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The Decline of the Confrontation Clause in New York - People v. Encarnacion

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THE DECLINE OF THE CONFRONTATION CLAUSE IN NEW YORK

SUPREME COURT OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

People v. Encarnacion[1]
(decided June 23, 2011)

A jury convicted Samuel Encarnacion of second-degree murder, attempted murder, and assault and sentenced him to twenty years to life.[2] Encarnacion appealed the trial court's decision, claiming his constitutional right to confront a witness under the Sixth Amendment[3] was violated through the prosecution's use of a grand jury testimony in its case-in-chief from a witness who refused to testify at trial.[4] Additionally, he alleged that the testimony of a DNA analyst, who did not personally conduct the DNA tests in which she was testifying to, violated his right to confront a witness.[5] The Appellate Division, First Department, affirmed the lower court finding that the defendant's misconduct "induced [the witness's] refusal to testify at trial"[6] and that the DNA results are "non-identifying raw data" that "shed no light on the guilt of the accused."[7]

[1] 926 N.Y.S.2d 446 (App. Div. 1st Dep't 2011).

[2] *Id.* at 457.

[3] The Supreme Court makes the "[Sixth Amendment] obligatory upon the States." Illinois v. Allen, 397 U.S. 337, 338 (1970) (citing Pointer v. Texas, 380 U.S. 400, 403 (1965)).

[4] *Encarnacion*, 926 N.Y.S.2d at 451.

[5] *Id.* at 454.

[6] *Id.* at 453.

[7] *Id.* (citing People v. Brown, 918 N.E.2d 927, 931 (N.Y. 2009)). In the alternative, the First Department held that if an error were made in admitting the testimony of the witness or the testimony of the DNA analyst, then such an error would nevertheless be harmless due to the weight of the evidence. *Id.* at 454.

I. FACTS

On January 20, 2005, police responded to a 911 call at an apartment building in Bronx, New York.[8] In the lobby, police met with Encarnacion and were directed to apartment 8J.[9] In the apartment, police discovered Ofelia Torres, Encarnacion's girlfriend, on the floor of the apartment with numerous stab wounds.[10] The police also discovered Ofelia's cousin, Johnny Torres, dead on the floor with numerous stab wounds.[11] In the compactor room of the apartment building, police discovered a garbage bag filled with "a pair of sweat pants, a white t-shirt, a pair of jeans, and a pair of sneakers."[12] In addition to the clothing in the bag, police also found bloody knives.[13] The bag found was similar to other bags found in Encarnacion's apartment building.[14] A doctor later asked Ofelia who her attacker was, and Ofelia verbally responded that it was Encarnacion.[15]

Before Ofelia could testify at trial, she had stopped cooperating with the prosecution and refused to testify against Encarnacion.[16] The prosecution informed the court that it intended to use Ofelia's grand jury testimony against the defendant.[17] The trial court then held a *Sirois*[18] hearing to determine if Encarnacion's misconduct caused Ofelia's refusal to cooperate.[19]

At the *Sirois* hearing, Ofelia's mother, Nancy Torres, testified that after the crime occurred, Encarnacion began to call Ofelia both at Nancy's home and on Ofelia's cell phone.[20] The number of calls to Nancy's home was in excess of 1,000 times.[21] She also testified to

[8] *Encarnacion*, 926 N.Y.S.2d at 450.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Encarnacion*, 926 N.Y.S.2d at 450.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 453.

[17] *Id.*

[18] At a *Sirois* hearing, before an out of court statement is allowed in a case-in-chief, the trial court must determine if the prosecution has shown "the defendant's misconduct by clear and convincing evidence" induced a witness not to testify against the defendant. *Encarnacion*, 926 N.Y.S.2d at 452-53.

[19] *Id.* at 453.

