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YOU BLEW IT: THE CONFRONTATION CLAUSE & BREATHALYZERS AS TESTIMONIAL EVIDENCE

SUPREME COURT OF NEW YORK APPELLATE DIVISION, FOURTH DEPARTMENT

People v. Umpierre¹
(decided September 21, 2012)

I. INTRODUCTION

Following the United States Supreme Court decisions in *Melendez-Diaz v. Massachusetts*² and *Bullcoming v. New Mexico*,³ with respect to scientific testing, courts have maintained varying views of what constitutes testimonial evidence,⁴ especially in New York.⁵ The first issue presented to the court in *Umpierre* was wheth-

¹ 951 N.Y.S.2d 382 (App. Div. 4th Dep't 2012).

² 557 U.S. 305 (2009).

³ 131 S. Ct. 2705 (2011).

⁴ Compare *Commonwealth v. Zeininger*, 947 N.E.2d 1060, 1062 (Mass. 2011), and *State v. Benson*, 287 P.3d 927, 928 (Kan. 2012) (holding that the Breathalyzer certifications were non-testimonial and were admissible absent live in-court testimony), with *Derr v. State*, 29 A.3d 533, 554 (Md. 2008), cert. granted, 133 S. Ct. 63 (relying on *Bullcoming*, holding that calibration reports are testimonial in nature because they “present[] a risk of error that might be explored on cross-examination”), and *Shiver v. State*, 900 So. 2d 615, 618 (Fla. Dist. Ct. App. 2005) (holding that Breathalyzer calibration reports are testimonial, even under *Crawford* standards, because an objective witness could reasonably expect that they would be used at a criminal prosecution).

⁵ Compare *People v. Hulbert*, 939 N.Y.S.2d 661, 662 (App. Div. 3d Dep't 2012), *People v. Harvey*, 907 N.Y.S.2d 102, 102 (Sup. Ct. 2010) (holding that the calibration reports and the simulator solution reports, ensuring the reliability of the Breathalyzer instrument, are not testimonial because they do not link the defendant to the crime), and *People v. Lebrecht*, 823 N.Y.S.2d 824, 828 (App. Term 2006) (holding that the breath test certification reports were non-testimonial because they were neutral in character, relating only to the operation of the instrument and the simulator solution used to calibrate it, and the reports did not result from “structured police questioning,” were not created as an official request to gain incriminating evidence, and did not accuse anyone of criminal conduct), with *People v. Heyanka*, 886 N.Y.S.2d 801, 802 (Dist. Ct. 2009) (holding that the calibration reports were testimonial because they were prepared with a “reasonable expectation that they would be used at criminal

er Breathalyzer and Intoxilyzer 5000 results qualified as testimonial evidence, requiring live in-court testimony.⁶ After determining that the Breathalyzer and Intoxilyzer 5000 results were testimonial, the court then had to determine who could testify in order to withstand a Confrontation Clause challenge.⁷ Relying on federal precedent, the court in *Umpierre* correctly held that the admission of the test results, without live in-court testimony from the officer who performed the Breathalyzer and Intoxilyzer 5000, violated Umpierre's rights under the Confrontation Clause.⁸

II. FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2010, Jose Umpierre was erratically changing lanes when two New York Police Department ("NYPD") Officers, Stephen Rizzo and Daniel Glatz, pulled him over.⁹ Officer Rizzo observed that Umpierre appeared intoxicated, and consequently gave Umpierre a Breathalyzer.¹⁰ While Officer Rizzo administered the Breathalyzer, Officer Glatz stood several feet away and did not hear any words exchanged.¹¹ Upon failing the Breathalyzer, Officer Rizzo arrested Umpierre and charged him with various alcohol-related traffic offenses.¹² After bringing Umpierre to the 45th precinct, Officer Rizzo administered a follow-up Intoxilyzer 5000, which the defendant also failed.¹³

In anticipation of trial, the prosecution sought to introduce

prosecutions."), and *People v. Carriera*, 893 N.Y.S.2d 844, 846 (Crim. Ct. 2010) (holding that the breath test calibration and simulator solution tests were testimonial because they were created by law enforcement officials for use at trial).

⁶ *Umpierre*, 951 N.Y.S.2d at 384.

⁷ *Id.*

⁸ *Id.* at 386.

⁹ *Id.* at 383.

¹⁰ *Id.*

¹¹ *Umpierre*, 951 N.Y.S.2d at 384 (noting that Officer Glatz operated a video camera during the testing but could not hear the words exchanged—why the prosecution did not admit the video into evidence is beyond the scope of this case note).

¹² *Id.* at 383. See N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney 2012) (driving while impaired statute); N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 2012) (driving while ability impaired statute); N.Y. VEH. & TRAF. LAW § 1192(2)(a) (providing the aggravated driving while intoxicated statute); VEH. & TRAF. LAW § 1192(3) (driving while intoxicated statute); N.Y. VEH. & TRAF. LAW § 1194(1)(b) (McKinney 2010) (administering field sobriety tests to establish the suspect's blood-alcohol level at the scene standard).

¹³ *Umpierre*, 951 N.Y.S.2d at 383; N.Y. VEH. & TRAF. LAW § 1194(2)(a).

both the Breathalyzer and the Intoxilyzer 5000 test results.¹⁴ Umpierre moved to exclude this evidence, arguing that because Officer Rizzo was unavailable he would not be able to cross-examine him about the test results; thus, his right to confrontation under the Sixth Amendment would be violated.¹⁵ Relying on the precedent set forth in *Melendez-Diaz* and *Bullcoming*, the court determined that the test results were testimonial and could only be introduced through live in-court testimony of the officer who conducted the tests—Officer Rizzo.¹⁶ The court explained that because Officer Glatz was merely a test observer and he was not within hearing distance while the tests were conducted, he could not testify on behalf of Officer Rizzo.¹⁷ Thus, the court granted the defendant’s motion.¹⁸

III. THE FEDERAL APPROACH TO THE CONFRONTATION CLAUSE

The Supreme Court’s interpretation of the Sixth Amendment Confrontation Clause has continuously evolved.¹⁹ The Sixth Amendment guarantees “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”²⁰ Although the language of the Sixth Amendment appears straight-forward, “the exact contours of th[is] right in the context of scientific testing is a source of significant litigation.”²¹ The Court built upon its Confrontation Clause jurisprudence in *Crawford v.*

¹⁴ *Umpierre*, 951 N.Y.S.2d at 383.

¹⁵ *Id.* at 384.

¹⁶ *Id.* at 386.

¹⁷ *Id.* at 384.

¹⁸ *Id.* at 386.

¹⁹ Megan Weisgerber, *Confronting Forensics: Bullcoming v. New Mexico and the Sixth Amendment*, 45 LOY. L.A. L. REV. 613, 614 (2012); *California v. Green*, 399 U.S. 149 (1970); *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by*, *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz*, 557 U.S. 305; *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Bullcoming*, 131 S. Ct. 2705; *Williams v. Illinois*, 132 U.S. 2221, 2227 (2012).

