id.* at 2536. The dissent argued that the cross-examination of analysts retains little value, explaining that " 'one would not reasonably expect a laboratory professional . . . to feel quite differently about the results of his scientific test by having to look at the defendant.' " *Id.* at 2536. The Majority stated that " '[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.' " *Melendez-Diaz*, 129 S. Ct. at 2536 (quoting *Crawford*, 541 U.S. at 62) (internal quotation marks omitted).

[87] *Id.* at 2538.

[88] *Id.* at 2532. This has created confusion amongst the courts, including those in New York. *See, e.g.*, United States v. Boyd, 686 F. Supp. 2d 382, 385-86 (S.D.N.Y. 2010) (explaining "[t]he limits of *Melendez-Diaz* are still being developed[,]" and holding "[o]nly the final [critical] stage of the DNA testing involved the type of analytical judgment for which a certificate would be an inadequate substitute for in-court testimony"); *see also* United States v. Darden, 656 F. Supp. 2d 560 (D. Md. 2009) (upholding admission of toxicology report where supervising toxicologist who reviewed data and reported conclusion testified at trial).

this particular failure are relatively unknown, as they have gone fairly unaddressed by the Second Circuit Court of Appeals; however, they may provide an interesting opening for debate amongst prosecutors and defense attorneys.

The United States Court of Appeals for the Second Circuit has failed to address the implications of the Supreme Court's decision in *Melendez-Diaz*. In *United States v. Feliz*,[89] decided prior to *Melendez-Diaz*, the court decided that autopsy reports were not testimonial.[90] Similar to certification of breathalyzers, the government entered nine autopsy reports performed by medical professionals into evidence as business records.[91] The defendant argued that the admission of those documents violated the Confrontation Clause because he was unable to cross-examine the medical examiners who prepared those documents.[92] The district court rejected that argument and the court of appeals affirmed.[93] The court explained that a more limited definition of testimonial is appropriate and the fact that a "medical examiner [would] reasonably . . . expect [that] autopsy reports may be available for use at trial . . . cannot be dispositive on the issue of whether those reports are testimonial."[94] Interestingly, *Feliz* still holds precedential value in the Second Circuit; however, district courts have expressed reservations about how *Melendez-Diaz* impacts this decision.[95]

The Supreme Court has caused some discontent and confusion after ushering in a new standard; a standard which failed to provide a bright line rule for the justiciability of Confrontation Clause

---

[89] 467 F.3d 227 (2d Cir. 2006), *cert. denied sub nom.* Erbo v. United States, 549 U.S. 1238 (2007).

[90] *Id.* at 238.

[91] *Id.* at 229.

[92] *Id.*

[93] *Id.* at 229, 238.

[94] *Feliz*, at 235.

[95] *See* Vega v. Walsh, No. 06-CV-6492 (ARR) (JO), 2010 WL 1685819, at *29 n.8 (E.D.N.Y. Apr. 22, 2010).

> Although *Melendez-Diaz* is unquestionably in tension–and probably irreconcilable–with *Feliz*, it neither explicitly overruled the latter case nor made its holding untenable. As a result, even if the court concludes (as I do) that applying the rule of *Melendez-Diaz* would forbid the admission of [this] testimony, it must nevertheless apply *Feliz* unless and until a higher court explicitly reaches [the] same conclusion.

Id.

issues. Although the Supreme Court has remedied some areas of major concern, it seems content dealing with issues as they arise. Ostensibly, federal courts will have to adjudicate grey areas within their best interpretation of the spirit of *Crawford* until the Supreme Court decides to take further action. Despite the confusion and frustration, this standard does not stop at federal courthouse doors. State courts, particularly in New York, fair no better and continue to find themselves confronted with the same enigma.

In *Pointer v. Texas*,[96] the United States Supreme Court made the Sixth Amendment applicable to the states in criminal prosecutions.[97] Consequently, after *Crawford* and *Melendez-Diaz*, New York courts have applied the new rules with conflicting results. The new standard created confusion in the courts because New York's business record hearsay exception conflicted with the Court's statement that " 'pretrial statements that declarants would reasonably expect to be used prosecutorially' " constituted testimonial evidence subject to confrontation.[98] This confusion has caused disagreement amongst New York courts as to whether the records are indeed business records, and if so, whether they still may be subject to confrontation demands.