[20] *Id.*

[21] *Id.*

the content of one of these telephone calls, in which she overheard Ofelia and Encarnacion discuss how to change Ofelia's testimony so Encarnacion would receive less time in prison.[22] After the conversation that Nancy described, the prosecution noted that Ofelia's testimony had changed from the one she gave to the grand jury.[23] Now she accused Johnny of stabbing her.[24] Upon Ofelia being hospitalized, she changed her story back to that of the grand jury testimony and admitted the defendant told her to lie.[25]

Nancy further testified that Ofelia told her that Encarnacion was the one who told her to change the story so he would get out of jail quicker.[26] Next, Ofelia told Nancy that her reasoning for refusing to cooperate was because Encarnacion, "through his friends," told Ofelia that if she "comes in [to testify] he would get her."[27]

At the conclusion of the *Sirois* hearing, the trial court then permitted the prosecution to use grand jury testimony of Ofelia in its case-in-chief, holding that Encarnacion's improper influence on Ofelia caused her refusal to testify.[28] On appeal, Encarnacion argued that the prosecution violated his constitutional right to confront a witness against him because the prosecution had not sufficiently proven that his misconduct had caused the witness's unavailability at trial.[29] The First Department upheld the trial court's holding, concluding, "clearly and convincingly," that the evidence had shown that Encarnacion, through fear, had caused the witness's refusal to testify.[30]

At trial, "the prosecution offered testimony from Danielle Coye, a forensic scientist employed by the Office of the Chief Medical Examiner[,] . . . [who] personally performed the DNA testing on all . . . [the] items from the crime scene . . . [w]ith the exception of a pair of jeans, sneakers and socks."[31] She testified from her notes and the exhibits in evidence regarding not only the tests she personally

[22] *Id.*
[23] *Encarnacion*, 926 N.Y.S.2d at 453.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* (internal quotation marks omitted).
[28] *Encarnacion*, 926 N.Y.S.2d at 453.
[29] *Id.* at 451.
[30] *Id.* at 454.
[31] *Id.* at 456.

performed, but also from tests she had not performed.[32]

A. First Department's Analysis of the *Sirois* Hearing

The court began its analysis by discussing the differences between the state and federal approach to defining misconduct.[33] The court emphasized New York's broader definition of misconduct over its federal counterpart, stating that New York's definition of misconduct includes "intimidation[,] . . . bribery, threats, and the use of a relationship to improperly procure a witness's silence."[34]

Next, the court looked at Nancy's testimony from the *Sirois* hearing, focusing specifically on the portion in which she testified that "Ofelia told her [that Encarnacion] through his friends, told Ofelia that if she comes in, [he] would get her."[35] The court noted that this statement implicitly showed that Encarnacion had threatened Ofelia and caused her silence.[36] From this, the court stated that because Encarnacion caused Ofelia's refusal to testify, he had lost his right to confront her, and therefore, the use of her grand jury minutes against him were proper.[37] Finally, regarding the evidence standard of the *Sirois* evidence, the court held that clearly and convincingly it had been shown that Encarnacion through his threats had caused the witness fear that prevented her from testifying.[38]

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[32] *Id.*

[33] *See Encarnacion*, 926 N.Y.S.2d at 452 (comparing the federal approach to the state's approach on defining misconduct).

[34] *Id.* (citations omitted) (citing People v. Johnson, 711 N.E.2d 967, 969 (N.Y. 1999)).

[35] *Id.* at 454 (internal quotation marks omitted).

[36] *Id.*

[37] *Id.*

[38] *Encarnacion*, 926 N.Y.S.2d at 458. In disagreement, the concurring opinion wrote:

> Even putting aside that on cross-examination [Nancy] repeatedly stated that her daughter had told her that an alleged friend, not friends, of defendant had made such a statement, this seems too slender a reed to support the conclusion that the People proved defendant's responsibility for such a threat by clear and convincing evidence.

Id. at 459 (McGuire, J., concurring).