²⁰ U.S. CONST. amend. VI. *See* *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (making the Sixth Amendment Confrontation Clause applicable to state criminal prosecutions through incorporation of the Fourteenth Amendment).

²¹ *Umpierre*, 951 N.Y.S.2d at 385; Michael J. Hutter, *‘Pealer’ and Forensic-Related Records: Confronting ‘Crawford’ and its progeny*, N.Y. L.J. (Apr. 4, 2013) (stating that because of the categories created in *Crawford*, “[m]uch litigation has ensued over the boundaries of these categories, especially as to the classification of forensic reports . . . and the records of the maintenance/calibration/inspection efforts employed to ensure that the devices or machines utilized in those analyses and tests are working properly.”).

*Washington*²² when it overruled *Ohio v. Roberts*²³ and shifted its inquiry from whether the evidence is reliable to whether the evidence is “testimonial.”²⁴ In recent years, the Court has clarified what constitutes testimonial evidence and what is required to pass constitutional muster.²⁵

In *Crawford* the Supreme Court established a new test to determine whether the evidence is testimonial in nature.²⁶ In *Crawford*, the defendant was charged with assault and attempted murder after he stabbed the victim.²⁷ Although the defendant claimed that he had stabbed the victim in self-defense, his wife gave a tape-recorded statement to the police undermining his self-defense claim.²⁸ At trial, the prosecution sought to play the recording because, under the state marital privilege statute, the prosecution was unable to call the defendant’s wife as a witness.²⁹ The defendant moved to suppress the recording, claiming that it violated his Sixth Amendment right because he could not cross-examine his wife.³⁰ The trial court, relying

²² 541 U.S. 36 (2004).

²³ 448 U.S. 56 (1980). The Court held that out-of-court statements by witnesses who are unable to testify can be admitted into evidence if the court determines that the evidence falls within a “firmly rooted hearsay exception” or has “particularized guarantees of trustworthiness”. *Id.* at 66. See Harlan Spector, *Legal Challenges Mount Against Controversial Breath-Alcohol Tester*, CLEVELAND.COM (Jan. 13, 2012, 12:01 AM), http://www.cleveland.com/metro/index.ssf/2013/01/legal_challenges_mount_against.htm l?utm_medium=referral&utm_source=t.co (stating that the sole purpose for the Confrontation Clause is to ensure the reliability of the statement).

²⁴ *Bullcoming*, 131 S. Ct. at 2714 n.6 (quoting *Davis*, 547 U.S. at 822 (determining that a statement is testimonial when it has a “primary purpose of establishing or proving past events potentially relevant to later criminal prosecution”) (internal quotation marks omitted)).

²⁵ See *Nardi v. Pepe*, 662 F.3d 107, 111 (1st Cir. 2011) (stating that the Supreme Court was sharply divided when it extended the ruling in *Crawford* to *Melendez-Diaz* and *Bullcoming*).

²⁶ 541 U.S. at 51-52; see also *United States v. Ramos-Gonzalez*, 664 F.3d 1, 4 (1st Cir. 2011) (noting that the Court in *Crawford* affected a shift in Confrontation Clause jurisprudence).

²⁷ *Crawford*, 541 U.S. at 38, 40.

²⁸ *Id.* at 40 (noting that the defendant had stabbed the victim because the victim had allegedly tried to rape the defendant’s wife).

²⁹ *Id.* The defendant’s wife was unavailable and was not subject to cross examination at trial because of the Washington State marital privilege statute, which generally bars a spouse from testifying against the other spouse without the defendant-spouse’s consent. *Id.* Under this statute, the privilege does not protect out-of-court statements made by the spouse, which are admissible as a hearsay exception. *Id.* See also WASH. REV. CODE. ANN. § 5.60.060(1) (LexisNexis 1994).

³⁰ *Crawford*, 541 U.S. at 40.

on the Supreme Court's decision in *Roberts*, allowed the prosecution to play the recording for the jury, which ultimately resulted in a guilty verdict for the defendant.³¹ On appeal, the Washington Court of Appeals reversed the defendant's conviction.³² However, the Washington Supreme Court reinstated the defendant's conviction, unanimously holding that the recording bore "guarantees of trustworthiness" because it was virtually identical to the defendant's confession.³³

On review, the United States Supreme Court in *Crawford* overruled *Roberts*, holding that the decision was inconsistent with the Framers' intentions.³⁴ The decision in *Crawford* repudiated the Court's prior Confrontation Clause jurisprudence by shifting the inquiry from whether the evidence had "indicia of reliability" to whether the evidence was testimonial.³⁵ If a statement is deemed testimonial, its introduction into evidence will violate the Sixth Amendment unless the prosecution produces the declarant as a witness or shows that the declarant is unavailable and that the defendant had a prior opportunity for cross-examination.³⁶ The Court established three categories of out-of-court statements that qualify as testimonial:

[(1)] 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; [(2)] extrajudicial statements . . . contained in formalized testimonial materials, such as

³¹ *Id.* at 40-41.

³² *Crawford*, 541 U.S. at 41. The court used a nine-factor test and determined the recording was not reliable because the witness stated that her eyes were shut during the stabbing, she contradicted a prior statement, and her answers were in response to specific questions asked by the police. *Id.*

³³ *Id.* The Confrontation Clause is implicated anytime a witness offers testimony against the defendant. *Id.* at 51.

³⁴ *Id.* at 62-63, 65-66 (stating that the reliability test strays from the original meaning of the Confrontation Clause and emphasizing that the right to confront one's accusers dates back to Roman times).

³⁵ *Id.* at 51 (defining testimony as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" and that assessing the reliability of testimony is amorphous and subjective).

³⁶ *Crawford*, 541 U.S. at 53-54 (emphasizing that the Framers would not have condoned ex parte examinations involving law enforcement because of the focused language of the Confrontation Clause).

affidavits, depositions, prior testimony, or confessions; and [(3)] statements that were made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial.³⁷

Under the first category, the Court held that because the prosecution introduced the recording into evidence and gave no opportunity for cross-examination, the defendant's Sixth Amendment right had been violated.³⁸ Despite establishing the three categories, the Court declined to clearly explain under what circumstances the admission of each type of evidence implicates the right to confrontation, leaving the issue "for another day."³⁹

That day arose when the Supreme Court decided *Melendez-Diaz v. Massachusetts*.⁴⁰ In *Melendez-Diaz*, Boston Police Officers received a tip from an informant that an employee of a local store was involved in suspicious activity.⁴¹ The police set up surveillance outside of the store and witnessed the employee get into a car with two men—activity resembling a drug deal.⁴² After the employee exited the vehicle, one of the officers detained and searched him, finding a plastic bag containing what appeared to be cocaine.⁴³ The officers arrested all three men, including the defendant and placed them in the back of their police vehicle.⁴⁴ At the police station, the officers found nineteen small plastic bags in the police vehicle where the defendant had been sitting.⁴⁵ The police sent the bags to the lab for testing, which revealed that they all contained cocaine.⁴⁶

At trial, the prosecution sought to introduce the criminal forensic laboratory certificates into evidence, which certified that the

³⁷ *Id.* at 51-52.

