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# Conflicting Confrontation Clause Concerns: The Admissibility of Hospital Records Versus a Defendant's Right to Confrontation

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Cover Page Footnote
29-4

# CONFLICTING CONFRONTATION CLAUSE CONCERNS: THE ADMISSIBILITY OF HOSPITAL RECORDS VERSUS A DEFENDANT'S RIGHT TO CONFRONTATION

## SUPREME COURT OF NEW YORK
## BRONX COUNTY

People v. Diaz[1]
(decided May 9, 2012)

## I. INTRODUCTION

In 1977, a New York Supreme Court jury returned a guilty verdict against Enrique Diaz, finding him guilty of rape, kidnapping, and coercion in the first degree.[2] Then, in 2011, Diaz brought a motion pursuant to New York Criminal Procedure Law section 440 seeking to vacate the conviction.[3] Diaz's appeal asserted that he was deprived of his Sixth Amendment confrontation rights when the trial court allowed the state to introduce notations made by a hospital resident who did not testify.[4] The defendant alleged that the hospital records, which included the notations, were testimonial in nature analogous to the forensic reports in the influential United States Supreme Court case, *Melendez-Diaz v. Massachusetts*.[5] Diaz also contended that the hospital report was prepared with the primary purpose of proving facts related to the prosecution of his alleged crime.[6]

"On April 28, 1978, the Appellate Division, First Department,

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[1] People v. Diaz, No. 02843-1975, 2012 WL 1606311, at *5 (N.Y. Sup. Ct. 2012).

[2] *Id.* at *2.

[3] *Id.* at *3; N.Y. CRIM. PROC. LAW § 440.10 (allowing a defendant to file a motion seeking to vacate their judgment based on "[m]aterial evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States").

[4] *Diaz*, 2012 WL 1606311, at *1.

[5] *Id.* at *5. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009) (holding certificates prepared by non-testifying laboratory analysts were testimonial statements, and the "analysts were 'witnesses' for the purposes of the Sixth Amendment").

[6] *Diaz*, 2012 WL 1606311, at *5.

. . . affirmed [Diaz's] conviction without opinion.[7] A year later, Diaz filed a habeas corpus petition in which the United States District Court for the Southern District of New York dismissed.[8] In response, Diaz filed a 440 motion on Sixth Amendment grounds, which was also subsequently denied.[9] The court held that the hospital reports were non-testimonial and properly admitted under the state's business records exception to hearsay.[10]

New York precedent supports the notion that statements made by a patient to a physician are not testimonial as long as they are in response to a physician's inquiry that has the primary objective of determining the mechanism of injury, rendering a diagnosis, and administering medical treatment.[11] Although the Supreme Court has yet to decide whether hospital records constitute testimonial evidence within the scope of the Confrontation Clause, the Court has addressed both the testimonial nature of forensic laboratory reports as well as the relevance of statements made by an individual during the existence of an ongoing emergency.[12] This note will discuss whether the *Diaz* opinion is consistent with New York's approach in determining admissibility of hospital records based on their testimonial nature and the business records exception. It will also examine the extent to which New York has adopted or departed from federal precedent. Lastly, this analysis will include a prediction of how the Supreme Court will decide on this issue.

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[7] *Id.* at *3.

[8] *Id.*

[9] *Id.* at *1.

[10]

> Contrary to the Defendant's contention, the hospital record in this case is not like the forensic report deemed testimonial by the Supreme Court in *Melendez-Diaz,* but rather, the record reflected occurrences and events that related to the diagnosis, prognosis and treatment of the complainant and was therefore properly admitted into evidence under the state's business records exception to the hearsay rule.

*Id.* at *5 (citing People v. Ortega, 942 N.E.2d 210, 214 (2010)).

[11] *Diaz*, 2012 WL 1606311, at *4 (citing People v. Duhs, 947 N.E.2d 617, 409 (N.Y. 2011) (holding "where the primary purpose of a physician's inquiry to a patient is to determine the mechanism in order to render a diagnosis and administer medical treatment, statements made by the patient to the physician are not testimonial in nature").

[12] *Melendez-Diaz*, 557 U.S. at 311; Davis v. Washington, 547 U.S. 813, 828 (2006).

## II. THE FACTS OF *PEOPLE V. DIAZ*

Diaz was charged and convicted of kidnapping and raping a young female.[13] At issue in the case was the testimony of Dr. Paul Fuchs.[14] Dr. Fuchs was the complainant's physician and a witness for the prosecution.[15] At trial, Dr. Fuchs testified that the complainant first sought his medical assistance at his office and that he continued to treat her after admitting her to the hospital.[16] He attested to the hospital's record of the complainant's stay as well as his personal examinations.[17] The hospital records included the notes and observations of the admitting physician at the hospital.[18] According to Dr. Fuchs, he was required to read the notations of the admitting physician and if he believed them to be accurate, he was to sign the record.[19] Dr. Fuchs testified that he signed the record because he agreed with the report.[20] In addition, Dr. Fuchs attested to the fact that the "hospital record was kept in the regular course of business."[21]

Counsel for the defense objected to Dr. Fuchs's testimony based on two separate grounds. First, the defense objected to Dr. Fuchs's statement that the complainant "was suffering from 'reactive anxiety depression and weight loss' " stemming from the assault committed by Diaz.[22] The defense argued that his observations were unrelated and were assuming the jury's role of assessing the credibility of the complaining witness.[23] Second, Diaz's counsel objected to the trial court's admission of the hospital record and argued that parts of the record included injuries inflicted upon the complainant that were committed by a co-conspirator.[24] The trial judge overruled both objections and allowed the hospital record to be admitted into evi-

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[13] *Diaz*, 2012 WL 1606311, at *1.

[14] *Id.* at *2-3.

[15] *Id.* at *2.

[16] *Id.* at *5.

[17] *Id.* at *2 (referring to the testimony introduced by in which he "reviewed the record at trial to refresh his recollection of his own observations of the complainant").

[18] *Diaz*, 2012 WL 1606311, at *2.

[19] *Id.*

[20] *Id.*

[21] *Id.* at *5.

[22] *Id.* at *2.

[23] *Diaz*, 2012 WL 1606311, at *2.