Moreover, the concurring opinion did not agree that there was even a threat made. *See id*. at 458 ("To repeat, there is no credible evidence that defendant knew about, condoned or encouraged the alleged threat."). The concurring opinion stated that Nancy's testimony was an "in-court statement . . . [made] about an out-of-court statement her daughter assertedly made about an out-of-court statement assertedly made by unidentified persons about an out-of-court statement assertedly made by defendant." *Id.* at 459. From this, the concurring opinion stated, "Any conclusion that this is competent evidence would be at least a contro-

II. FEDERAL COURTS' APPROACH TO WAIVER OF THE SIXTH AMENDMENT'S RIGHTS

The Supreme Court case of *Illinois v. Allen*[39] provides the guidelines regarding waiver of a defendant's confrontation rights.[40] There, the Supreme Court held that a defendant through misconduct could lose his right to be present at trial.[41] In *Allen*, the defendant, repeatedly and after numerous warnings from the trial judge, continued to act in an abusive and disrespectful manner that interfered with his trial.[42] The Supreme Court of the United States granted certiorari to consider whether there was a violation of the Confrontation Clause.[43]

The Court refused to make the Confrontation Clause absolute where there is "flagrant disregard in the courtroom of elementary standards of proper conduct."[44] The Court also quoted Justice Cardozo: "No doubt the privilege of [personally confronting witnesses] may be lost by consent or at times even by misconduct."[45] In direct disagreement with the Seventh Circuit, the Court held that the Sixth Amendment's Confrontation Clause is not absolute, and as such, it can be lost by a defendant's misconduct.[46]

The Second Circuit in *United States v. Mastrangelo*,[47] expanded on the misconduct exception to the Confrontation Clause by

versial one." *Id.* Furthermore, the concurring opinion notes that the majority did not cite to any "precedent supporting its implicit position that such an extended chain of out-of-court statements by unidentified persons is not only competent evidence but evidence that can play a decisive role in satisfying the prosecution's burden to prove its case by clear and convincing evidence." *Encarnacion*, 926 N.Y.S.2d at 459.

[39] 397 U.S. 337 (1970).

[40] *See id.* at 346-47 (holding that the trial judge did not commit any legal error removing the defendant from his own trial); *see also* Snyder v. Commonwealth, 291 U.S. 97, 121-22 (1934) (holding that a defendant did not have a right to visit the scene of the crime with the jury); Diaz v. United States, 223 U.S. 442, 458-59 (1912) (holding that the defendant waived his right to be present at trial when he consented for the trial to proceed without him).

[41] *Allen*, 397 U.S. at 342-43.

[42] *Id.* at 339-41. The Supreme Court of Illinois held that the defendant by his conduct had "relinquished his constitutional right to be present." *Id.* at 341.

[43] *Id.* at 338.

[44] *Id.* at 343.

[45] *Allen*, 397 U.S. at 342-43 (quoting Snyder v. Massachusetts, 291 U.S. 97, 106 (1934), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964)).

[46] See *id.* (holding "that a defendant can lose his right to be present at trial" through his misconduct).

[47] 693 F.2d 269 (2d Cir. 1982).

including waiver of a defendant's right to confront a witness if the defendant uses chicanery,[48] threats,[49] murder, or violence to procure a witness's silence.[50] In *Mastrangelo*, the purchase of four trucks linked the defendant to the crime, with only one witness of that purchase.[51] At grand jury, the witness testified that he sold the trucks to the defendant.[52] Parts of a recorded conversation between the witness and defendant could reasonably be understood as threats to prevent the witness from testifying against the person who purchased the trucks.[53] On the day the witness was to testify at trial, two men shot him.[54] After a mistrial, the prosecution sought to introduce the witness's prior grand jury testimony, which the trial court allowed.[55]

The Second Circuit affirmed the use of the prior grand jury testimony, stating that if the defendant had played a part in the witness's refusal to testify, he would have waived any confrontation clause objections against the admittance of the witness's testimony.[56] The court further stated that a person, in both criminal and civil trials, cannot take advantage of a wrong he has committed.[57]

Next, the court had to determine the appropriate burden of proof for waiver hearings in a federal court.[58] The court stated the prosecution has the burden; however, it was unclear on the appropriate burden.[59] While the court in *United States v. Balano*[60] used a "preponderance of the evidence" test, the court in *United States v. Thevis*[61] applied a higher standard of "clear and convincing."[62] The Second Circuit held that the burden of proof in a waiver hearing

[48] *Id.* at 272-73 (citing United States v. Mayes, 512 F.2d 637, 650-51 (6th Cir. 1975)).