³⁸ *Id.* at 68.

³⁹ *Id.*; see *Nardi*, 662 F.3d at 111 (noting that although the majority opinion in *Crawford* commanded seven Justices and the remaining two Justices concurred with that result, the decision was misleading because the Court declined to determine how far the testimonial statement reached, suggesting a narrow interpretation of what constitutes testimonial evidence).

⁴⁰ *Melendez-Diaz*, 557 U.S. at 307.

⁴¹ *Id.*

⁴² *Id.* at 308.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Melendez-Diaz*, 557 U.S. at 308.

⁴⁶ *Id.*

drug in the defendant's possession was cocaine.⁴⁷ The defendant objected to the admission of these affidavits, arguing that his inability to cross-examine the analyst who conducted the tests violated the Confrontation Clause.⁴⁸ The trial court overruled the defendant's objection; the defendant was convicted and subsequently appealed.⁴⁹ The Appeals Court of Massachusetts rejected the defendant's claim, relying on state precedent that "authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment."⁵⁰

After granting certiorari, the Supreme Court, in a five-to-four decision, expanded the scope of testimonial evidence to include a consideration of whether the evidence was obtained strictly for use at trial.⁵¹ The Court, relying on its decision in *Palmer v. Hoffman*,⁵² stated that documents containing hearsay, which can ordinarily be admitted under the business record exception, cannot be admitted if the regularly conducted business activity is "the production of evidence for use at trial."⁵³ Affidavits, like the ones at issue, had already been analyzed in *Davis v. Washington*,⁵⁴ and the Court noted that "'certificates' [that] are functionally identical to live, in-court testimony, do[] 'precisely what a witness does on direct examination.'"⁵⁵ The Court concluded that, absent the testimony of the person who performed the underlying tests, the criminal forensic laboratory reports were testimonial, and thus, inadmissible.⁵⁶ The Court reasoned that the reports were not exempt from Confrontation Clause scrutiny because they were "quite plainly affidavits" falling within the "core

⁴⁷ *Id.*

⁴⁸ *Id.* at 309.

⁴⁹ *Id.* (holding that the certificates were admitted pursuant to Massachusetts law as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed") (quoting MASS. GEN. LAWS, ch. 111, § 13 (repealed 2012) (alteration in original)).

⁵⁰ *Melendez-Diaz*, 557 U.S. at 309; *Commonwealth v. Verde*, 827 N.E.2d 701, 705-06 (Mass. App. Ct. 2005) (holding that the drug certificates at issue were admissible as business records and did not constitute testimonial evidence because they have very little connection to the type of evidence the Confrontation Clause was designed to exclude).

⁵¹ *Melendez-Diaz*, 557 U.S. at 309, 321.

⁵² 318 U.S. 109, 113-14 (1943).

⁵³ *Melendez-Diaz*, 557 U.S. at 321; FED. R. EVID. 803(6).

⁵⁴ *Davis*, 547 U.S. at 836-37.

⁵⁵ *Melendez-Diaz*, 557 U.S. at 310-11 (quoting *Davis*, 547 U.S. at 83, that the affidavits are testimonial under *Crawford* because an objective witness could reasonably believe that they would be used for trial and that the sole purpose was to make a prima facie prosecution).

⁵⁶ *Id.* at 324.

class of testimonial statements” set forth in *Crawford*.⁵⁷ The Court emphasized that confrontation ensures accurate forensic analysis and is “designed to weed out not only the fraudulent analyst, but the incompetent one as well.”⁵⁸ The Court observed that an analyst’s lack of proper training or deficiency in a judgment may be discovered during cross-examination.⁵⁹

Subsequently, in *Bullcoming v. New Mexico*,⁶⁰ a five-Justice majority reaffirmed *Melendez-Diaz* and clarified that a substitute analyst could not testify on behalf of the person who performed the certifications in order to withstand Confrontation Clause scrutiny.⁶¹ In *Bullcoming*, the defendant rear-ended a pick-up truck, and as the driver of the pick-up truck approached the defendant to exchange information, he smelled alcohol and noticed that the defendant’s eyes were bloodshot.⁶² The defendant fled the scene and was later apprehended by police, who administered field sobriety tests.⁶³ Upon failing the tests, the police arrested the defendant.⁶⁴ Because the defendant refused to take another sobriety test, the police obtained a warrant authorizing such a test at a nearby hospital.⁶⁵ After the sample was taken, the police sent it to the New Mexico Department of Health, Scientific Laboratory Division (“SLD”).⁶⁶ The SLD’s report contained information supplied by the arresting officer, including that he witnessed the blood being drawn.⁶⁷ The report also contained certifications by the nurse who drew the sample and the SLD analyst’s cer-

⁵⁷ *Id.* at 310 (relying on *Crawford* to find that the defendant was entitled to confront the analysts at trial).

⁵⁸ *Id.* at 312, 319 (emphasizing that the majority was not, as the dissent warned, “sweeping away an accepted rule governing the admission of scientific evidence,” and that all of the cases it cited relied on the “since-rejected theory that unconfrosted testimony was admissible as long as it bore indicia of reliability.”).

⁵⁹ *Id.* at 317-20 (quoting *Crawford*, 541 U.S. at 62, that “[the Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”).

⁶⁰ 131 S. Ct. 2705 (2011).

⁶¹ *Bullcoming*, 131 S. Ct. at 2713; compare *Melendez-Diaz*, 557 U.S. at 306, (Kennedy, J., dissenting), with *Bullcoming*, 131 S. Ct. at 2709 (Kennedy, J., dissenting).

⁶² *Bullcoming*, 131 S. Ct. at 2710.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Bullcoming*, 131 S. Ct. at 2710.

tifications, stating that the defendant's blood-alcohol level was well above the legal limit.⁶⁸

At trial, the prosecutor announced that another SLD analyst would be called as a witness because the SLD analyst who performed the certification had gone on unpaid leave.⁶⁹ The defendant objected to this analyst's testimony, arguing that it violated his rights under the Confrontation Clause.⁷⁰ The trial court overruled the defendant's objection and admitted the SLD report into evidence as a business record.⁷¹ The jury convicted the defendant of aggravated driving while intoxicated ("DWI").⁷² On appeal, the New Mexico Court of Appeals upheld the defendant's conviction and concluded that the report was non-testimonial and was "prepared routinely with guarantees of trustworthiness."⁷³ While the defendant's appeal to the New Mexico Supreme Court was pending, the United States Supreme Court decided *Melendez-Diaz*.⁷⁴ In light of the Court's decision in *Melendez-Diaz*, the New Mexico Supreme Court held that the admission of the report did not violate the Confrontation Clause despite acknowledging that the report was testimonial.⁷⁵

The Supreme Court granted certiorari in *Bullcoming* to address whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report through live in-court testimony of an analyst who did not perform the underlying test.⁷⁶ The Court reasoned that because the SLD analyst's testimony not only indicated the results of the analysis, but also the procedures involved, a substitute analyst would not be able to testify to any potential errors during that process.⁷⁷ This type of evidence, the Court stated, was testimonial if it was "made in aid of a police investigation" or if it was used in order to establish a fact at trial.⁷⁸ The Court held that the prosecutor could not introduce the written analysis of individuals who neither

⁶⁸ *Id.*

⁶⁹ *Id.* at 2711-12.