In *People v. Orpin*,[99] the court addressed a defendant charged with driving while intoxicated.[100] "[T]he prosecution [entered] into evidence [] the record of inspection, maintenance, and calibration prepared by the New York Division of Criminal Justice Services for the [breathalyzer] . . . and [] a certification of analysis" of the solution used in the breathalyzer.[101] The prosecution argued that the evidence

---

[96] 380 U.S. 400 (1965).

[97] *Id.* at 407.

[98] *See* People v. Orpin, 796 N.Y.S.2d 512, 515-16 (Irondequoit J. Ct. 2005) (quoting *Crawford*, 541 U.S. at 51) (expressing a difficulty in making a decision because the question presented satisfied both opposing tests in *Crawford*); *see also* People v. Heyanka, 886 N.Y.S.2d 801, 802 (Suffolk Cnty. Dist. Ct. 2009) (holding the breathalyzer reports were inadmissible until the People produced the technician for cross-examination and that holding certificates "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[]' are testimonial in nature") (citing *Melendez-Diaz*, 129 S. Ct. at 2532). The court reasoned, because the reports were prepared with a "reasonable expectation that they would be used in [a] criminal prosecution[]" they were testimonial in nature and subject to the confrontation clause. *Id.*

[99] 796 N.Y.S.2d 512.

[100] *Id.* at 513.

[101] *Id.* (noting that the evidence was entered to bolster the reliability of the results obtained from the breathalyzer).

was non-testimonial and admissible via the business record rule exception.[102] The defense countered, arguing the evidence was testimonial and a violation of the Sixth Amendment's Confrontation Clause.[103] The court struggled to rectify New York's business records exception and the new standard promulgated in *Crawford*.[104] The records satisfy the business records exception; however, the court interpreted the Supreme Court's concern for government involvement "in the production of testimony with an eye toward trial" as indicating "that business records are subject to the same confrontation demands as other out-of-court statements."[105] Based on this premise and an objective analysis, the court believed that the declarants knew these certificates would be used in criminal prosecutions; hence, the statements are testimonial and implicate the Confrontation Clause.[106] Furthermore, the court believed "[s]ubjecting the persons who conduct these calibration tests to the 'crucible of cross-examination' will help ensure the reliability of their work."[107]

In a direct rebuke of the *Orpin* decision, the District Attorney in *Green v. DeMarco*[108] asked the court to declare that "the use of government-generated business records to establish the foundation requirements for the admission of breathalyzer test results d[id] not violate the Confrontation Clause."[109] The District Attorney argued that future DWI cases would be dismissed because it was nearly impossible to furnish the witnesses who certified the breathalyzer's proper functioning.[110] Upon making its determination, the court focused on *Orpin's* reasoning that the evidence was testimonial because the certification was done primarily for purposes of litigation.[111] The

---

[102] *Id.* at 514.

[103] *Id.*

[104] *See Orpin*, 796 N.Y.S.2d at 516.

[105] *Id.* at 516.

[106] *Id. See also* Shiver v. State, 900 So. 2d 615, 617 (Fla. Dist. Ct. App. 2005) (finding the admission of an affidavit proving the breathalyzer's proper functionality violated *Crawford* because the affidavit contained statements that would reasonably be expected to be used prosecutorially).

[107] *Orpin*, 796 N.Y.S.2d at 517 (noting there had been "recent problems even with reliability of the FBI laboratory's analyses").

[108] 812 N.Y.S.2d 772 (Sup. Ct. 2005).

[109] *Id.* at 774.

[110] *Id.* at 773-74.

[111] *Id.* at 781. *See also* People v. Foster, 261 N.E.2d 389, 391-92 (N.Y. 1970) (holding that if records are required by the business and made for reasons other than litigation, the business exception still applied).

court disagreed, finding the records were clearly business records because their sole purpose was not for litigation; the records were primarily produced for "quality assurance."[112] Furthermore, the breathalyzer certificates were neutral because they only related "to the operation of the breath test instrument and the reference solution used to calibrate it," and were not created for any prosecution of a particular defendant.[113] Therefore, for all the foregoing reasons, the court held that the certification of the breathalyzer's functionality did not implicate the Confrontation Clause.[114] The majority of New York courts are in accord with *DeMarco*.[115]

Although the previous cases discussed have involved criminal defendants charged with driving while intoxicated, the New York Court of Appeals decided a case with strikingly similar facts to those of *Melendez-Diaz*. In *People v. Brown*,[116] the court held that neutral scientific reports that did not accuse the defendant or establish a fact necessary to prove the defendant's guilt were non-testimonial.[117] The victim of a rape entered the hospital for medical treatment.[118] After an examination, the staff prepared a rape kit which was sent for testing to the Medical Examiner's office.[119] After the rape kit was processed and recorded, it registered a cold hit an astounding "nine years after the crime."[120] Subsequently, the police located the defendant and charged him with "two counts of sodomy in the first degree,

---

[112] *DeMarco*, 812 N.Y.S.2d at 782 (holding the state mandated certification of materials is a legitimate business practice even in the absence of litigation).