[49] *Id.* (citing United States v. Balano, 618 F.2d 624, 628-29 (10th Cir. 1979)).

[50] *Id.* (citing United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1975)).

[51] *Id.* at 271.

[52] *Mastrangelo*, 693 F.2d at 271.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 271-72.

[56] *Id.* at 272.

[57] *Mastrangelo*, 693 F.2d at 271 (quoting Diaz v. United States, 223 U.S. 442, 458 (1912)).

[58] *See id.* at 273.

[59] *Id.*

[60] 618 F.2d 624 (10th Cir. 1979).

[61] 665 F.2d 616 (5th Cir. 1982).

[62] *See Mastrangelo*, 693 F.2d at 273 (comparing the evidentiary standard set out in *Balano*, to the standard set out in *Thevis*).

where there is misconduct would be "by a preponderance of the evidence."[63] The court in its reasoning, noted that there is a difference between the Confrontation Clause and waiver by misconduct, thereby allowing different burdens of proof.[64] Consequently, the lower evidentiary standard of preponderance of the evidence satisfied the court.[65]

Having established the burden of proof, the court remanded the case to the district court to determine, by a preponderance of the evidence, if the defendant was involved in the witness's murder.[66] If so, he waived his rights under the Confrontation Clause.[67] In addition, the court stated, "Bare knowledge of a plot to kill [the witness] and a failure to give warning to appropriate authorities is sufficient to constitute a waiver."[68]

III. NEW YORK'S HOLLOW HEIGHTENED EVIDENTIARY STANDARD FOR WAIVER HEARINGS

The New York State Court of Appeals defined misconduct more broadly than its federal counterpart,[69] and it began with an expressly higher standard on its Confrontation Clause waiver hearings.[70] The New York Court of Appeals in *People v. Geraci*,[71] extended the definition of misconduct in New York to include intimidation and bribery[72] and required the evidence at a waiver hearing to be "clear and convincing," which affords a greater protection to the defendant than in federal court.[73] The court held that grand jury testimony may be used against a defendant where it has been

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id*. at 273-74

[67] *Mastrangelo*, 693 F.2d at 273-74.

[68] *Id.*

[69] *Encarnacion*, 926 N.Y.S.2d at 452.

[70] *Compare Mastrangelo*, 693 F.2d at 273 (setting out a preponderance of the evidence standard), *with* People v. Geraci, 649 N.E.2d 817, 822 (N.Y. 1995) (setting out a clear and convincing standard for the state of New York).

[71] 649 N.E.2d 817 (N.Y. 1995).

[72] *Id.* at 824.

[73] *Compare Mastrangelo*, 693 F.2d at 273 (setting out a preponderance of the evidence standard), *with Geraci*, 649 N.E.2d at 822 (setting out a clear and convincing standard for the state of New York).

shown that the defendant induced the witness's unavailability.[74]

In *Geraci*, a witness's grand jury testimony supplied the main evidence in an indictment of the defendant.[75] After the witness's grand jury testimony, but before trial, the witness abruptly left his job and family to move out of state.[76] The prosecution then learned that the witness no longer wished to testify and sought a *Sirois* hearing to use the witness's grand jury testimony against the defendant at trial.[77]

The New York Court of Appeals upheld the decision, stating that a factfinder could clearly and convincingly conclude from the evidence and the inferences drawn from that evidence that the defendant had played a part in the witness's unavailability.[78] Further noting, that the conclusions reached by the trial court rested on "concrete facts."[79]

In support of its holding that the clear and convincing standard had been met, the court noted first that there was evidence showing the motive and opportunity of the defendant.[80] Specifically, the defendant being out on bail for months prior to trial gave him opportunity to intimidate the witness.[81] Furthermore, a fact finder could conclude from the evidence before it that there was a strong motive for the defendant to cause the witness not to testify.[82] The evidence supported the inference that the defendant was aware of the witness's value to the prosecution and the witness's lack of cooperation with

[74] *Geraci*, 649 N.E.2d at 821.