⁷⁰ *Id.* at 2712.

⁷¹ *Id.*

⁷² *Bullcoming*, 131 S. Ct. at 2712.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 2712-13 (emphasizing that the substitute analyst was a qualified expert with respect to the machine).

⁷⁶ *Id.*

⁷⁷ *Bullcoming*, 131 S. Ct. at 2711.

⁷⁸ *Id.* at 2717.

participated in nor observed the testing of the blood sample.⁷⁹ The Court emphasized that the accused have a right to confront the analyst who made the report and that an additional scientific report could not be introduced unless the defendant had a prior opportunity to cross-examine the analyst who prepared it.⁸⁰

IV. THE NEW YORK INTERPRETATION OF TESTIMONIAL EVIDENCE

Prior to *Melendez-Diaz* and *Bullcoming*, the New York Court of Appeals had decided *People v. Rawlins*⁸¹ and *People v. Meekins*.⁸² The Court of Appeals decided both *Rawlins* and *Meekins* on the same day and relied upon the precedent set by *Crawford* to assess whether DNA and latent fingerprint comparison reports were testimonial in nature, and thus, whether their admission, absent the experts' testimony, violated each respective defendant's Confrontation Clause rights.⁸³ The Court of Appeals explored the first category of "ex parte in-court testimony," established by the Court in *Crawford*, to justify its holding.⁸⁴

The Court of Appeals held that latent fingerprint comparison reports, prepared by law enforcement in *Rawlins*, were "nothing but testimonial" because they were prepared by police for the use at trial; however, because of the overwhelming evidence, the admission of the reports was deemed harmless error.⁸⁵ In the companion case, *Meekins*, the court deemed a rape-kit DNA analysis, prepared by an Office of the Chief Medical Examiner ("OCME") employee, non-testimonial because it was the product of a neutral scientific analysis.⁸⁶ Thus, the court held that the reports were admissible and did not offend the Confrontation Clause because they were not the type of "ex parte testimony that the Confrontation Clause was designed to

⁷⁹ *Id.* at 2710.

⁸⁰ *Id.* (holding that a "surrogate analyst," or any person who works for the laboratory, is not a sufficient witness and will not escape the Confrontation Clause violation).

⁸¹ 884 N.E.2d 1019 (N.Y. 2008) (noting that, at that time, this was an issue of first impression for the New York Court of Appeals).

⁸² 884 N.E.2d 1034 (N.Y. 2008) (holding that a rape-kit DNA report, prepared by the OCME, was non-testimonial because it was the product of a scientific analysis and did not indicate the defendant's innocence or guilt).

⁸³ *Rawlins*, 884 N.E.2d at 1022.

⁸⁴ *Id.* at 1026.

⁸⁵ *Id.* at 1033-34.

⁸⁶ *Id.* at 1035.

protect against.”⁸⁷ The court determined that the DNA reports fell outside of the scope of the first category because the reports were neither made “with an eye toward trial,” nor prepared as “formal statement[s] to government officers.”⁸⁸

However, in 2009, after the Supreme Court, in *Melendez-Diaz*, clarified that *Crawford*'s categories of testimonial evidence extended to scientific testing, the New York Court of Appeals decided *People v. Brown*⁸⁹ and disregarded the Court's decision by following and expanding upon its own decision in *Rawlins* and *Meekins*.⁹⁰ And yet, even after the Supreme Court expanded its Confrontation Clause jurisprudence in *Bullcoming*, the New York Court of Appeals in *People v. Pealer*⁹¹ analyzed the issue by relying on *Rawlins*, *Meekins*, and *Brown* instead of the federal precedent.⁹² Because of the conflicting interpretations of Confrontation Clause precedent by the Court of Appeals, many lower New York courts continue to struggle when determining what type of evidence triggers the Confrontation Clause.⁹³

In *Brown*, the defendant raped a nine-year old girl and hit her with a brick after she resisted his sexual advances.⁹⁴ Upon awaking, the victim ran to her friend who brought her to the hospital where a rape kit was performed.⁹⁵ Due to a substantial backlog and lack of funding, the OCME sent the rape kit—almost nine years after the crime—to one of its subcontracting laboratories for testing.⁹⁶ While

⁸⁷ *Id.* (noting that although the Court in *Crawford* declined to give a “precise definition” of testimonial, the Court categorically gave “additional clues,” which are generally described on the whole as “ex parte accusatory” testimony).

⁸⁸ *Rawlins*, 884 N.E.2d at 1026 (quoting *Crawford*, 541 U.S. at 56, that the involvement of government law enforcement officials in gathering ex parte accusatory testimony or statements presents a “unique potential for prosecutorial abuse”).

⁸⁹ 918 N.E.2d 927 (N.Y. 2009).

⁹⁰ *See Hutter*, *supra* note 27 (stating that the New York Court of Appeals provided the framework, which the Supreme Court lacked, which is necessary in determining whether evidence is testimonial).

⁹¹ 985 N.E.2d 903 (N.Y. 2013).

⁹² *Id.* at 903.

⁹³ *See, e.g., People v. Freycinet*, 892 N.E.2d 843 (N.Y. 2008) (holding that an autopsy report could be admitted as a business record, not requiring live in-court testimony because an autopsy report is non-testimonial); *People v. Hall*, 923 N.Y.S.2d 428 (App. Div. 1st Dep't 2011) (holding that an un-redacted autopsy report could be admitted into evidence without testimony from the person who prepared it because it was not testimonial).

⁹⁴ *Brown*, 918 N.E.2d at 928.