[24] *Id.*

dence.[25]

In 1977, Diaz appealed his conviction claiming ineffective assistance of counsel for failing to object to the admittance of the hospital records at trial.[26] The Appellate Division, First department affirmed Diaz's conviction on April 28, 1978.[27] A year later, Diaz unsuccessfully sought habeas relief when the United States District Court for the Southern District of New York dismissed his petition.[28] Then in August of 2011, Diaz filed a CPL 440 motion to vacate his conviction, asserting that the admission of the complainant's hospital record violated his Sixth Amendment constitutional right to confrontation.[29] The Supreme Court of Bronx County denied Diaz's motion holding that the defendant's rights under the Confrontation Clause were not violated because the hospital record was not testimonial in nature.[30] Furthermore, the court ruled the hospital record was admissible under New York's business records exception to the hearsay rule.[31]

## III. THE COURT'S REASONING

### A. Confrontation Clause

The court's denial of Diaz's appeal began with a discussion of the federal approach towards confrontation issues in its analysis of *Crawford v. Washington*[32] and its progeny. The Sixth Amendment bestows upon the accused "the right . . . to be confronted with the witnesses against him."[33] In *Crawford*, the Supreme Court held that the Confrontation Clause prohibits the admission of out-of-court statements that are testimonial in nature unless the declarant is una-

[25] *Id.* at *2-3 ("Justice Rosenberg overruled the objections of the Defendant's trial counsel, with an instruction to the jury that they were not required to decide whether the complainant had a condition or not; the doctor's testimony related to the issue of the complainant's credibility.").

[26] *Id.* at *3.

[27] *Id.*

[28] *Diaz*, 2012 WL 1606311, at *3.

[29] *Id.* at *1, *3.

[30] *Id.* at *5.

[31] *Id.*

[32] 541 U.S. 36 (2004).

[33] Bullcoming v. New Mexico, 131 S. Ct. 2705, 2713 (2011); U.S. CONST. amend. VI.

vailable and the defendant had a prior opportunity to cross-examine the declarant regarding the statements at issue.[34] *Crawford* failed to provide a comprehensive definition of "testimonial," but two years later in *Davis v. Washington*[35] the Court established the "primary purpose" test as a means of determining whether statements are testimonial or not.[36] Under the "primary purpose" test, statements made with the primary purpose of proving facts or events in anticipation of a criminal trial are deemed testimonial in nature.[37]

The court in *Diaz* applied the "primary purpose" test introduced by *Davis* and held that the complainant's hospital record was not testimonial because it was not prepared with the primary purpose of proving facts relevant to the prosecution of a crime.[38] The court reasoned that the circumstances surrounding the time in which the complainant's statements were made to the doctor did not suggest that the record was prepared in anticipation of proving facts relevant to the prosecution of Diaz.[39]

### B. Business Record Exception

The court deemed the hospital record non-testimonial because it reflected "occurrences and events related to the diagnosis, prognosis and treatment of the complainant."[40] As such, the records were admissible under the business records exception to the hearsay rule.[41] Since business records are generally admissible when they are not deemed testimonial, Diaz's Sixth Amendment rights were not violat-

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[34] *Crawford*, 541 U.S. at 59 (recognizing "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine").

[35] 547 U.S. 813 (2006).

[36] *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of "testimonial"); *Davis*, 547 U.S. at 822 (holding "[statements] 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 later criminal prosecution").

[37] *Davis*, 547 U.S. at 822.

[38] *Diaz*, 2012 WL 1606311, at *5 ("In this case, the hospital record was not prepared with the primary purpose of proving facts relevant to the prosecution of a crime.").

[39] *Id.* ("At trial, Dr. Fuchs testified that he was treating the complainant as a patient, that she first came to him at his private practice, and that thereafter he admitted her to the hospital.").

[40] *Id.*

[41] *Id.*

ed.[42]

The *Diaz* court also relied on several notable New York Court of Appeals cases in coming to the business record exception determination. For example, the court found the statements made by the complainant to Dr. Fuchs were comparable to the statement admitted in *People v. Ortega*.[43] In *Ortega*, the court held medical records to be admissible under the business records exception because of the record's reference to a safety plan and incidents of domestic violence, which were relevant to the victim's treatment.[44] Evidently the court in *Diaz* found that the complainant had suffered similar psychological and traumatic issues as the complainant in *Ortega*.[45] Having been victims of domestic violence and rape, it is likely that they both endured more than just physical wounds.[46] The statements elicited from the complainant in *Diaz*, just like those from *Ortega*, were necessary in order to properly diagnose and treat her. [47]

In addition to *Ortega*, the court in *Diaz* referenced three other relevant New York decisions that admitted reports under the business records exception, despite the fact that the reports contained state-

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[42] *Id.*

[43] 942 N.E.2d 210 (N.Y. 2010).

[44] *Diaz*, 2012 WL 1606311, at *5 (citing *Ortega*, 942 N.E. 2d at 215 (holding "references to 'domestic violence' and to the existence of a safety plan were admissible under the business records exception")).

> Not only were these statements relevant to complainant's diagnosis and treatment, domestic violence was part of the attending physician's diagnosis in this case. With all that has been learned about the scourge of domestic violence in recent decades, we now recognize that it differs materially, both as an offense and a diagnosis, from other types of assault in its effect on the victim and in the resulting treatment. In this context, a doctor faced with a victim who has been assaulted by an intimate partner is not only concerned with bandaging wounds. In addition to physical injuries, a victim of domestic violence may have a whole host of other issues to confront, including psychological and trauma issues that are appropriately part of medical treatment. Developing a safety plan, including referral to a shelter where appropriate, and dispensing information about domestic violence and necessary social services can be an important part of the patient's treatment. Therefore, it was not error to admit references to domestic violence and a safety plan in complainant's medical records.

*Id.*

[45] *Id.* at *5.

[46] *Ortega*, 942 N.E. 2d at 212; *Diaz*, 2012 WL 1606311, at *1.

[47] *Diaz*, 2012 WL 1606311, at *5.

ments of non-testifying witnesses.[48] First, in *People v. Freycinet*,[49] the Court of Appeals deemed the factual portions of an autopsy report to be non-testimonial and was properly introduced at trial under the business records exception, even though the doctor who prepared the report did not testify.[50] Second, the *Diaz* opinion relied on *People v. Hall*[51] where the First Department admitted an autopsy report under the business records exception without requiring the medical examiner who created the report to testify.[52] Last, the court in *Diaz* rendered the holding in *People v. Brown*[53] to be applicable in its analysis. In *Brown*, a DNA report consisting of raw data produced by a machine was admissible under the business record exception, despite the fact that the analyst who compiled the report did not testify.[54] Although the *Diaz* opinion does not explicitly mention the statements made by the complainant to Dr. Fuchs, the court found reason to believe that the record reflected information that was germane to administering the appropriate medical treatment and provided sufficient New York precedent to support its findings.[55]

## IV. THE FEDERAL APPROACH

To fully understand the issue that was before the court in *Diaz*, it is pertinent to discuss the impact of several notable Supreme Court cases that have shaped the Confrontation Clause analysis. Despite having been abrogated by *Crawford*, a brief synopsis of the 1980 Supreme Court decision *Ohio v. Roberts*[56] is an appropriate starting point.

