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An Unappealing Decision for New York DWI Defendants - People v. Pealer

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AN UNAPPEALING DECISION FOR NEW YORK DWI DEFENDANTS

SUPREME COURT OF NEW YORK APPELLATE DIVISION, FOURTH DEPARTMENT

People v. Pealer[1]
(decided November 18, 2011)

Robert Pealer appealed his conviction of two counts of felony driving while intoxicated, (*hereinafter* "DWI")[2] on grounds that the submission of "breath test documents"[3] into evidence violated his Sixth Amendment right of confrontation.[4] Pealer argued that the breath test documents were testimonial in nature.[5] He alleged that by allowing the documents into evidence, the trial court deprived him of his Sixth Amendment right to confront the witnesses against him.[6] The Appellate Division unanimously held that the breath test documents were non-testimonial; and therefore, their admission into evidence was not a violation of Pealer's rights.[7]

Officer Kirk Crandall stopped Robert Pealer on October 19, 2008 at approximately 1:28 A.M., because his vehicle had a sticker on one of its windows in violation of Vehicle and Traffic Law Section 375.[8] The Officer had also previously received an anonymous

[1] 933 N.Y.S.2d 473 (App. Div. 4th Dep't 2011).

[2] Pealer was charged under N.Y. VEH. & TRAF. LAW § 1192[2] (McKinney 2009), and N.Y. VEH. & TRAF. LAW § 1193[1][c][ii] (McKinney 2010). *Id.* at 474.

[3] *Id.* (Breath test documents refers to both the breath test calibration and simulator solution certificates, both of which are "used to establish that the breath test machine used in a particular case is accurate, a necessary foundational requirement for the admission of breath test results.") *Id.*

[4] *Id.* at 474; the Sixth Amendment in pertinent part states: "to be confronted with the witnesses against him." U.S. CONST. amend. VI.

[5] *Pealer II*, 933 N.Y.S.2d at 474.

[6] *Id.*

[7] *Id.* at 475.

[8] N.Y. VEH. & TRAF. LAW § 375 (McKinney 2012).

tip that Pealer was driving while intoxicated.[9] While speaking with Pealer, Officer Crandell smelled an odor of alcohol, and noticed that Pealer's eyes were red and glassy and his speech was impaired.[10] Pealer was then given several sobriety tests, including a preliminary alcohol screen, which he failed.[11] Officer Crandell then placed Pealer under arrest for DWI.[12] Upon being transported to the Sheriff's Office, Pealer agreed to submit to a breath test.[13] After a bench trial, Pealer was convicted of two counts of felony DWI.[14]

On appeal, Pealer argued that the trial court erred in admitting the breath test documents into evidence.[15] The error alleged was that by admitting the breath test documents into evidence, without allowing Pealer the opportunity to cross-examine the examiner who certified the documents, was a violation of his Sixth Amendment right of confrontation.[16] However, the Appellate Division unanimously held that the breath test documents were non-testimonial, because "the only relevant fact established by the documents is that the breath test instrument was functioning properly" and "[t]he functionality of the machine, however, neither directly establishes an element of the crimes charged nor inculpates any particular individual."[17] The Appellate Division reasoned that because the documents were non-testimonial, Pealer's Sixth Amendment right to confrontation was not violated, under the Supreme Court's holding in *Crawford v. Washington*,[18] and the New York Court of Appeals' holding in *People v. Brown*.[19]

[9] *Pealer I*, 899 N.Y.S.2d 62, 1 (Yates Co. Ct. 2009).

[10] *Id.*

[11] *Id.* at 2.

[12] *Pealer II*, 933 N.Y.S.2d at 474. Note that Pealer challenged the submission of the sample he provided collaterally by way of challenging the documents that certified the machine was functioning properly at the time he submitted his sample. *Id.*

[13] *Id.*

[14] *Pealer II*, 933 N.Y.S.2d at 474.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 474-75.

[18] 541 U.S. 36 (2004).

[19] *Pealer II*, 937 N.Y.S.2d at 475; People v. Brown, 918 N.E.2d 927 (N.Y. 2009). *See generally* Crawford v. Washington, 541 U.S. 36 (2004).