⁹⁵ *Id.*

⁹⁶ *Id.* at 928-29.

examining the perpetrator's semen from the rape kit, the laboratory technician isolated a male DNA specimen from a string of thirteen areas.⁹⁷ The technician entered this information into the Combined DNA Index System, and three years later, "a routine search of the database registered a 'cold hit,' linking [the] defendant's DNA to the profile found in the victim's rape kit."⁹⁸ Subsequently, the Queens Special Victims Squad took a DNA sample from the defendant and delivered it to the OCME, who then compared the defendant's DNA to the DNA from the rape kit.⁹⁹ The OCME analyst determined that the two profiles matched, occurring in "one out of one trillion males."¹⁰⁰

At trial, the prosecution sought to introduce the DNA report, including a profile of the specimen taken from the rape kit as a business record.¹⁰¹ Despite the defendant's objections, the trial court held that the DNA evidence was admissible because it was non-testimonial.¹⁰² The jury convicted the defendant of two counts of sodomy, two counts of assault, and endangering the welfare of a child; the Appellate Division Second Department affirmed the conviction.¹⁰³ On appeal to the New York Court of Appeals, the court differentiated DNA results from other laboratory results by stating that "DNA test results, standing alone, shed no light on the guilt of the accused in the absence of an expert's opinion that the results genetically match a known sample."¹⁰⁴ The Court distinguished *Melendez-Diaz* from *Brown*, observing that in *Brown*, the OCME analyst testified and came to her own conclusions based on the report provided by the subcontracting laboratory, whereas in *Melendez-Diaz*, the affidavits concluded that the defendant possessed cocaine.¹⁰⁵ The court relied on the primary purpose test, enunciated in *People v. Freycinet*,¹⁰⁶ to clarify whether the report about which the OCME an-

⁹⁷ *Id.* at 929 (noting that the lab technician also created a report which contained "machine-generated raw data, graphs and charts of the male specimen's DNA characteristics.").

⁹⁸ *Id.*

⁹⁹ *Brown*, 918 N.E.2d at 929.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 929-30.

¹⁰³ *Id.* at 930.

¹⁰⁴ *Brown*, 918 N.E.2d at 930-31.

¹⁰⁵ *Compare id.* at 931 (noting that the OCME analyst took the stand), with *Melendez-Diaz*, 557 U.S. at 308-09 (noting that the prosecution sought to introduce the certificates without in-court testimony).

¹⁰⁶ 892 N.E.2d 843 (N.Y. 2008).

alyst testified was the functional equivalent of live in-court testimony, and thus, testimonial under *Crawford*. The standard created by the court asked:

(1) whether the agency that produced the record is independent of law enforcement; (2) whether it reflects objective facts at the time of their recording; (3) whether the report has been biased in favor of law enforcement; and (4) whether the report accuses the defendant by directly linking him or her to the crime.¹⁰⁷

After considering all four categories, the court held that the reports were non-testimonial.¹⁰⁸ The court determined that the subcontracting laboratory was private and independent of law enforcement and that there was no subjective analysis because the report did not contain any conclusions regarding the suspect's identity.¹⁰⁹ The court emphasized that the technician prepared the report prior to the defendant becoming a suspect and that the testimony of the OCME analyst, not the report, linked the defendant to the crime.¹¹⁰ Thus, the court reasoned that, unlike the defendant in *Melendez-Diaz*, the defendant in *Brown* had the ability to cross-examine the witness who linked him to the crime.¹¹¹

In *People v. Thompson*,¹¹² law enforcement officials took blood samples from two burglary crime scenes.¹¹³ The samples were sent to two private laboratories and technicians created reports containing DNA profiles developed from the samples.¹¹⁴ At trial, the prosecution sought to introduce the reports without providing testimony from the technician who prepared them.¹¹⁵ The defendant objected, arguing that this would violate his Sixth Amendment right.¹¹⁶ The court held that the reports were not testimonial, and the jury ultimately found the defendant guilty.¹¹⁷ The defendant appealed, and

¹⁰⁷ *Brown*, 918 N.E.2d at 931.

¹⁰⁸ *Id.* at 932; *see also Pealer*, 985 N.E.2d at 904.

¹⁰⁹ *Brown*, 918 N.E.2d at 931.

¹¹⁰ *Id.* at 932.

¹¹¹ *Id.* at 931.

¹¹² 895 N.Y.S.2d 148 (App. Div. 2d Dep't 2010).

¹¹³ *Id.* at 148-49.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 149.

¹¹⁶ *Id.*

¹¹⁷ *Thompson*, 895 N.Y.S.2d at 148.

the Second Department affirmed, relying on *Brown*, stating that because the reports were “merely machine-generated graphs,” they would not require further explanation.¹¹⁸ The Second Department observed that the analysts would only be able to testify as to how they performed certain tests because their analysis did not link the defendant to any crime nor did it contain any subjective conclusions or comparisons of the samples taken from the defendant and from the crime scene.¹¹⁹

Subsequently, in *People v. Encarnacion*,¹²⁰ upon responding to a 911 call at a Bronx apartment building, the defendant told the police that while he was out getting food “some black guy” stabbed his girlfriend and her cousin.¹²¹ The police subsequently entered the apartment and found the defendant’s girlfriend, with multiple stab wounds, alongside her cousin who was dead.¹²² At the scene, police found a garbage bag full of different items including clothing and bloody knives.¹²³ After the defendant’s girlfriend was transported to the hospital, she told doctors that the defendant had stabbed her.¹²⁴ The police interviewed the defendant, and after telling him that his girlfriend was alive and had identified him as her attacker, he confessed.¹²⁵

At trial, the prosecution called the forensic analyst from the OCME, who performed the DNA testing on all of the clothing except for a pair of jeans, sneakers, and socks.¹²⁶ The analyst testified about the tests that she performed—but also about the tests that she did not perform—which linked the defendant to the crime.¹²⁷ The defendant objected, arguing that the analyst’s testimony, linking his DNA to the DNA found on all of the clothes, violated his right to confrontation.¹²⁸ The trial court rejected the defendant’s argument, and the jury subsequently convicted him on all counts.¹²⁹

¹¹⁸ *Id.* at 149.

¹¹⁹ *Id.*

¹²⁰ 926 N.Y.S.2d 446 (App. Div 1st Dep’t 2011).

¹²¹ *Id.* at 450.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Encarnacion*, 926 N.Y.S.2d at 450-51.

¹²⁶ *Id.* at 456.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 451 (noting that the defendant was convicted of second degree murder, attempted

On appeal, the First Department upheld the defendant's conviction, stating that a DNA analyst can testify regarding the analysis of a test she did not perform because those tests revealed non-accusatory raw data.¹³⁰ The court relied on the decision in *Brown* and deemed the analyst's testimony, and all corresponding notes and reports, to be non-testimonial.¹³¹ Ironically, the same day that the First Department decided *Encarnacion*, the Supreme Court decided *Bullcoming*, which took the opposite view.¹³²

Despite the trend in New York, the Second Department came to a different conclusion in *People v. Oliver*¹³³ and followed the Supreme Court's interpretation of testimonial evidence in *Melendez-Diaz* and *Bullcoming*.¹³⁴ In *Oliver*, the police found blood at the scene of a burglary and sent it to the Suffolk County Crime Laboratory for testing.¹³⁵ The forensic scientist tested the DNA and uploaded it onto the database; two weeks later, he discovered that a crime laboratory in Albany matched the DNA profile to the defendant's.¹³⁶ At trial, evidence of the DNA match was admitted, and the jury subsequently convicted the defendant of burglary in the second degree.¹³⁷

Surprisingly, the Second Department, on appeal, reversed the defendant's conviction and ordered a new trial.¹³⁸ The Second Department held that the DNA profile match was testimonial in nature

second degree murder, two counts of first degree assault, and he was sentenced to twenty years to life for the murder which would run consecutively with three twenty year prison terms for the other charges).