In *Roberts*, the defendant was charged and convicted of for-

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[48] *Id.*

[49] 892 N.E.2d 843 (N.Y. 2008).

[50] *Id.* at 846 (holding that an autopsy report was non-testimonial and thus admissible under the business records exception to the hearsay rule).

[51] 923 N.Y.S.2d 428 (App Div. 1st Dep't 2011).

[52] *See Hall*, 923 N.Y.S.2d at 429 (holding that an autopsy report was non-testimonial and its admission into evidence did not violate defendant's rights under the Confrontation Clause).

[53] 918 N.E.2d 927 (N.Y. 2009).

[54] *See Brown*, 918 N.E.2d at 932 (holding that the court's admission of a DNA report despite not producing the technician who performed the testing did not violate defendant's rights under the confrontation clause).

[55] *Diaz*, 2012 WL 1606311, at *5.

[56] 448 U.S. 56 (1980).

gery of a check and possession of stolen credit cards.[57] The defendant appealed and the Supreme Court of Ohio found that the use of the transcript from the preliminary trial, which included testimony from the defendant's daughter, violated Roberts' confrontation rights.[58] The court reasoned that the transcript should not have been introduced because the defendant's daughter had not been cross-examined at the preliminary hearing and did not appear at trial.[59]

*Roberts* made its way up to the United States Supreme Court where the Court was faced with determining whether it was constitutional to admit testimony from a preliminary hearing despite the witness not being produced at the defendant's criminal trial.[60] The Supreme Court held that the introduction of the daughter's testimony from the defendant's preliminary hearing did not offend the Confrontation Clause because it was "subjected to the equivalent of significant cross-examination" and bore adequate "indicia of reliability."[61] The Court explained that the test for determining sufficient "indicia of reliability" is one that either falls "within a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."[62]

In *Crawford*, the Supreme Court overturned the "indicia of reliability" framework established by *Roberts*,[63] instituting a test based on a statement's "testimoniality" instead. In *Crawford*, the defendant was charged with assault and attempted murder for stabbing a man who allegedly tried to rape his wife, Silvia Crawford.[64] In an effort to

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[57] *Roberts*, 448 U.S. at 58. During Robert's preliminary hearing, the defense called Bernard Isaacs' daughter, Anita Isaacs, as a witness who attested to the fact that she had given Roberts permission to reside in her apartment for several days while she was away. *Id.* Anita denied all allegations made by the defense counsel that she had given Roberts permission to use her father's checks and credit cards. *Id.* In addition to the defense counsel's failure to request Anita be placed on cross-examination, the defense did not declare Anita as a hostile witness. *Id.* After the grand jury indicted Roberts on all charges, five subpoenas were issued to Anita but she failed to appear at the trial return date. *Id.* at 59.

[58] *Roberts*, 448 U.S. at 59-60, 62.

[59] *Id.* at 61-62.

[60] *Id.* at 58.

[61] *Id.* at 78.

[62] *Id.* at 66.

[63] *See Crawford*, 541 U.S. at 68 (overturning the precedent established by *Roberts* and properly holding that "the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her, alone is sufficient to make out a violation of the Sixth Amendment . . . we decline to mine the record in search of indicia of reliability").

[64] *Id.* at 38.

prove the defendant was not acting in self-defense, the State played the police recording of Sylvia's account of the events in question.[65] Crawford was convicted but appealed his case to the Washington Court of Appeals, which reversed his conviction.[66] However, on review the Washington Supreme Court reversed and reinstated Crawford's conviction.[67] The court reasoned that Sylvia Crawford's statement satisfied the "particularized guarantees of trustworthiness" standard set forth in *Roberts*.[68] The Supreme Court granted certiorari and reversed the court's decision.[69]

Unlike *Roberts*, the main focus of the *Crawford* opinion outlined the historical background of the Confrontation Clause.[70] Justice Scalia addressed the shortcomings of the *Roberts* opinion by pointing out that the "indicia of reliability" test was in conflict with two important principles.[71] First, the purpose of the Confrontation Clause was to guard against the "use of *ex parte* examinations as evidence against the accused."[72] Scalia elaborated on this by stating that the aim of the Confrontation Clause is to bar the admission of testimonial hearsay and contended that the interrogations conducted by the police fell within that class.[73] Second, the Framers were not of the opinion that the prior opportunity to cross-examine a witness was a dispositive right.[74] Rather, historical sources indicate that the "Framers would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-

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[65] *Id.* The defendant did not have an opportunity to cross-examine his wife because her interrogation took place at the police station. *Id.* at 65. Sylvia Crawford did not testify because of marital privilege. *Id.* at 40.

[66] *Crawford*, 541 U.S. at 41.

[67] *Id.*

[68] *Id.* (holding "although Sylvia's statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness" because Sylvia's statements and those made by the defendant appear to overlap).

[69] *Id.* at 42.

[70] *Id.* at 66 (recognizing how the Framer's would react: "The Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers").

[71] *Crawford*, 541 U.S. at 36.

[72] *Id.* at 36-37 (stating that the "*Roberts* test departs from historical principals because it admits statements consisting of ex parte testimony upon a mere reliability finding").

[73] *Id.* at 36 (observing "[t]he Clause's primary object is testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class").

[74] *Id.* at 52.

examination."[75]

*Crawford* is also distinguishable from *Roberts* in that it stressed the importance of differentiating between non-testimonial and testimonial statements when facing Confrontation Clause issues.[76] While Justice Scalia did not provide an exhaustive definition of "testimonial," he did give some insight as to the persons and types of evidence the clause was aimed at.[77] Scalia observed that the Confrontation Clause is applicable to those who "bear testimony" against the accused.[78] Furthermore, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[79] Moreover, Scalia provided an informal test for establishing the presence of a testimonial statement when he stated: "[S]tatements that [are] 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 considered testimonial.[80] Under this test, examples of testimonial statements would include, but are not limited to, depositions, confessions, affidavits, custodial examinations and ex-parte-testimony.[81]

Under this reasoning, the Supreme Court found the statements taken by the police officers while conducting their interrogation to be testimonial in nature[82] and that the admission of such evidence violated the defendant's right to confrontation because he did not have a prior opportunity to cross-examine his wife and she was unavailable

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[75] *Id.* at 36 ("And the 'right . . . to be confronted with the witnesses against him,' is most naturally read as a reference to the common-law right of confrontation, admitting only those exceptions established at the time of the founding.").

[76] *Crawford*, 541 U.S. at 69, 71-72.