I. THE FEDERAL APPROACH TO THE CONFRONTATION CLAUSE

The seminal case of modern Confrontation Clause jurisprudence is *Crawford v. Washington*.[20] In *Crawford*, the Supreme Court held that testimonial statements by witnesses, who do not appear in court, cannot be introduced into evidence without violating a defendant's Sixth amendment right to confrontation.[21] In *Crawford*, defendant Michael Crawford was charged with assault and attempted murder.[22] At trial he claimed that he stabbed the man in self-defense.[23] At issue was the recorded statement Crawford's wife made to investigators shortly after the stabbing.[24] At trial, the prosecution used this ex parte statement against Crawford and it served to undermine his claim of self-defense.[25] Crawford objected to the use of his wife's statement as a violation of his Sixth Amendment right to confrontation, because he was unable to cross-examine her.[26] However, the trial court allowed her statement into evidence under the *Ohio v. Roberts*[27] exception to the Confrontation Clause.[28] After a jury trial, Crawford was found guilty of aggravated assault with a deadly weapon.[29]

The Supreme Court granted certiorari to address the question of whether the use of a testimonial statement, which conforms to the *Roberts* exception, violates an accused's Sixth Amendment right of confrontation.[30] The Supreme Court answered in the affirmative and overruled the *Roberts* exception as being inconsistent with the framer's intention in drafting the Sixth Amendment.[31] The Court held

[20] *Crawford*, 541 U.S. 36.

[21] *Id.* at 54.

[22] *Id.* at 40.

[23] *Id.*

[24] *Id.*

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

[26] *Id.* at 40. Washington's marital privilege prohibits one spouse from testifying against the other without the consent of the other spouse. *Id.* at 40.

[27] Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington 541 U.S. 36 (2004).

[28] *Crawford*, 541 U.S. at 40. Under the *Roberts* exception, out of court statements by witnesses who are unavailable to testify can be introduced into evidence if the Judge determines it falls within a " 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' " *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

[29] *Id.* at 41.

[30] *Id.* at 42.

[31] *Id.* at 67-69.

that in order to admit out of court testimonial evidence, the Confrontation Clause requires that the witness must be unavailable to testify, and defendant must have had a prior opportunity for cross-examination.[32]

In *Crawford*, the Court opted to fully define testimonial at a later date, but stated, that the Confrontation Clause "applies to witnesses against the accused . . . those who 'bear testimony.' "[33] The Court also defined testimony as, " 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' "[34] Next, the Court defined those statements that are clearly testimonial, or the "core class of 'testimonial' statements."[35] The "core class" includes, "*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."[36] While *Crawford* was a great leap, as it overruled *Roberts*, the Court by its own admission, was not finished.[37] In *Melendez-Diaz v. Massachusetts*,[38] the Court elaborated upon its holding in *Crawford*, providing additional insight into what statements qualify as testimonial.[39]

The Supreme Court held in *Melendez-Diaz* that forensic laboratory certificates that served the same purpose as an affidavit were testimonial.[40] In *Melendez-Diaz*, Luis Melendez-Diaz was charged under state law with distributing and trafficking cocaine.[41] At trial, in spite of Melendez-Diaz's objection, the court allowed into evidence certificates that stated the substances seized at the time of his arrest were cocaine.[42] On appeal, Melendez-Diaz argued that his Sixth Amendment right to confrontation was violated when the trial court

[32] *Id.* at 68-69.

[33] *Crawford*, 541 U.S. 51.

[34] *Id.* (quoting WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 68 (stating "we leave for another day any effort to spell out a comprehensive definition of 'testimonial' ").

[38] 129 S. Ct. 2527 (2009).

[39] *Id.* at 2532.

[40] *Id.*

[41] *Id.* at 2530.

[42] *Id.* at 2530-31.

allowed the certificates into evidence.[43] The Appeals Court of Massachusetts affirmed the trial court based on the Massachusetts Supreme Judicial Court's holding in *Commonwealth v. Verde*,[44] that "the authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment."[45] Accordingly, the Massachusetts Supreme Judicial Court denied review.[46]

The Supreme Court granted certiorari to answer the question of whether the admission of the certificates violated Melendez-Diaz's Sixth Amendment right to confrontation.[47] Quoting *Crawford*, the Court stated that the certificates were clearly an affidavit because they were a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[48] Furthermore, the Court placed additional emphasis on the purpose of the statement, and according to Massachusetts law,[49] the certificates "*sole purpose*" was to provide "prima facie evidence" at trial.[50] Additionally, the certificates sought to establish that defendant was in possession of cocaine at the time of his arrest, which was an element of the crime for which defendant was charged.[51] The Court stated that this case was a simple application of its holding in *Crawford*, because that decision mentioned affidavits as falling within the "core class of testimonial statements."[52] Therefore, the Court held the certificates were testimonial.[53] Finally, the Court also provided additional insight into what statements qualify as testimonial, and in a footnote stated, "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."[54]

Recently, the Supreme Court further clarified the meaning of

[43] 129 S. Ct. at 2531.