¹³⁰ *Encarnacion*, 926 N.Y.S.2d at 450.

¹³¹ *Id.*

¹³² *Compare id.* (holding that the DNA evidence could be admitted as a business record, and did not implicate the Confrontation Clause, so there was no requirement for live in-court testimony), *with Bullcoming*, 131 S. Ct. 2705 (holding that the DNA evidence was testimonial, and was inadmissible absent live in-court testimony from the actual person who performed the test; a substitute witness would be insufficient to withstand a Confrontation Clause violation).

¹³³ 938 N.Y.S.2d 619 (App. Div. 2d Dep't 2012). *Compare id.* at 621 (holding that the DNA reports, matching the defendant's blood with the blood at the crime scene, which were prepared by the Suffolk County Crime Laboratory, were testimonial), *with Umpierre*, 951 N.Y.S.2d at 385 (holding that the Breathalyzer and Intoxilyzer 5000 results, showing that the defendant's blood-alcohol level was above the legal limit, which were conducted by NYPD Officer Stephen Rizzo, were testimonial). The Second Department decided *Oliver* seven months before the Fourth Department decided *Umpierre*. *Id.*

¹³⁴ *Oliver*, 938 N.Y.S.2d 619.

¹³⁵ *Id.* at 621.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

because it did not consist of “machine-generated graphs” and “raw data,” as enunciated in *Brown*, but instead “consisted of information which shed light on the guilt of the defendant and accused the defendant ‘by directly linking him . . . to the crime.’ ”¹³⁹ The Second Department rejected the analysis in *Brown*, reasoning that the admission of this evidence violated *Crawford* and the Confrontation Clause because the source of this information did not testify at trial and was not subject to cross-examination.¹⁴⁰ Moreover, the court rejected the prosecution’s contention that this evidence was properly admitted to “complete the narrative.”¹⁴¹ The court emphasized that the trial court’s error in admitting this evidence could not be deemed harmless because it would compromise the defendant’s constitutional right to confront his accusers.¹⁴²

However, the New York Court of Appeals recently decided *People v. Pealer*, holding that Breathalyzer calibration reports, offered to show the reliability of the Breathalyzer instrument, were non-testimonial.¹⁴³ In *Pealer*, police officers pulled over the defendant after observing him weaving in-and-out of lanes.¹⁴⁴ Upon speaking with the defendant, the officers noticed that his eyes were red and glassy and that his speech was slurred.¹⁴⁵ After the defendant was arrested for failing the field sobriety tests and an initial breath screening, he took another Breathalyzer at the station, which revealed that his blood-alcohol content was twice the legal limit.¹⁴⁶

At trial, the prosecution offered two documents which stated that the Breathalyzer instrument had been calibrated by the New York State Division of Criminal Justice Services in Albany and a third document which stated that the simulator solution sample was approved for use in the Breathalyzer by the State Police.¹⁴⁷ Despite the defendant’s objection that his inability to cross-examine the author of each report violated his rights under the Confrontation Clause, the court admitted the reports as a business record and the jury con-

¹³⁹ *Oliver*, 938 N.Y.S.2d at 621-22.

¹⁴⁰ *Id.* at 622.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 985 N.E.2d at 904.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 904-05.

¹⁴⁶ *Id.* at 905.

¹⁴⁷ *Id.* (noting that these documents were introduced to show that the Breathalyzer at issue was in proper working order at the time it was given to the defendant).

victed the defendant.¹⁴⁸ On appeal, the Fourth Department affirmed, stating that the calibration reports were non-testimonial because they were not accusatory, nor did they link the defendant to the charged crime because they simply established the working order of the Breathalyzer.¹⁴⁹

On review, the New York Court of Appeals utilized its primary purpose test and acknowledged that “the records at issue bear some resemblance to traditional testimonial hearsay because they contain certified declarations of fact attesting that the breathalyzer machine was functioning properly and its readings were accurate and reliable.”¹⁵⁰ However, this consideration alone, the court stated, could not outweigh the remaining considerations.¹⁵¹ With regard to classifying documents, the court relied on dicta from *Melendez-Diaz*, observing that “[the Supreme Court] recognized the possibility that records ‘prepared in the regular course of equipment maintenance’—precursors to an actual Breathalyzer test of a suspect—‘may well qualify as non-testimonial records.’”¹⁵² However, the Court of Appeals rejected the suggestion that “*Melendez-Diaz* pronounced a shift in Confrontation Clause analysis that might call our precedent into question.”¹⁵³

V. RECONCILING THE CONFLICTING INTERPRETATIONS OF TESTIMONIAL EVIDENCE

Decisions of the United States Supreme Court, regarding the Constitution and federal law, are binding precedent on the lower courts; however, the New York Court of Appeals has declined to follow the Supreme Court’s reasoning and has created conflict and inconsistencies among lower courts.¹⁵⁴

Although the Court in *Crawford* declined to name what spe-

¹⁴⁸ *Pealer*, 985 N.E.2d at 905.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 906-07.

¹⁵¹ *Id.* at 907.

¹⁵² *Id.*

¹⁵³ *Pealer*, 985 N.E.2d at 907.

¹⁵⁴ See *Planned Parenthood v. Casey*, 947 F.2d 682, 691 (3d Cir. 1991) (holding that “[t]here is no room in our system for departing from this principle [that the Supreme Court’s decisions are binding], for if it were otherwise, the law of the land would quickly lose its coherence.”); *People v. Kin Kan*, 574 N.E.2d 1042, 1045 (N.Y. 1991) (stating that all courts are bound by the United States Supreme Court’s interpretation of the federal Constitution and federal statutes).

cific and particular types of evidence are testimonial, the Court established three categories in order to aid courts in making this determination.¹⁵⁵ In *Melendez-Diaz* and *Bullcoming*, the Supreme Court gave additional insight as to what evidence resembles “ex parte in-court testimony or its functional equivalent,” what considerations are important in making this determination, and under what circumstances this type of evidence is admissible without violating the Confrontation Clause.¹⁵⁶ The Court established, in *Melendez-Diaz*, that the affidavit, which revealed that the defendant possessed cocaine at the time of his arrest, was testimonial, regardless of the fact that a neutral laboratory conducted the testing.¹⁵⁷ The Court’s decision in *Bullcoming* bolstered the protection of the Confrontation Clause by making it clear that the testimonial evidence could only be admissible when the person who physically conducted the tests or certified the documents could be cross-examined in court.¹⁵⁸ By deeming the forensic laboratory affidavits at issue in *Melendez-Diaz* and the blood-alcohol test reports at issue in *Bullcoming* testimonial,¹⁵⁹ the Supreme Court added to the principles established in *Crawford*.¹⁶⁰