[77] *Id.* at 68.

[78] *Id.* at 51.

[79] *Id.*

[80] *Id.* at 52.

[81]

> Various formulations of this core class of 'testimonial' statements exist: '*ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, . . . extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions.'

*Crawford*, 541 U.S. at 51-52.

[82] *Id.* at 68.

to testify at trial.[83] *Crawford*'s significant impact on the way courts assess issues involving the Confrontation Clause is two-fold: First, it abrogated the longstanding precedent established in *Roberts*. Second, the opinion failed to provide a comprehensive definition of what constitutes a "testimonial" statement, leaving courts treading in uncharted seas. However, in 2006, the Supreme Court provided some much needed clarity by introducing the "primary purpose" test set forth in *Davis v. Washington* as a way to distinguish testimonial and non-testimonial statements.[84]

In *Davis*, the Supreme Court was faced with the issue of whether statements made during a recording of a 911 call were testimonial, and thus subject to the requirements of the Sixth Amendment's Confrontation Clause.[85] The testimony in question, made by Michelle McCottry to a 911 operator, included statements in which McCotty identified and described a domestic dispute with her former boyfriend, Adrian Davis.[86] The State introduced the 911 recording and the defense objected, contending that its admittance violated Davis's Sixth Amendment right to cross-examine McCottry.[87] The trial court allowed the State to play the recording for the jury and Davis was eventually convicted.[88] Both the Washington Court of Appeals and the Supreme Court of Washington upheld Davis's conviction, finding the 911 conversation identifying Davis as the assailant to be non-testimonial.[89]

The Supreme Court affirmed, ruling that McCottry's statements made to the 911 operator, while the defendant was still within the vicinity and in violation of a no-contact order, were not testimonial, and therefore not subject to the Confrontation Clause.[90] The Court reasoned, "Statements are nontestimonial [sic] 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."[91] In contrast,

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[83] *Id.* at 68-69.
[84] *Davis*, 547 U.S. at 822.
[85] *Id.* at 817.
[86] *Id.*
[87] *Id.* at 819.
[88] *Id.*
[89] *Davis*, 547 U.S. at 819.
[90] *Id.* at 829.
[91] *Id.* at 822.

statements should be considered 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 later criminal prosecution."[92]

In the *Davis* opinion, the Supreme Court distinguished the testimonial statements made in *Crawford* from the non-testimonial statements at issue in *Davis*.[93] For example, in *Davis*, the statements in question were made by the victim as the events were happening in real time,[94] whereas the statements made by Crawford's wife took place several hours after the stabbing occurred.[95] Second, the *Davis* statements elicited by the 911 call were "necessary to enable the police to *resolve* the present emergency, rather than simply learn . . . what had happened in the past," which was the case in *Crawford*.[96] Lastly, the Court pointed out the distinct difference in the level of formality in the way the absentee witnesses answered questions in the respective cases.[97] In *Crawford*, the defendant's wife "was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers."[98] The circumstances in *Davis* were strikingly less formal where the victim frantically answered questions prompted by a 911 operator while she remained in an unsafe and hostile environment.[99] For these reasons, the Court in *Davis* felt McCottry was not acting as a witness for purposes of a criminal investigation.[100]

Three years after *Davis*, the Supreme Court provided even more insight when it decided *Melendez-Diaz v. Massachusetts*. There, the defendant was charged with trafficking and distributing cocaine.[101] The State introduced certificates authored by state labora-

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[92] *Id.*

[93] *Id.* at 827 ("The difference between the interrogations in Davis and the one in Crawford is apparent on the face of things.").

[94] *Davis*, 547 U.S. at 827.

[95] *See id*. (comparing statements made by complainant in *Davis* versus statements in question in *Crawford*).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Davis*, 547 U.S. at 827 ("McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe.").

[100] *Id.* at 828 (holding "that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency").

[101] *Melendez-Diaz*, 557 U.S. at 308.

tory analysts indicating the presence of cocaine from seized evidence.[102] Despite the analysts not testifying at trial, the trial court allowed the certificates to be admitted and the defendant was convicted.[103] On appeal, the defendant argued that the admission of the certificates violated his Sixth Amendment right to confront the witnesses against him.[104] Relying on the precedent established by *Crawford*, the defense asserted that the prosecution's use of the certificates was contingent upon the analysts testifying in person at the defendant's trial.[105]

The Supreme Court ruled in favor of Melendez-Diaz and found there to be "no *Crawford* exception" that would allow the introduction of affidavits comprised of forensic analysis for the purpose of proving the defendant was in possession of cocaine, where the affiants did not testify at trial.[106] The Court relied on the "primary purpose" test in finding that the certificates were testimonial, reasoning that the affidavits were being used to prove or establish historical events relevant to a criminal trial expected to take place in the future.[107] It is important to note that the majority explicitly rejected the respondent's comparison of the affidavits to the business records admissible at common law.[108] However, the majority elaborated on the use of business records and stated that "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status,"[109] although the Court was quick to add that "th[is] is not the case if the regularly conducted business activity is the production of evidence for use at a trial."[110]

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[102] *Id.*

[103] *Id.* at 309.

[104] *Id.* The Supreme Court was faced with the issue of whether affidavits by analysts at a state lab, attesting that the substance analyzed was cocaine, were testimonial rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment. *Id.* at 307.

[105] *Melendez-Diaz*, 557 U.S. at 309 ("Petitioner objected to the admission of the certificates asserting our Confrontation Clause decision in *Crawford v. Washington*, required the analysts to testify in person.").

[106] *Id.* at 311.

[107] *Id.* (ruling that if an out of court statement is being used to prove an event previously occurred then it is subject to the Confrontation Clause).

[108] *Id.* at 321.

[109] *Id.*

[110] *Melendez-Diaz*, 557 U.S. at 321. *See* Palmer v. Hofmann, 318 U.S. 109, 114 (1943) (holding that an accident report made by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations,

Another noteworthy Supreme Court case elaborating on the term "ongoing emergency" with respect to the primary purpose test is *Michigan v. Bryant*.[111] In *Bryant*, the Court faced the issue of whether the Confrontation Clause barred the admission of statements made at a crime-scene by a mortally wounded victim that identified and described the location and identity of his assailant.[112] The Court held that the circumstances of the interaction between the victim and the police, viewed from an objective standpoint, indicated that the primary purpose of the interrogation was to enable the police to put an end to an ongoing emergency.[113]

In its analysis, the Court recognized that the primary purpose test was an objective one and stressed the importance of what reasonable participants would have ascertained having encountered the situation in question.[114] In essence, the circumstances, including the statements and actions of the parties involved, should be evaluated as they appear at the time and not with the benefit of hindsight.[115]

The Court also stressed the importance of a victim's medical condition for purposes of determining the primary purpose of a police interrogation.[116] Although the Court in *Bryant* disagreed with the Michigan Supreme Court's finding that all statements made by a fatally injured victim during police questioning at a crime scene should be found non-testimonial, it did recognize a victim's mental state to be a significant factor in the primary purpose inquiry.[117] The Court

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it was "calculated for use essentially in the court, not in the business").