[44] 870 N.E.2d 676 (2007).

[45] *Melendez-Diaz*, 129 S. Ct. at 2531.

[46] *Id.*; *see also* 874 N.E.2d 407 (Mass. 2007) (denying review).

[47] *Melendez-Diaz*, 129 S. Ct. at 2531.

[48] *Id.* at 2532.

[49] MASS. GEN. LAWS ANN. ch. 111, § 13 (West 2011) (stating "when properly executed, [the affidavit] shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic or other drug, poison, medicine, or chemical analyzed").

[50] *Melendez-Diaz*, 129 S. Ct. at 2532.

[51] *Id.* at 2533.

[52] *Id.* at 2542.

[53] *Id.*

[54] *Id.* at 2532 n.1.

testimonial in *Bullcoming v. New Mexico*.[55] In *Bullcoming*, the Supreme Court held a blood alcohol report was testimonial and that the surrogate testimony of another analyst who did not participate in the testing was not adequate to satisfy defendant's Sixth Amendment right to confrontation.[56] In *Bullcoming*, defendant, Donald Bullcoming, was charged with aggravated DWI.[57] At trial, the prosecution submitted into evidence a blood alcohol test that certified that Bullcoming's blood alcohol content was higher than the legal limit.[58] The prosecution called an analyst to testify who was familiar with the procedures of the lab, but who had not personally tested or observed the test that was performed on Bullcoming's blood.[59] The Supreme Court of New Mexico held that the blood alcohol test was testimonial, but indicated that the "live testimony of another analyst satisfied the constitutional requirements."[60] The Supreme Court of New Mexico affirmed Bullcoming's conviction, reasoning that because the analyst merely transcribed the results produced by the machine, another analyst, familiar with the machine and its workings, satisfied the Sixth Amendment's guarantee of confrontation.[61]

The Supreme Court granted certiorari to address whether the Confrontation Clause prohibited the testimony of a substitute analyst.[62] The Court answered this question in the affirmative and rejected the Supreme Court of New Mexico's reasoning.[63] First, the Court reasoned that an analyst's testimony attests to more than just the results, it also attests to the procedures used in obtaining them.[64] Therefore, the testimony of a substitute analyst fails to adequately reveal any errors in that process.[65] Next, the Court dealt with the issue of whether the blood analysis was testimonial.[66] The Court examined the purpose of the statement as it did in *Melendez-Diaz*, and stated

[55] 131 S. Ct. 2705 (2011).
[56] *Id.* at 2713.
[57] *Id.* at 2709.
[58] *Id.* at 2712.
[59] *Id.* at 2709.
[60] *Bullcoming*, 131 S. Ct. at 2709-10.
[61] *Id.*
[62] *Id.* at 2710.
[63] *Id.*
[64] *Id.* at 2714.
[65] *Bullcoming*, 131 S. Ct. at 2715.
[66] *Id.* at 2716.

that "a document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial."[67] Additionally, the Court found that the fact that the statement was not sworn was not "dispositive."[68] Finally, the court found that the statement sought to establish a fact at trial, and thus was testimonial.[69]

II. THE NEW YORK APPROACH TO THE CONFRONTATION CLAUSE

The New York Court of Appeals stated in *People v. Rawlins*,[70] that the Confrontation protections afforded under the New York Constitution[71] are the same as the protections provided under the Sixth Amendment.[72] Therefore, the question is not whether the New York State Constitution provides greater protections than the Sixth Amendment, but rather whether the New York Court of Appeals, in interpreting *Crawford*, affords greater protections through its definition of testimonial. The seminal case in which the New York Court of Appeals defined testimonial is *Rawlins*.[73]

In *Rawlins*, the New York Court of Appeals combined the appeals of *People v. Rawlins* and *People v. Meekins*.[74] In *Rawlins*, defendant, Michael Rawlins, appealed after he was convicted of six counts of third-degree burglary, after a jury trial.[75] Defendant, Michael Rawlins, was arrested after his fingerprints were recovered from the scene of a burglary.[76] Based upon similarities between this burglary and four prior incidents, Rawlins was arrested and charged

[67] *Id.* at 2717 (quoting *Melendez-Diaz*, 129 S. Ct. at 2522).