When the New York Court of Appeals analyzed *Rawlins*, only *Crawford* had been decided, which did not include any discussion about scientific testing.¹⁶¹ Yet, the Court of Appeals, recognized that latent fingerprint comparison reports under *Crawford* standards, in which police officers identified a match between the defendant’s fingerprints and the fingerprints found at the crime scene, were “nothing but testimonial.”¹⁶² However, even after *Melendez-Diaz*, the New York Court of Appeals in *Brown* relied on its decision in *Meekins*, in which the court held that rape-kit DNA reports were non-testimonial.¹⁶³ The court dismissed the Supreme Court’s reasoning

¹⁵⁵ *Crawford*, 541 U.S. at 51-52 (noting that determination of constitutional admissibility is almost always fact-specific as the inquiry is whether an out-of-court statement is a proper substitute for accusatory in-court testimony).

¹⁵⁶ *Melendez-Diaz*, 557 U.S. at 310; *Bullcoming*, 131 S Ct. 2705.

¹⁵⁷ *Melendez-Diaz*, 557 U.S. at 306 (holding that the affidavit was testimonial because the results either inculpated or exculpated the defendant, and an objective witness conducting the tests would reasonably know that this type of report would be used in a criminal prosecution).

¹⁵⁸ *Bullcoming*, 131 S. Ct. at 2705.

¹⁵⁹ *Melendez-Diaz*, 557 U.S. at 306; *Bullcoming*, 131 S Ct. at 2705.

¹⁶⁰ *Crawford*, 541 U.S. at 51-52.

¹⁶¹ *Id.*

¹⁶² *Rawlins*, 884 N.E.2d at 1033.

¹⁶³ *Brown*, 918 N.E.2d at 932.

and placed great weight on the fact that a neutral party conducted the DNA testing, which only revealed non-identifying “raw data.”¹⁶⁴ However, the Court of Appeals failed to realize that the DNA data report, which is a certified affidavit under both *Crawford* and *Melendez-Diaz*, supplies the reader with scientific test results, which shed light on the defendant’s guilt.¹⁶⁵ The OCME analyst who testified in *Brown* had no personal knowledge of the tests that were performed on both samples and could not testify to any errors that occurred during that process.¹⁶⁶ The fact that she came to her own conclusion about the defendant’s guilt should not dispose of the safeguards of the Confrontation Clause in allowing the DNA reports into evidence. The New York Court of Appeals’ interpretation of DNA evidence as non-testimonial is inconsistent with the reasoning of the Supreme Court in *Melendez-Diaz* and *Bullcoming*.¹⁶⁷

Despite being decided before *Bullcoming*, both of the reports in *Thompson* and *Encarnacion* should have been deemed testimonial under the first and third categories set forth in *Crawford*.¹⁶⁸ The job of both the private lab technician in *Thompson* and the OCME analyst in *Encarnacion* was predicated on obtaining results which will be used in aid of an investigation, which in many cases leads to a trial.¹⁶⁹ The courts in *Thompson* and *Encarnacion* also rejected the Court’s reasoning in *Melendez-Diaz*, which stressed the importance of being able to use confrontation as a tool of reliability to protect against fraudulent or incompetent forensic evidence.¹⁷⁰ By determining that the reports were non-testimonial and admitting them into evidence without live in-court testimony, the courts in *Thompson* and *Encarnacion* violated the very essence of what the Court in *Melendez-Diaz* and *Bullcoming* sought to protect—the reliability of the evidence and the defendant’s ability to confront the actual person who

¹⁶⁴ *Id.* at 930-31.

¹⁶⁵ *Id.* at 932.

¹⁶⁶ *Id.* at 930.

¹⁶⁷ *Id.* at 928.

¹⁶⁸ *Thompson*, 895 N.Y.S.2d at 149; *Encarnacion*, 926 N.Y.S.2d at 446. The first category is an affidavit that the defendant was unable to cross-examine, and the third category includes statements made under circumstances that would lead an objective witness to believe those statements would be used at trial. *Crawford*, 541 U.S. at 51-52.

¹⁶⁹ *Thompson*, 895 N.Y.S.2d at 149.

¹⁷⁰ *Id.*; *Encarnacion*, 926 N.Y.S.2d at 446 (rejecting *Melendez-Diaz*, 557 U.S. at 312, 319).

performed the tests that shed light on his or her guilt.¹⁷¹

In DWI prosecutions specifically, New York courts should follow the trend set in *Oliver* and *Umpierre* because the very nature of sobriety tests, prepared by law enforcement and not a neutral agency, are to prove that the defendant's blood-alcohol level was either above or below the legal limit, which will either convict or acquit the defendant.¹⁷² The only reason the court in *Rawlins* did not find a Confrontation Clause violation was because there was already such overwhelming evidence of the defendant's guilt.¹⁷³ The court in *Brown* disregarded the Supreme Court's holding in *Melendez-Diaz*, that scientific testing affidavits qualified as testimonial, by relying on the court's holding in *Meekins* that rape-kit DNA reports were non-testimonial.¹⁷⁴ This not only created confusion on what qualifies as testimonial evidence, but confusion on what precedent to follow.¹⁷⁵

VI. UMPIRING UMPIERRE

The issue before the court in *Umpierre* was whether the Breathalyzer and Intoxilyzer 5000 results were testimonial, and if so, whether Officer Glatz could testify on behalf of Officer Rizzo.¹⁷⁶ Following the Supreme Court's decision in *Melendez-Diaz* and *Bullcoming*, the court correctly determined that the Breathalyzer and Intoxilyzer 5000 results were testimonial and that Officer Glatz could not testify on behalf of Officer Rizzo. Assuming that the Fourth Department dismissed the federal precedent, like its counterparts that followed the state precedent, it is likely that the Fourth Department would still have held Breathalyzers to be testimonial requiring testimony from Officer Rizzo—exemplifying the importance of this decision for New York Confrontation Clause jurisprudence.

¹⁷¹ Compare *Thompson*, 895 N.Y.S.2d at 149 and *Encarnacion*, 926 N.Y.S.2d at 446, with *Melendez-Diaz*, 557 U.S. at 312, 319, and *Bullcoming*, 131 S. Ct. at 2705. It is the author's opinion that *Thompson* and *Encarnacion* should be overruled because those interpretations of what constitutes testimonial evidence and substitute witnesses are inconsistent with the precedent set forth by the United States Supreme Court.