[111] 131 S. Ct. 1143 (2011).

[112] *Id.* at 1150. The victim was shot by Bryant on Bryant's property but managed to drive himself to a nearby parking lot where police found him and questioned him. *Id.*

[113] *Id.* Therefore, the admission of the victim's statements at trial did not violate the defendant's Sixth Amendment right to confront his witness. *Id.*

[114] *Bryant*, 131 S. Ct. at 1156 ("[T]he relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.").

[115] *Id.* at n.8. When evaluating the existence of an ongoing emergency, the Court said that the focus is on the participant's statements as a means to end the threatening situation, not on "proving past events potentially relevant to later criminal investigation." *Id.* at 1157.

[116] *Id.* at 1148 ("A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and the likelihood that any such purpose statement would be a testimonial one.").

[117] *Id.* at 1159 ("Taking into account the victim's medical state does not, as the Michigan Supreme Court below thought, 'rende[r] non-testimonial . . . all statements made while the police are questioning a seriously injured complainant.' ").

observed:

> The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one.[118]

Furthermore, the Court warned that circumstances surrounding an ongoing emergency can evolve from non-testimonial to testimonial.[119] For example, in situations where a victim is interrogated by police officers in order to provide emergency assistance and the victim's assailant who posed a threat to the public is no longer at large, then statements made by the victim could be deemed testimonial.[120]

The Supreme Court recently faced a similar issue to the one it faced in *Melendez-Diaz*. In *Bullcoming v. New Mexico*,[121] the defendant was charged with driving while intoxicated.[122] The prosecution sought to introduce a sample containing the defendant's blood alcohol as evidence at trial.[123] However, the analyst that conducted the report did not appear at trial;[124] instead, the prosecution called another analyst to attest to the sample despite the fact that this analyst did not actually observe the testing of the defendant's blood sample.[125] The trial court allowed the introduction of the sample finding that it qualified as a business record, and the defendant was thereafter convicted.[126] The defendant appealed and the case made its way to the New Mexico Supreme Court, which relied on the holding from *Melendez-Diaz*.[127] The court ruled that the report containing the de-

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[118] *Bryant*, 131 S.Ct. at 1159 (holding "the victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves and the public"). *Id.*

[119] *See Davis*, 547 U.S. at 828 ("That is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot . . . 'evolve into testimonial statements.' ").

[120] *Bryant*, 131 S. Ct. at 1159.

[121] 131 S. Ct. 2705 (2011).

[122] *Bullcoming*, 131 S. Ct. at 2709.

[123] *Id.* at 2710.

[124] *Id.* at 2711-12.

[125] *Id.* at 2712. The defense objected to the use of this evidence arguing that it violated the defendant's Sixth Amendment right to confront his witness. *Id.*

[126] *Bullcoming*, 131 S. Ct. at 2712.

[127] *Id.* at 2712.

fendant's blood alcohol concentration was testimonial, but nonetheless permitted the prosecution to introduce it into evidence.[128] This holding was clearly at odds with *Crawford* because the New Mexico Supreme Court admitted the testimonial evidence even though the forensic analyst was unavailable at trial.[129] Furthermore, there was no indication that the defendant had a prior opportunity to cross-examine the forensic analyst.[130]

The Supreme Court was faced with the question of whether the Confrontation Clause allows a forensic analyst to testify to a lab report that he did not conduct or observe and was conducted for the purpose of proving a particular fact in a criminal trial.[131] The Court held that the forensic analyst's testimony made on behalf of the analyst who actually conducted the analysis did not comport with the Confrontation Clause.[132] The Supreme Court rejected the reasoning applied by the New Mexico Supreme Court and reiterated the rule established by *Crawford*.[133]

The Court observed that the analyst who actually performed the test was in effect certifying more than a machine-generated number.[134] The analyst who executed the report certified that he had received the defendant's blood sample "with the seal unbroken, that he checked to make sure that the forensic report number and the sample number 'corresponded,' and that he performed on Bullcoming's sample a particular test, adhering to precise protocol."[135] The absent forensic analyst also attested to the fact that the sample had not been manipulated.[136] The Supreme Court ruled that because the testifying analyst could neither confirm nor deny what the absentee analyst ob-

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[128] *Id.*

[129] *Id.* at 2713.

[130] *Id.* at 2714.

[131] *Bullcoming*, 131 S. Ct. at 2710.

[132] *Id.* (holding that "the accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable, and the accused had an opportunity, pretrial, to cross-examine particular scientist"). *Id.*

[133] *Id.* at 2713 ("[If] an out of court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness."). *Id.*

[134] *Bullcoming*, 131 S. Ct. at 2715.

[135] *Id.* at 2714.

[136] *Id.* ("[H]e further represented, by leaving the 'remarks' section of the report blank, that no 'circumstance or condition . . . affected the integrity of the sample . . . or the validity of the analysis.' ").

served, the defendant was not afforded a fair opportunity to cross examine.[137] Furthermore, had the performing analyst been made available at Bullcoming's trial, the defense would have had an opportunity to undermine his credibility by questioning why he had been placed on unpaid leave and to inquire as to whether he performed the tests according to the precise protocols.[138]

## V. NEW YORK APPROACH

New York courts have expanded upon the definitions of testimonial statements provided by the Supreme Court, following a rubric set forth in *People v. Rawlins*.[139] *Rawlins* illustrated the Court of Appeals' use of the "indicia of testimoniality," including:

> (1) [T]he extent to which the entity conducting the procedure is "an 'arm' of law enforcement"; (2) whether the contents of the report are a contemporaneous record of objective fact, or reflect the exercise of "fallible human judgment"; (3) the question, closely related to the previous two, of whether a pro-law enforcement bias is likely to influence the contents of the report; and (4) whether the report's contents are "directly accusatory" in the sense they explicitly link the defendant to the crime.[140]

The Court of Appeals applied these factors in *Rawlins* where a fingerprint analysis was the evidence at issue.[141] The prosecution introduced a report, which included the defendant's fingerprints and fingerprints lifted from the scenes of six burglaries.[142] Only one of the two analysts who performed the comparison testified at trial.[143] And this analyst concluded that the prints sampled from the crime scenes matched the defendant's.[144] Using the "indicia of

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[137] *Id.* at 2715.