[68] *Id.*

[69] *Bullcoming*, 131 S. Ct. at 2716.

[70] 884 N.E.2d 1010 (N.Y. 2008).

[71] New York State's Constitution states, in pertinent 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." N.Y. CONST. art. I, § 6.

[72] *Rawlins*, 844 N.E.2d at 1025; *see also* U.S. CONST. amend. VI (the Court of Appeals compared the language of the New York State Constitution with the language of Sixth Amendment, and found because the wording was similar the rights were intended to be the same).

[73] *Rawlins*, 844 N.E.2d 1033.

[74] 884 N.E.2d 1010 (N.Y. 2008).

[75] *Rawlins*, 844 N.E.2d at 1022.

[76] *Id.*

with five burglaries, totaling six counts of third-degree burglary.[77]

At issue in *Rawlins* was the admission of a latent fingerprint comparison, which was made by a detective who did not testify.[78] Before trial, the case was assigned to Detective Connolly, who reviewed the prints recovered from all five burglaries and made his determination that all of the prints matched.[79] However, prior to Connolly's investigation, Detective Beatty prepared a report on only two of the prior burglaries.[80] At trial, both reports were admitted into evidence, however, while Detective Connolly testified as to his findings, Detective Beatty did not.[81] After a jury trial Rawlins was convicted of all six counts.[82]

On appeal, Rawlins argued that the trial court erred in admitting Beatty's report in violation of his Sixth Amendment rights.[83] The Court of Appeals found that the admission of Beatty's report was a violation of Rawlins' right to confrontation.[84] However, the court found the error was harmless, because the report merely restated the information that was also contained in Detective Connolly's report.[85] In determining whether the fingerprint analysis was testimonial, the court relied on two factors.[86] First, the court looked at "whether the statement was prepared in a manner resembling ex parte examination."[87] Next, the court asked, "whether the statement accuse[d] the defendant of criminal wrongdoing."[88] The court refused to create a bright-line rule, insisting on a case-by-case analysis.[89] The court reasoned that the "facts and context are essential" to the determination

[77] *Rawlins*, 844 N.E.2d at 1022-23. Note the discrepancy of six counts of burglary to five break-ins, is due to the fact that one incident involved two businesses which shared a building.

[78] *Id.* at 1023.

[79] *Id.* at 1022-23.

[80] *Id.* at 1023.

[81] *Id.*

[82] *Rawlins*, 884 N.E.2d at 1022.

[83] *Id.* at 1023.

[84] *Id.* at 1034.

[85] *Id.* at 1033.

[86] *Id.*

[87] *Rawlins*, 884 N.E.2d at 1033. Note the court did not confine the test to only two factors but stated, "it is impossible to provide an exhaustive list of factors that may enter into the mix." *Id.*

[88] *Id.*

[89] *Id.* at 1029.

of whether a statement is testimonial.[90] The court also emphasized the importance of the declarant's purpose in making the statement.[91] The court found the analysis resembled ex parte examination because it was prepared solely for use at trial.[92] Moreover, the court also found the statement was accusatory because it attempted to establish that defendant committed the crime.[93]

In *People v. Meekins*,[94] the companion case to *Rawlins*, defendant, Dwain Meekins, was convicted by a jury of "first-degree sodomy, first-degree sexual abuse, and third-degree robbery."[95] At issue was a DNA report prepared by an independent laboratory.[96] The report was an analysis of the samples acquired from the rape-kit collected by the police after the crime.[97] At trial, an employee of the laboratory and the Office of the Chief Medical Examiner testified as to the results of the DNA analysis.[98] However, neither had participated in the testing.[99] On appeal, Meekins argued that the DNA report admitted into evidence was testimonial because it was prepared solely for use at trial and its purpose was to establish the identity of the suspect who committed the crime.[100] The Court of Appeals held that the DNA report was non-testimonial, and its admission into evidence did not violate defendant's right of Confrontation under the Sixth Amendment.[101]