[113] *Id.* at 783. *See, e.g.*, People v. Rogers, 780 N.Y.S.2d 393, 397 (App. Div. 3d Dep't 2004).

[114] *DeMarco*, 812 N.Y.S.2d at 782-83.

[115] *See* People v. Rawlins, 884 N.E.2d 1019 (N.Y. 2008); People v. Cratsley, 653 N.E.2d 1162 (N.Y. 1995); People v. Lebrecht, 823 N.Y.S.2d 824 (App. Term 2d Dep't 2006); People v. Harvey, No. 09100144, 2010 WL 376935 (Niagara Cnty. Sup. Ct. Feb. 4, 2010); People v. Brooks, No. 23961C/07, 2008 WL 4934628 (Bronx Cnty. Sup. Ct. Nov. 19, 2008); People v. Kanhai, 797 N.Y.S.2d 870 (Queens Cnty. Crim. Ct. 2005); People v. Krueger, 804 N.Y.S.2d 908 (Niagra Cnty. Just. Ct. 2005); People v. Mellott, 809 N.Y.S.2d 483 (Monroe Cnty. Just. Ct. 2005).

[116] *Brown*, 918 N.E.2d at 928.

[117] *Brown*, 918 N.E.2d at 931 ("The [r]eport . . . was not 'testimonial' under such circumstances because it consisted of merely machine-generated graphs, charts and numerical data. There were no conclusions, interpretations or comparisons apparent in the report since the technicians' use of the typing machine would not have entailed any such subjective analysis.").

[118] *Id.* at 928.

[119] *Id.*

[120] *Id.* at 928-29.

kidnapping in the second degree, three counts of assault in the second degree and endangering the welfare of a child."[121] At trial, the People called a forensic biologist who examined the defendant's file and used that data to link the defendant to the crime.[122] Then, the People moved to enter the reports into evidence under the business records exception.[123] However, the defendant objected and argued that his inability to cross-examine the analyst who had performed the test constituted a violation of his right to confrontation.[124] The court affirmed the lower court's decision to allow the admission of the records under the business records exception.[125] The court reasoned that the analysis performed by the technicians was neutral because it did not require any discretion and a suspect was not yet named during its undertaking.[126] Furthermore, the technicians would not have been able to offer anything additional to the case, and the proper person with discretion over the data was available for cross-examination.[127]

Brown was an acknowledgement that *Melendez-Diaz* broadened the breadth and scope of testimonial hearsay evidence. Although the defendant in *Brown* was unable to cross-examine the original analyst who performed the work, he was able to cross-examine the medical examiner who interpreted the results.[128] This might lead to the conclusion that *Brown* was less about the debate of evidence with an eye toward prosecution being testimonial and more of a debate about whom down the chain of analysts may be subject to cross-examination.[129]

Additionally, *Brown* relied upon the rationale that instrument

---

[121] *Id.* at 929.

[122] *Brown,* 918 N.E.2d at 931.

[123] *Id.* at 930.

[124] *Id.* at 929.

[125] *Id.* at 933.

[126] *Id.* at 931-32.

[127] *Brown*, 918 N.E.2d at 931-32. *See also* People v. Kelly, No. 2007NY078228, 2009 WL 5183779, at *3-4 (N.Y. City Crim. Ct. Dec. 22, 2009) (holding that breathalyzer calibration tests were non-testimonial because they were performed prior to the defendant's arrest, were not prepared for a specific defendant, and were scientifically neutral because the certifications were "devoid of any opinions or subjective conclusions"); People v. Lent, 908 N.Y.S.2d 804 (App. Term 9th and 10th Jud. Dists. 2010).

[128] *Brown*, 918 N.E.2d at 931-32.