[138] *Id.*

[139] 884 N.E.2d 1019 (N.Y. 2008).

[140] *Freycinet*, 892 N.E.2d at 845-46 (quoting *Rawlins*, 884 N.E.2d at 1030-31 (internal citations and quotation marks omitted)).

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

[142] *Id.*

[143] *Id.* at 1023.

[144] *Id.*

testimoniality," the court deemed the fingerprint comparison to be prepared "solely for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish the defendant's identity," thus touching upon the fourth prong.[145] In addition, the first indicia was also satisfied because police department analysts, who fall within the category of law enforcement personnel, produced the evidence.[146] Lastly, the fingerprints taken from the scene of the burglary in question matched the defendant's, thus linking him to the burglary.[147] In light of this, the court in *Rawlins* ruled that the fingerprint analysis was testimonial and the defendant was therefore entitled to confront his accusers.[148]

In the context of hospital and medical reports specifically, most indicia will not apply. For example, medical professionals such as doctors and nurses are the ones scribing information of patients, and neither are generally considered an arm of law enforcement. Also, without more information, it is likely that no pro-law enforcement bias will influence the hospital staff to alter the report. Most at issue is the fourth prong, where patients are more likely to identify someone who physically or sexually assaulted them or inflicted any other harm upon them. But while *Crawford* and its progeny and *Rawlins* have provided frameworks for deciding testimonial evidence subject to the Confrontation Clause, there is no federal precedent that addresses the testimonial nature of hospital records. In contrast, New York courts have been faced with deciding whether a defendant's confrontation rights are implicated by the admittance of physician records on a number of occasions.[149]

A recent Court of Appeals case, *People v. Duhs*,[150] illustrated New York's usage of the primary purpose test with respect to a doctor's testimony concerning a child's statement made during an examination.[151] In *Duhs*, the defendant allegedly placed his girlfriend's

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[145] *Id.* at 1033.

[146] *Rawlins*, 884 N.E.2d at 1023.

[147] *Id.* at 1033.

[148] *Id.*

[149] *See, e.g.*, People v. Duhs, 947 N.E.2d 617, 618 (N.Y. 2011) (holding that a physician's testimony concerning a child's statement made during an examination that was absent from the hospital record to be non-testimonial because it was necessary to the child's medical diagnosis and treatment).

[150] 947 N.E.2d 617 (N.Y. 2011).

[151] *Duhs*, 947 N.E.2d at 619-20.

child in a bathtub filled with boiling water resulting in the child suffering third degree burns.[152] At trial, the prosecution called upon the doctor, who examined the child as a witness.[153] The doctor testified to an exchange that occurred between himself and the patient that was not included in the medical records.[154] The defendant objected, arguing that his right to confront the witnesses against him was violated by allowing the doctor to testify to a conversation he had with the child.[155] The State contended that this statement was not subject to the Confrontation Clause because it was non-testimonial.[156] The State's argument was based on the primary purpose test, which indicated that the purpose of the doctor's question was to determine the cause of the injury and apply the appropriate treatment, *not* to elicit facts or other information to be used later at trial.[157] The Court of Appeals agreed and affirmed the lower court's holding that the statement in question was non-testimonial.[158]

The court reasoned that the child's statement indicating that his mother's boyfriend prevented him from getting out of a tub filled with boiling water was not testimonial because the primary purpose of the physician's inquiry was to establish the cause of the accident to render adequate aid.[159] Additionally, the court also recognized that the Supreme Court has already stated that " 'statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules' and not the Confrontation Clause."[160] Because the doctor's first and foremost duty was to offer medical assistance to a child, and not to obtain information relevant to a future prosecution, the court concluded that the child's statement "was germane to his medical diagnosis and treatment," and therefore was properly admitted under the medical treatment hearsay exception."[161]

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[152] *Id.* at 618.

[153] *Id.*

[154] *Id.* (referring to when the doctor asked the child why he did not get out of the tub and the child said "he wouldn't let me out").

[155] *Id.* at 619.

[156] *Duhs*, 947 N.E.2d at 619.

[157] *Id.* at 619-20.

[158] *Id.* at 620.

[159] *Id.* at 619-20.

[160] *Id.* at 620 (quoting Giles v. California, 554 U.S. 353, 376 (2008)).

[161] *Duhs*, 947 N.E.2d at 618. The Court of Appeals relied on *Davidson v. Cornell*, 30 N.E. 573, 576 (N.Y. 1892), which observed the unique circumstances where a patient is seeking medical attention and "there is a strong inducement for the patient to speak truly of

The Court of Appeals faced another similar situation involving medical records in *People v. Ortega*. There, the court also allowed the prosecution to introduce hospital records, though the only difference between this case and *Duhs* was that the statements were admitted under a different hearsay exception.[162] *Ortega* provided the rule that the admissibility of a victim's medical records under the business records exception hinges on whether the statement at issue is relevant to diagnosis and treatment.[163]

The complainant in *Ortega* was taken to the hospital after a physical altercation with her boyfriend.[164] Once there, she informed the medical personnel that her older boyfriend used a belt to strangle her.[165] The attending physician marked in the victim's report that she suffered from "domestic violence and asphyxiation."[166] While some information from the hospital report was redacted at the behest of the defense counsel, the information concerning references to domestic violence and the description of the weapon were permitted to be introduced at trial.[167] The defendant was convicted of assault and appealed, but the Appellate Division affirmed, "finding that it was a proper exercise of discretion for the court to allow limited references in medical records and testimony to the effect that complainant 'was diagnosed as having been subjected to domestic violence involving a former boyfriend,' as those references were relevant to the proposed treatment."[168]

The Court of Appeals affirmed, going into depth on the trustworthiness of hospital records with respect to criminal trials.[169] The court observed that hospital records are reliable because they reflect the human emotion to report the facts as they truly occurred, and also

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his pains and sufferings . . . ." *Id.* Therefore statements that are made by a patient describing his "present condition are permitted to be given as evidence only when made a physician for the purposes of treatment." *Id.*

[162] *Ortega*, 942 N.E.2d at 216.

[163] *Id.* at 211. The court will admit hospital records under the business records exception when they "reflect acts, occurrences, or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects of the particular patient's hospitalization." *Id.* at 214.

[164] *Id.* at 212.

[165] *Id.*

[166] *Ortega*, 942 N.E.2d at 212.

[167] *Id.*

[168] *Id.* at 213.