¹⁷² Compare *Oliver*, 938 N.Y.S.2d at 621-22, with *Umpierre*, 951 N.Y.S.2d at 383.

¹⁷³ *Rawlins*, 884 N.E.2d at 1026.

¹⁷⁴ *Brown*, 918 N.E.2d at 930-31.

¹⁷⁵ *Id.*

¹⁷⁶ *Umpierre*, 951 N.Y.S.2d at 383.

A. Breathalyzers as Testimonial Evidence

In a DWI prosecution, the admission of Breathalyzers as evidence is two-fold: (1) the evidence of the actual test results regarding the blood-alcohol level, and (2) the certificates that confirm the Breathalyzer's function, calibration, and maintenance.¹⁷⁷ Regardless of whether the New York Court of Appeals in *Pealer* was correct in holding that documents certifying the function of the equipment are non-testimonial, and thus, admissible, it is evident that *Crawford*, *Melendez-Diaz* and *Bullcoming*, and even *Brown*, identify Breathalyzers as testimonial.¹⁷⁸ Breathalyzer results, which are often conducted and prepared by law enforcement officials, will either inculpate or exculpate the defendant by showing that his blood-alcohol level was either above or below the legal limit.¹⁷⁹ In *Umpierre*, the prosecution only sought to introduce the first type of Breathalyzer evidence because the prosecution suggested that the Breathalyzer and Intoxilyzer 5000 were self-calibrating.¹⁸⁰ If, under *Pealer*, the prosecution is allowed to submit the calibration certificates without implicating the Confrontation Clause and is also allowed to submit the actual Breathalyzer results without necessitating live in-court testimony, the defendant would have no way to defend himself because he would not be able to cross-examine the documents.¹⁸¹ This would result in a conviction virtually every time.¹⁸²

B. Substitute Witnesses and Law Enforcement Involvement

After determining that the test results were testimonial, requiring live in-court testimony, the court in *Umpierre* considered whether Officer Glatz could testify in place of Officer Rizzo to withstand a constitutional violation.

The court distinguished *Umpierre* from *Brown* because rather

¹⁷⁷ *Carriera*, 893 N.Y.S.2d at 846.

¹⁷⁸ *Umpierre*, 951 N.Y.S.2d at 386; *Bullcoming*, 131 S. Ct. at 2714 (noting that if a Breathalyzer had been given to help the defendant receive medical attention or to solve an ongoing emergency, the results would likely have been deemed non-testimonial under *Crawford* and *Melendez-Diaz* but still not under *Bullcoming*); *Brown*, 918 N.E.2d at 930.

¹⁷⁹ *Umpierre*, 951 N.Y.S.2d at 386.

¹⁸⁰ *Id.* at 384.

¹⁸¹ *Id.* at 385.

¹⁸² *Id.*

than a subcontractor of the OCME, law enforcement officials prepared the Breathalyzer tests.¹⁸³ The court in *Umpierre* observed that the New York Court of Appeals relied heavily on the fact that the scientific report in *Brown* arose from a source independent from law enforcement.¹⁸⁴ In *Umpierre*, the court stated, “everything presented shows substantial law enforcement involvement,” and thus, “by necessity invokes a confrontational situation even under the *Brown* rationale.”¹⁸⁵ While in *Brown*, the identity of the suspect was unknown and the testing did not connect the defendant to the crime until years later, *Umpierre*’s identity and guilt were known immediately following the testing.¹⁸⁶ This is more testimonial in nature than a forensic analyst’s test on a DNA sample to determine the identity of the perpetrator because there is a greater risk that law enforcement officials will conduct procedures with a bias or motive to gain incriminating evidence.

After determining that the Breathalyzer and Intoxilyzer 5000 results were testimonial, the Court properly concluded that Officer Glatz could not testify on Officer Rizzo’s behalf. The Court in *Bullcoming* made it clear that the only way to prevent a Confrontation Clause violation is to have the person who conducted the tests testify.¹⁸⁷ Officer Glatz, although a trained officer who knew of Officer Rizzo’s training with respect to Breathalyzers, did not have personal knowledge of the encounter, and he would not be able to answer questions about the Breathalyzer equipment and test, including any possible human error.¹⁸⁸

VII. CONCLUSION

The United States Supreme Court’s Confrontation Clause jurisprudence has evolved over time.¹⁸⁹ The Court has effectuated a shift in determining whether there is a violation of a defendant’s right to confrontation, focusing more on the testimonial nature of the evidence, rather than its reliability.¹⁹⁰ While the Supreme Court has ex-

¹⁸³ *Id.* at 386.

¹⁸⁴ *Umpierre*, 951 N.Y.S.2d at 386.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Bullcoming*, 131 S. Ct. at 2714.

¹⁸⁸ *Id.* at 2714-15.

¹⁸⁹ Weisgerber, *supra* note 25, at 614.

¹⁹⁰ *Ramos-Gonzalez*, 664 F.3d at 4.

panded the meaning of testimonial, the New York Court of Appeals' failure to follow the Supreme Court's reasoning has caused confusion among its lower courts.¹⁹¹

Despite this, the court's decision in *Umpierre* follows the precedent set forth by the Supreme Court in *Crawford*, *Melendez-Diaz* and *Bullcoming*.¹⁹² Even if the court in *Umpierre* used the test announced in *Brown*, it still would have determined that both the Breathalyzer and Intoxilyzer results were testimonial, requiring in-court testimony from Officer Rizzo because the prosecution's case relied solely on the NYPD's Breathalyzer and Intoxilyzer 5000 test results, which revealed the defendant's blood-alcohol level was above the legal limit.¹⁹³ Because the test results' sole purpose was to connect the defendant to the crime, in order to withstand a constitutional violation, the live in-court testimony of the enforcement official who conducted the tests, Officer Rizzo, was required.¹⁹⁴

Although the courts in New York, even after *Crawford*, *Melendez-Diaz*, and *Bullcoming* have narrowly interpreted what constitutes testimonial evidence, it is evident that Breathalyzer results are, by their very nature, testimonial. Therefore, the court in *Umpierre* correctly reasoned and concluded that the admission of the test results violated the Confrontation Clause. The decision in *Umpierre* is very significant for New York Confrontation Clause jurisprudence because it will, like the seminal trio of federal cases, effectuate a shift within the lower courts, as the court properly observed that the involvement of law enforcement in collecting and presenting evidence lends itself to a court's finding that the evidence is testimonial in nature.

¹⁹¹ Compare *Freycinet*, 892 N.E.2d 843 (holding that an autopsy report could be admitted as a business record, not requiring live in-court testimony, because an autopsy report is non-testimonial), with *Hall*, 923 N.Y.S.2d 428 (holding that an unredacted autopsy report could be admitted into evidence without testimony from the person who prepared it because it was not testimonial).

¹⁹² *Umpierre*, 951 N.Y.S.2d 382.

¹⁹³ *Id.* at 386.

¹⁹⁴ *Id.*

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