In *Meekins*, the court focused on the nature of the report and found it was not "the kind of ex parte testimony the Confrontation Clause was designed to protect against."[102] Of critical importance was the fact that the report was not discretionary or based on the analyst's opinions, but rather was the product of scientific analysis.[103] The court stated that the report was not accusatory because, by itself,

[90] *Rawlins*, 884 N.E.2d at 1033.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] 884 N.E.2d 1010 (N.Y. 2008).
[95] *Meekins*, 884 N.E.2d at 1024.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Meekins*, 884 N.E.2d at 1034.
[101] *Id.*
[102] *Id.* at 1035.
[103] *Id.*

it "shed no light" on whether Meekins was innocent or guilty.[104]

In *People v. Freycinet*,[105] the Court of Appeals held that a redacted autopsy report was non-testimonial.[106] In *Freycinet*, defendant, Gary Freycinet, was indicted for "murder, manslaughter and other crimes."[107] After a bench trial, Freycinet was acquitted of murder, but found guilty of manslaughter in the second degree.[108] The Appellate Division affirmed, and the Court of Appeals granted review.[109] On appeal, the court considered whether the admission of a redacted autopsy report into evidence violated Freycinet's Sixth Amendment right to confrontation.[110]

At issue was an autopsy report performed by a doctor who was unavailable to testify, however, the report was redacted to remove his opinions.[111] While the doctor who performed the autopsy was unavailable to testify, another doctor testified as to her own opinions that were formed on the basis of the report.[112] The Court of Appeals found that because the report was redacted, it was an objective account of observations and measurements.[113] Furthermore, because the report did not "explicitly link the defendant to the crime" the court found it was not accusatory.[114] Accordingly, the Court of Appeals held the autopsy report was non-testimonial, and its admission into evidence was not a violation of Freycinet's Sixth Amendment right to confrontation.[115]

[104] *Id.*

[105] 892 N.E.2d 843 (N.Y. 2008).

[106] *Id.* at 846.

[107] *Id.* at 844.

[108] *Id.* at 845.

[109] *Id.* at 845.

[110] *Freycinet*, 892 N.E.2d at 845.

[111] *Id.* at 846.

[112] *Id.*

[113] *Id.* at 846. Note, the court conceded that the autopsy report contained some observations that required judgment, such as classifying a wound to the victim as a stab wound. *Id.* However, these observations did not make the report testimonial, because they were "concerned only with what happened to the victim, not with who killed her." *Id*.

[114] *Id.*

[115] *Id.*

III. RECONCILING THE FEDERAL AND NEW YORK APPROACHES TO THE CONFRONTATION CLAUSE

The Supreme Court's approach, as stated in *Crawford* and its progeny, is concerned with the type of statement being made, and whether it bears testimony against the defendant.[116] In *Crawford*, the Court recognized certain statements are within the "core class" of testimonial statements, such as police interrogations and affidavits.[117] However, the Court refused to create a bright line rule and overturned the *Roberts* exception.[118] In *Melendez-Diaz*, the Court reaffirmed its prior holding in *Crawford*—that testimonial statements are inadmissible unless the witness is unable to testify and defendant has had a prior opportunity to confront.[119] However, the Court also stated that the "core-class of testimonial statements" were merely the heart of what the Confrontation Clause was seeking to redress, but not its "limit," leaving room for lower courts to define testimonial.[120] Finally, the Court in *Bullcoming* further elaborated upon its decision in *Crawford*, holding that any document prepared for the sole purpose of establishing a fact at trial is testimonial,[121] and that a substitute witness is never adequate for a testimonial statement.[122]

At the heart of the Supreme Court's approach to determining whether a statement is testimonial, is the Sixth Amendment's plain command that defendants have the right to confront their accusers.[123] The Court's holdings appear to reflect this command, as they have been limited to statements by witnesses, or those statements that bear testimony against the accused.[124] This ensures that defendants have a fair opportunity to confront those whose testimony is used against them.[125] Next, the Court has emphasized the importance of the

[116] *Crawford*, 541 U.S. at 51.

[117] *Id.* at 51-52.

[118] *Id.* at 68.

[119] *Melendez-Diaz*, 129 S. Ct. at 2542.

[120] *Id.* at 2534.

[121] *Bullcoming*, 131 S. Ct. at 2717.

[122] *Id.* at 2715.

[123] *Crawford*, 541 U.S. at 68-69 (stating "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation").