[169] *Id.* at 214.

because they are designed to be referred to in moments of life and death.[170] Accordingly, hospital records fall within the business records exception when the information contained in them is useful for understanding the aspects of a patient's hospitalization, including the events leading up to hospitalization, diagnosis, and prognosis.[171]

As examples, the court cited to *Williams v. Alexander*[172] and *People v. Greenlee*.[173] In *Williams*, the plaintiff was involved in a car accident and told the attending physician that a car struck another car which propelled itself into his vehicle.[174] The court determined that this statement focused primarily on how the accident occurred rather than on providing information relevant to diagnosis or treatment, and thus rendered the statement inadmissible as a business record.[175] In contrast, the statement of a woman to a doctor claiming that she was threatened by her former boyfriend was relevant in order to formulate a discharge plan to ensure her safety.[176] These cases reiterate the rule that the inquiry regarding a statement's admissibility is whether the statement is relevant to a patient's diagnosis or treatment.[177] The court held that because instances of domestic violence require treatment plans different from other types of assaults due to the intimate relationship and living conditions of the parties, admitting the references to domestic violence and a safety discharge plan in the hospital records were not improper.[178]

## VI. CONSISTENCY IN THE FACE OF NEW YORK AND FEDERAL PRECEDENT

### A. Is *Diaz* Consistent with New York Precedent?

The court in *Diaz* was correct in finding that the hospital re-

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170 *Id.*
171 *Ortega*, 942 N.E.2d at 214.
172 129 N.E.2d 417 (N.Y. 1955).
173 70 A.D.3d 966 (App. Div. 2nd Dep't 2010).
174 *Williams*, 129 N.E.2d. at 418.
175 *Id*. at 420.
176 *Greenlee*, 70 A.D.3d at 967.
177 *Ortega*, 942 N.E.2d at 215.
178 *Id.*

port was non-testimonial in nature[179] and is consistent with *Duhs* and its progeny.[180] Based on *Duhs*, the court in *Diaz* deemed the hospital report to be non-testimonial because the report included statements made by the patient to the doctor, which were germane her diagnosis and treatment.[181] The *Diaz* opinion is also consistent with New York's position with respect to admitting hospital records under the business records exception.[182] Not surprisingly, the business records requirement is noticeably similar to the standard used to determine the testimonial nature of hospital records.[183] The court, in citing to *Ortega*, stated that "hospital records [are] admissible under the business records exception when they reflect acts or events that relate to diagnosis, prognosis, or treatment."[184]

The testifying doctor stated that "the record of the complainant's stay at Whitestone Hospital was kept in regular course of business,"[185] and it is assumed that it is within the hospital's regular course of business to prepare such reports because whenever a patient is admitted to a hospital their condition and treatment is documented. For these reasons, the court in *Diaz* was correct in finding the hospital records admissible under the business records exception.[186]

At first glance it could be argued that the defendant posed a valid argument when he asserted that the hospital records were analogous to the forensic reports in *Melendez.*[187] The opinion does not elaborate on the basis of his argument, but there are several recognizable similarities. First, a hospital record can be used in the same manner as a forensic report.[188] For example, both can be used to dispel or prove a fact in the prosecution's case.[189] In the *Diaz* case, the

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[179] *Diaz*, 2012 WL 1606311, at *5.

[180] *Id.* at *4.

[181] *Id.* at *4-5.

[182] *Id.* at *5.

[183] *Id.* at *4.

[184] *Diaz*, 2012 WL 1606311, at *4.

[185] *Id.* at *2.

[186] *Id.* at *5.

[187] *Id.*

[188] *Melendez-Diaz*, 557 U.S. at 324 ("[T]he analysts' statements here prepared specifically for use at petitioner's trial were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.").

[189] *See id.* at 311 (utilizing the "primary purpose" test in finding that the forensic reports indicating the presence of cocaine seized from evidence constituted testimonial evidence, reasoning that the certified reports were being used to prove or establish historical events

complainant sought medical care from her physician after being raped.[190] Generally, when a patient has endured a rape there are certain medical procedures performed by medical personnel to determine the physical damage caused,[191] often referred to as a "rape kit."[192] The purpose of the rape kit is to preserve physical evidence following a sexual assault, which can subsequently be used in a rape investigation.[193] The rape kit is then sent to law enforcement for DNA testing.[194] In essence, the rape kit is the first step in the forensic analysis. Assuming a rape kit was actually performed in *Diaz* and the results were sent for DNA testing, it is likely that this information would have been included in the complainant's hospital record. The results of the rape kit could then be used to prove the prosecution's case, which supports the argument that the report was prepared in anticipation of litigation and thus testimonial.[195] Moreover, if the hospital record was deemed testimonial, then the hospital resident would have been a "witness" for purposes of the Confrontation Clause.[196]

However, the court in *Diaz* did not go into much detail with respect to how much reliance the doctor placed on the hospital reports or whether or not the doctor was familiar with the hospital's procedures.[197] Instead, the *Diaz* opinion merely stated that the doctor reviewed the hospital record and that he signed the record because he agreed with the resident's notations.[198] Furthermore, Diaz's contention that his situation was analogous to that in *Melendez-Diaz* falls short because, unlike the analysts in *Melendez-Diaz*, the doctor in his

relevant to a criminal trial expected to take place in the future).

[190] *Diaz*, 2012 WL 1606311, at *2-*3. Recall that the complainant was then admitted to the hospital where she was treated by a hospital resident who made notations in her hospital record as to his observations. *Id.* at *1. Dr. Fuchs then testified to his own examinations of the complainant and to the hospital record of the complainant's stay. *Id.* at *2.

[191] Jill E. Daly, *Gathering Dust on the Evidence Shelves of the United States—Rape Victims and Their Rape Kits: Do Rape Victims Have Recourse Against State and Federal Justice Systems?*, 25 WOMEN'S RTS. L. REP. 17, 21 (2003).

[192] N.Y. CRIM. LAW § 6:64 (McKinney 2011).

[193] Daly, *supra* note 191, at 21.

[194] *Id.* at *5.

[195] *Diaz*, 2012 WL 1606311, at *5.

[196] *Compare id.* (ruling that the hospital report contained statements from non-testifying persons), *with Melendez-Diaz*, 557 U.S. at 311-12 ("The forensic reports certifying the presence of cocaine, are comparable to 'live in-court testimony, doing precisely what a witness does on direct examination.' ").

[197] *Brown*, 918 N.E.2d at 932.