[129] *Id.* at 932 (stating "not everyone 'whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case' " (quoting *Melendez-Diaz*, 129 S. Ct. at 2532)).

testing is scientifically neutral.[130] This reliability argument has been disposed of by the Supreme Court, stating, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[131] The neutrality argument contains further flaws. Under this argument, a police officer should not be subject to cross-examination. The officer's administration and recordation of the breathalyzer is a neutral non-discretionary procedure. The officer's job is to administer a test and record a numerical signal, by which a determination is made based upon the law—whether the number registers above or below legal limits. The officer does not have the ability to determine whether the breathalyzer is in working order, because that has been certified for the officer by scientific professionals. Therefore, arguably this procedure is more neutral and/or reliable than the scientific procedure used to analyze a breathalyzer. Furthermore, the test to assure proper performance of the device is essential to "establishing or proving [the] fact" that the device registered the correct reading and therefore, based upon that reading, the defendant is guilty.[132] The certification records are a clear link necessary to proving the defendant's offense, without it the results would lack necessary credibility.

After a thorough analysis of *Melendez-Diaz*, it becomes evident that *Carreira* much more closely interprets the true intent of the Supreme Court. First, both the records certifying the breathalyzer and the certificates of forensic analysis in *Melendez-Diaz* are affidavits and clearly within one of the definable classes of testimonial statements set forth by *Crawford*.[133] In addition, the majority stated that the affidavits were " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' "[134] The Court described this application as "straightforward."[135] If the same straightforward analysis was applied to the certification of breathalyzer functionality, it is evident that analysts would believe their statements would be used at trial sometime in the future, because the instruments they are

---

[130] *Id.* at 931-32.

[131] *Crawford*, 541 U.S. at 62.

[132] *See Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 51).

[133] *See Crawford*, 541 U.S. at 51-52.

[134] *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 52) (internal quotation marks omitted).

[135] *Id.* at 2533.

testing are used to determine whether a defendant does or does not have the legal limit of alcohol in his or her system. If the defendant has been charged, the affidavit certifying the breathalyzer's suitability for police use will be used at trial. Otherwise, these documents are unnecessary; if the breathalyzer was not certified for proper use, it would never end up in the hands of police officers. However, even if testimonial, it is argued that the document is admissible under the hearsay exception for business records.

This is one of the main arguments for the document's admissibility. Proponents argue that the records certifying breathalyzers are admissible under the business records exception because the records are produced through a mandate by the state to obtain quality assurance of their utility. Although these records are made in the regular course of business, the majority in *Melendez-Diaz* stated the records were not admissible if the "regularly conducted business activity is the production of evidence for use at trial."[136] While there may be quality assurance purposes, the main function of the record keeping is to provide documentation for the court as a certification of the criminal result. The State has an interest in obtaining successful prosecution of drunk drivers. Therefore, the creation of a statute does not entitle an immediate presumption of business function, and the People cannot hide behind quality assurance to circumvent their true intention of producing evidence for the successful conviction of DWI charges at trial. If the instrument had not been certified, the evidence would hold no weight and there would most likely be no conviction. Also, it is important to recognize that Justice Scalia never pronounced that all business records were non-testimonial.[137]

Justice Scalia did acknowledge that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because . . . [they are] not for the purpose of establishing or proving some fact at trial."[138] The question that New York courts struggle with is whether the sole purpose of the records must be to prove some fact at trial, or whether another legitimate purpose trumps the record's testimonial status. In analyzing the breathalyzer records, it is clear that two purposes may exist. However, it is also abundantly clear how much

---

[136] *Id.* at 2538.

[137] *See Crawford*, 541 U.S. at 56.

[138] *Melendez-Diaz*, 129 S. Ct. at 2539-40.

weight and power these certificates provide to prosecutors at trial. Acknowledging this factor should push the dial towards rendering these records as testimonial evidence.

Once the records have been classified as testimonial, the proponent of the evidence must produce a witness, however, a large question still remains. Even if New York courts were to determine that breathalyzer certification records were testimonial, *Melendez-Diaz* still fails to answer just who during the analytical process is subject to cross-examination. This is a critical question that deserves serious consideration. Some courts may only allow a supervisor to testify; yet that practice may fail to catch integral mistakes unnoticed beneath his or her control. However, as the Court stated, not everyone involved in the process must be produced for cross-examination. This is a reasonable determination, but one which still leaves several questions to be answered.

Any rigid standard is likely to be ineffective. The best approach may be a case by case analysis. Some cases may only require a supervisor or even a single technician, where others may have involved multiple parties in which each party's role should be carefully scrutinized. The judge should examine the process by which the substance or procedure in question was performed. Then, there should be a determination made about which technicians were involved in the most intricate steps of the analysis or the steps most prone to error. The technician or technicians involved in these steps should appear for testimony. At the very least, the prosecution should be required to produce one supervisor who has approved the handling of the process, and a technician who was most heavily involved in that process. This will ensure more accurate results and convictions.