[124] *See Crawford*, 541 U.S. at 68; *Melendez-Diaz*, 129 S. Ct. at 2532; *Bullcoming*, 131 S. Ct. at 2717.

[125] *Melendez-Diaz*, 129 S. Ct. at 2532.

statements character, evaluating whether its primary purpose is to be used at trial.[126]

Likewise, New York Courts have followed a similar approach. New York's approach is also designed to bar statements that bear testimony against a defendant, or establish an element of the offense at trial, unless a defendant has an opportunity to confront witnesses.[127] The most notable distinction made by the Court of Appeals, is between factual statements and statements which bear opinions.[128] This distinction is particularly instructive, as it illuminates the difference between accusatory and non-accusatory statements. As stated in *Freycinet*, an autopsy report that was redacted to remove the opinions of the examining doctor was not accusatory because it was an objective report of the underlying facts and did not bear testimony against defendant.[129] The crucial fact was that the report, by itself, did not link defendant to the crime.[130] However, the opinion generated from the information within the report was testimonial because it attempted to link defendant to the crime."[131]

The court in *Pealer* specifically distinguished its case from *Bullcoming* because the "breath test documents," or certificates, were used only to establish that the machine was working properly.[132] The key distinction that the court made was that the certificates were non-testimonial, because by themselves they did not shed any light on defendant's "guilt or innocence."[133] While in *Bullcoming*, the blood test analysis on its own provided evidence defendant was intoxicated, which was an element of the crime for which he was charged.[134] The court's approach in *Pealer* is consistent with the New York Court of

[126] *Bullcoming*, 131 S. Ct. at 2716-17; *id.* at 2719-20 (Sotomayor, J. concurring).

[127] *Rawlins*, 884 N.E.2d at 1033.

[128] *Freycinet*, 892 N.E.2d at 846.

[129] *Id.*

[130] *Id.* This is also not to say that defendant has no recourse to the submission of the reports into evidence. He is still free to challenge the certificate on other grounds. 70 AM. JUR. TRIALS 1 § 8 (1999).

[131] Perhaps a more blunt, but illustrative analogy, is that the court would not permit the defendant to raise an objection to his inability to cross examine the bullet recovered from the crime scene, but would allow him to raise an objection to being unable to cross-examine the ballistics expert who determined the bullet was a match to others fired from his gun.

[132] *Pealer II*, 933 N.Y.S. at 475.

[133] *Id.* at 474.

[134] *Pealer II*, 933 N.Y.S.2d at 475.

Appeals decision in *Rawlins* and *Freycinet*.[135] Additionally, while distinguishable from *Bullcoming*, the approach is consistent with *Bullcoming's* holding and the decisions of the Supreme Court.[136]

IV. CONCLUSION

The decision in *Pealer* is not likely to change the analysis of whether statements are testimonial under *Crawford*, in the Fourth Department, or within New York's courts. As the Court of Appeals has determined, the New York Constitution provides the same protections as the Sixth Amendment.[137] Because New York has followed the Supreme Court's approach in determining whether statements are testimonial, it is no surprise the court's decision in *Pealer* is consistent with both New York and federal law.[138] Recently, in *People v. Hulbert*,[139] the New York Appellate Division, Third Department reached the same conclusion as the court in *Pealer*.[140]

However, the practical implications of this decision are troubling. At first glance the opinion appears to stand for the principle that a person being tried for a crime is barred from challenging the evidence against him. This is because to a person who is charged with DWI, the question of whether the breath test machine was functioning properly is of secondary importance, only to the results that it produced.[141] This decision appears to bar any collateral challenge to the test results, as the certificates are entered into evidence without an opportunity for confrontation.[142] The Appellate Division decided in *Pealer* that the certificates were not testimonial, because they failed to establish an element of the crime defendant was charged with.[143] While it must be conceded that the certificate, which attests that the breath test machine was working properly by itself does not establish an element of the crime, is it not close enough to warrant that defen-

[135] *Compare Rawlins*, 884 N.E.2d at 1033, and *Freycinet*, 892 N.E.2d at 846, *with Pealer II*, 933 N.Y.S.2d at 475.

[136] *Pealer II*, 933 N.Y.S.2d at 475.

[137] *Rawlins*, 844 N.E.2d at 1025.

[138] *Id.*

[139] 939 N.Y.S.2d 661 (App. Div. 3d Dep't 2012).