[198] *Diaz*, 2012 WL 1606311, at *2.

case actually treated and diagnosed the complainant.[199]

The trend among New York cases is that the defendant rarely has the opportunity to confront the analysts or doctors who actually prepare the reports being used against him or her at trial because such evidence is regularly deemed non-testimonial.[200] Notice that the New York Court of Appeals has already ruled hospital reports, forensic reports, autopsy reports, and DNA reports containing the results of a rape kit, to be non-testimonial in nature.[201] Essentially, New York courts find that raw factual data does not implicate Confrontation Clause concerns. New York's pro-non-testimonial view is distinguishable from the Supreme Court, which has consistently found forensic reports to be testimonial in nature and subject to the Confrontation Clause.[202]

### B. If the Supreme Court Hears the Hospital Records Issue, How Will it Decide?

The Supreme Court's strict approach to the Confrontation Clause is distinguishable from the New York Court of Appeals. Federal precedent demonstrates the Supreme Court's position on preserving the defendant's constitutional right to confront his or her witness. Perhaps that is why the Court is cautious in its determinations of what evidence is deemed testimonial.

As previously noted, the United States Supreme Court has not been faced with the issue of deciding whether a hospital report is considered testimonial for purposes of the Confrontation Clause. But based on *Crawford* and its progeny, there is some indication that the Court might come to a finding similar to that of the forensic reports in *Melendez-Diaz*.[203] Similar to the forensic reports in *Melendez-*

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[199] *Id.*

[200] *Duhs*, 947 N.E. 2d at 619-20. *See also People v. Hall*, 923 N.Y.S.2d 428 (2011) (finding that the autopsy report was properly admitted as business record despite fact that medical examiner who created report did not testify); *People v. Freycinet*, 892 N.E.2d 843 (N.Y. 2008) (factual portions of autopsy report were not testimonial and could be introduced as a business record without doctor who performed autopsy); *People v. Brown*, 918 N.E.2d 927 (N.Y. 2008) (holding DNA report containing "raw data" admitted as business record despite fact that analyst who prepared report did not testify).

[201] *Diaz*, 2012 WL 1606311, at *5.

[202] *Melendez-Diaz*, 557 U.S. at 311; *Bullcoming*, 131 S. Ct. at 2710.

[203] *Melendez-Diaz*, 557 U.S. at 310 ("There is little doubt that the documents at issue in this case fall within the core clause of testimonial statements [described in *Crawford*.]").

*Diaz*, the Court would likely find hospital reports susceptible to manipulation.[204] For example, when a patient is being observed in a hospital, their chart is accessible to a number of nurses, doctors, and medical students who may make notations as they see fit.[205] While hospital records include notations as to machine-generated data, *e.g.*, vitals, heart rate, etc., they also include subjective observations of the patient's condition.[206] These subjective observations include the patient's physical appearance, statements made by the patient to the physician, and the patient's mental state.[207] This argument is comparable to the reasoning set forth in *Bullcoming*.[208]

In light of the Supreme Court's strict adherence to preserving a defendant's right to confront their accusers, it is unlikely that the Court would admit any record containing subjective observations through the testimony of a surrogate witness. The rationale behind this was addressed in *Bullcoming*. Like the analyst in *Bullcoming*, the doctor in *Diaz* was not only attesting to raw data but rather the condition of the complainant based on the perspective of other hospital employees.[209] It is one thing to account for one's own medical expertise, but it is quite another to testify to the knowledge and experience of others. This is especially dangerous because doctors often have different opinions regarding treatment options and can misdiagnose. Moreover, like the testifying analyst in *Bullcoming*, the doctor in *Diaz* could neither confirm nor deny what the absentee hospital resident observed during his analysis.[210] This in turn did not give Diaz a fair opportunity to cross-examine.[211] For these reasons, it is un-

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[204] *Id.* at 318 ("Forensic evidence is not uniquely immune from the risk of manipulation.").

[205] *Id.* at 320 ("At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have had.").

[206] Mark R. Bower, *Providing a Separate Cause of Action in Malpractice Cases, for Violation of the Federal "Anti-Dumping" Act*, N.Y. ST. B. J. 34, 35 (1994).

[207] *Id.*

[208] *See Bullcoming*, 131 S. Ct. at 2714 (recognizing that "[t]hese representations, relating to past events and human actions not revealed in raw, machine-produced data, are meant for cross-examination").

[209] *Diaz*, 2012 WL 1606311, at *2.

[210] *Bullcoming*, 131 S. Ct. at 2715 ("But surrogate testimony of the kind [the surrogate analyst] was equipped to give could not convey what [the absentee analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed.").

[211] *Id.* at 2716 ("Accordingly, the Clause does not tolerate dispensing with confrontation

likely that the Supreme Court would declare a hospital report non-testimonial because of the probability that it contains subjective observations.

On the other hand, if the Supreme Court adopted *Bryant*'s "on going emergency" approach in assessing the testimonial nature of hospital records, it would find such records to be non-testimonial in certain situations.[212] The circumstances surrounding an ongoing emergency are similar to those when a complainant makes a statement to their doctor for purposes of seeking medical treatment.[213] For example, when a physician makes inquiries to his patient's condition, those statements made by the patient are for the purpose of sustaining human life and not in anticipation of a criminal trial.[214] The Court would apply the same factors as it did in *Bryant*.[215] Under the *Bryant* analysis, it would evaluate whether the victim is stable versus whether the victim is fatally wounded and is conscious of his or her condition. Similar to that of the police officer in *Bryant* whose job is to diminish the threat, the doctor's job is to stabilize his patient.[216]

Due to the overwhelming likelihood that any hospital report would include subjective observations, it is improbable that the Court would apply the "on going emergency" standard if there were a surrogate witness testifying to such report. In light of this, and the arguable similarities shared between forensic reports and hospital records, the Supreme Court would adopt the same reasoning as they did in *Melendez-Diaz* or *Bullcoming*.

## VII. CONCLUSION

In conclusion, the *Diaz* opinion is clearly consistent with New York precedent established by *Duhs* and the cases that followed. New York's position with respect to the testimonial nature of hospital records and forensic reports is clearly at odds with the federal ap-

simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.").

[212] *Bryant*, 131 S. Ct. at 1147-48.

[213] *Id.* at 1148 ("A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one.").

[214] *Diaz*, 2012 WL 1606311, at *5.

[215] *Bryant*, 131 S. Ct. at 1162.

[216] *Id.* at 1159.

proach. New York infringes on the Sixth Amendment rights of defendants by being too relaxed in its rendering of hospital records and forensic reports as non-testimonial, thereby not giving defendants an opportunity to confront their accusers.

Based on the Court's decisions in *Melendez-Diaz* and *Bullcoming*, the Supreme Court would likely consider hospital records to constitute testimonial evidence within the scope of the Confrontation Clause. Federal precedent has made it abundantly clear that a defendant's right to confront his accuser is not a dispositive right and therefore it is unlikely that the Supreme Court would render all hospital records to be non-testimonial.

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