Critics may argue that the cross-examination of officers from Albany who had tested the solution and calibrated the breathalyzer is impossible.[139] This can easily be remedied through legislation which creates an organized process of connecting each analyst and/or technician to each breathalyzer tested. Elected officials and bureaucratic agencies are highly equipped and certainly experienced at carrying out such a task.

Beyond legal arguments, allowing criminal defendants to confront certified records prepared through laboratory analysis consti-

[139] *See, e.g., DeMarco*, 812 N.Y.S.2d at 773 (noting that the District Attorney contended it was nearly "impossible for him to produce . . . the required witnesses from Albany").

tutes sound public policy. Many courts have enumerated this policy in their decisions.[140] Although it is true that the certification of breathalyzers does not involve forensic science, the procedures used to determine the proper chemical levels in the instrument do require some degree of scientific discretion and expertise. Akin to any scientific testing regardless of field, the sciences being performed will always be subject to human error. The level of difficulty in attaining legal checks on scientific testing is a small consideration when the calculations subject to error are determining the preservation or deprivation of liberty. Without confrontation, there exists no check on shoddy work or human error and may foster an environment more susceptible to mistakes. These mistakes are certainly possible and will lead to false convictions. The introduction of the availability of cross-examination of officers who perform this work for New York State will provide a level of accountability and a higher level of care into the certification. "[T]he Confrontation "Clause is [a] deterrent . . . upon falsification of records and reports, and [it provides] corresponding encouragement of careful recordkeeping and documentation of evidence."[141] This is an enormously large and sound public policy concern providing substantial weight against saving these analysts from the crucible of cross-examination.

Although *Carreira* has provided a significant amount of controversy, the likelihood of it influencing other cases within New York State is still relatively unknown. The case takes clear positions with sound parallelism to *Melendez-Diaz* which hopefully can guide future cases to similar results. Unfortunately, the decision is in a growing minority. Post *Melendez-Diaz*, the majority of New York courts continue to hold that the business records exception is applicable, arguing that the records sole purpose is to ensure quality performance of the device and not to be used in criminal prosecutions.[142] The court in *Carreira* should be commended for its eloquent criticism on this issue. Many constitutional triumphs have started with a bold stance challenging customary attitudes, interpretations, and opinions.

The Sixth Amendment's Confrontation Clause remains an integral part of the truth seeking process in our court system. A fun-

---

[140] *See Melendez-Diaz*, 129 S. Ct. at 2536-37.

[141] Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 501 (2006).

[142] *See Kelly*, 2009 WL 5183779 at *3; *Harvey*, 2010 WL 376935 at *3; *DiBari*, 2010 WL 432361 at *3; *Lent*, 908 N.Y.S.2d at 809.

damental question asks whether the decision in *Crawford* has maintained, improved, or hampered its purpose. Interestingly enough, the Court attempted to provide a more consistent standard which embodied the framers' original intent. Although the Supreme Court attempted to provide a clearer standard with more consistent results, it has failed to answer the question of what is testimonial evidence.[143] The Court did list some examples, 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."[144] However, by leaving the question open ended, the Court contradicted its own criticism of the *Roberts* test, which it believed was too discretionary, subjective, and ultimately left too much in the hands of the justices. The failure to provide a strict definition of testimonial hearsay has once again put discretion and subjectivity in the hands of those whom the test was deemed to take it out of.

Even with the decision's shortcomings, it is still a profoundly better standard than the *Roberts* test. This new test provides a reinvigorated life into our judicial system through a renewed trust in the process—a process that was designed to get to the truth. The critics will argue that by taking more discretion out of the hands of the justices, the *Crawford* standard will not allow as much evidence to be admitted without cross-examination and therefore prolong an already long and arduous process. This criticism may be correct, but it is misguided. The judicial system offers much frustration, not unlike our political institutions, because of its slow reach to results. However, when someone's liberty is at stake, time is hardly something to be regarded higher than a judicious result.

Michael J. Puma[*]

[143] *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' ").

[144] *Id.* at 51.

[*] I would like to thank my family, friends, and especially Stefanie for all their love, patience, and support through the duration of this process and my law school career. Without them none of my accomplishments would have been possible.