[140] *Compare Hulbert*, 939 N.Y.S.2d at 662, *with Pealer II*, 933 N.Y.S.2d at 475.

[141] *See generally* 70 AM. JUR. TRIALS 1 § 8 (1999).

[142] *Pealer II*, 933 N.Y.S.2d at 474.

[143] *Id.*

dant have an opportunity to cross examine the person who certified those documents?

Although *Pealer* was distinguished from *Bullcoming*, there are elements of the Supreme Court's holding in *Bullcoming* that appear applicable to *Pealer*.[144] First, the Court in *Bullcoming* relied upon its holding in *Melendez-Diaz* that "a document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial."[145] While these certificates are clearly distinguishable from those at issue in *Melendez-Diaz* and *Bullcoming*, as the certificates themselves do not establish Pealer committed a crime, they were created solely for an evidentiary purpose—to establish that the machine was working properly at trial.[146] Therefore, it follows that breath test certificates are arguably testimonial. Second, the view that these certificates are testimonial is also supported by Justice Sotomayor's concurring opinion in *Bullcoming*.[147] Justice Sotomayor's concurrence suggested an alternative method of determining whether a statement is testimonial.[148] According to Sotomayor, a statement is testimonial if its primary purpose is to create "an out-of-court substitute for trial testimony."[149] Applying this test to the use breath test certificates, it appears that the primary purpose of these documents is to substitute for in court testimony; the documents seek to establish precisely what the employee would be called on to provide at trial, testimony that the machine was certified to give an accurate reading.

Nevertheless, it is unlikely the Court's holding in *Bullcoming* will be extended to find the certificates at issue in *Pealer* testimonial.[150] As noted above, the statements at issue in *Melendez-Diaz* as well as *Bullcoming*, are distinguishable from *Pealer*, because those statements alone established an element of the crime defendant was charged with.[151] The certificates at issue in *Pealer*, while an integral part of the prosecution's case, do not meet the threshold of testimoni-

[144] *Bullcoming*, 131 S. Ct. at 2716-17.

[145] *Id.* at 2717.

[146] *Melendez-Diaz*, 129 S. Ct. at 2530; *Bullcoming*, 131 S. Ct. at 2717.

[147] *Bullcoming*, 131 S. Ct. at 2719-20 (Sotomayor, J., concurring).

[148] *Id.* at 2720.

[149] *Id.*

[150] *Bullcoming*, 131 S. Ct. at 2717.

[151] *Compare Bullcoming*, 131 S. Ct. at 2716, *and Melendez-Diaz*, 129 S. Ct. at 2530, *with Pealer II*, 933 N.Y.S.2d at 474-75.

al, because the statements, on their own, failed to establish an element of the crime for which defendant was charged.[152] Because the certificates do not reach the threshold of testimonial, the Sixth Amendment is not invoked, and the admission of the certificates does not constitute a violation of Pealer's rights.[153] Furthermore, in a footnote within *Melendez-Diaz*, the Court stated, "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."[154] The court in *Pealer* relied on this dicta, finding it to be "indicative on how the Court would rule on the issue."[155] Additionally, the Supreme Court in *Crawford* specifically left the issue of the admissibility of non-testimonial statements under hearsay exceptions for the state courts.[156] Thus, the Supreme Court is unlikely to grant certiorari on this issue.

Perhaps the most troubling aspect of *Pealer* is that a significant part of the prosecution's case is exempt from cross-examination.[157] However, the reality is that the certificates could still be challenged on other grounds.[158] With two of the Appellate Division departments holding that breath test certificates are non-testimonial, it does not appear likely that a challenge to the admission of breath test certificates will prevail on confrontation grounds in New York courts.[159]

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[152] *Pealer II*, 933 N.Y.S.2d at 474-45.

[153] *Crawford*, 541 U.S. at 68.

[154] *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

[155] *Pealer II*, 933 N.Y.S.2d at 475.

[156] *Crawford*, 541 U.S. at 68.

[157] *See* 70 AM. JUR. TRIALS 1 § 8 (1999) ("Leaving the BAC score unchallenged and hoping that the trier of fact will merely ignore this damaging evidence all but guarantees a verdict of guilty.").

[158] *Id.*

[159] *See Pealer II*, 933 N.Y.S.2d 473, *Hulbert*, 939 N.Y.S.2d 661.

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