[75] *Id.* at 819.

[76] *Id.*

[77] *Id.* At the hearing, two police investigators testified that the defendant had made contact with the witness, seeking to have him come speak to the defendant's lawyer. *Id.* The investigators also revealed that the witness called them from Florida to tell them that he was aware that the defendant had a copy of his testimony, and the witness expressed fear not only for himself, but also for his family because if he testified he would end up in trouble. *Geraci*, 649 N.E.2d at 819. The investigators also stated that the witness told them that a friend of the witness had stopped people coming to break the witness's legs. *Id.* Additionally, the investigators testified that the witness was now receiving money from the defendant's uncle after an unidentified friend of the witness had spoken with the uncle. *Id.* at 819-20. After this attempted bribery is when investigators realized that the witness had altered his original testimony, and now claims he never saw the stabbing. *Id.* The trial court allowed the grand jury testimony in place of the witness's live testimony. *Id.* at 820.

[78] *Geraci*, 649 N.E.2d at 824.

[79] *Id.*

[80] *Id.* at 823.

[81] *Id.*

[82] *Id.*

the defense.[83]

Second, the court noted that there was evidence that an unknown person confronted the witness and that he showed a copy of the witness's accusation against the defendant.[84] Third, the witness's actual statements to the investigators showed that his intimidation was attributed to the defendant.[85] The statements by the witness to the investigators logically showed that the defendant caused the witness's fear.[86] Those statements also showed the "fear and resentment" that the witness felt against the defendant.[87] Lastly, the defendant's likelihood of involvement was dramatically multiplied when the witness at the hearing testified that the defendant's uncle had offered him more than $10,000 to remain silent.[88] It was this financial arrangement that the court noted, "directly benefitted" the defendant, and therefore, it was a reason to find that the defendant had used intimidation or bribery in procuring the witness's silence.[89]

The New York Court of Appeals seemingly hollowed out the evidentiary standard of clear and convincing for a *Sirois* hearing when it decided *People v. Cotto*.[90] In *Cotto*, the prosecution's key witness, who was going to identify the defendant as the shooter, unexpectedly phoned the prosecutor and refused to testify at trial due to fear for himself and his family.[91] The prosecution then noted that the witness informed them that his life might be in jeopardy after several men approached him and his family.[92]

Subsequently, the court ordered a *Sirois* hearing to determine if the defendant through intimidation had induced the witness not to testify.[93] An officer testified at the hearing that the witness's fiancé was fearful for her and her child, after a man asked the witness's

[83] *Geraci*, 649 N.E.2d at 823.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Geraci*, 649 N.E.2d at 823-24.

[89] *Id.* at 824.

[90] 699 N.E.2d 394 (N.Y. 1998); *see also* Cotto v. Herbert, 331 F.3d 217, 233 (2d Cir. 2003) (regarding *Cotto*, 699 N.E.2d 394, the Second Circuit on habeas corpus appeal stated that a de novo review of the case may lead to find that the evidence "was insufficient to permit the admission of the out-of-court statements").

[91] *Cotto*, 699 N.E.2d at 396.

[92] *Id.*

[93] *Id.*

mother and sister about the witness's whereabouts.[94] In addition, a detective testified at the hearing that the witness's sister said several unidentified people had asked her about the witness's specific whereabouts in jail.[95] The sister also told the detective that there was "word on the street" that her brother had talked.[96] The mother of the witness also testified, which corroborated the sister's testimony.[97] The trial court held that the prosecution had shown, by a clear and convincing standard, the use of misconduct to induce a witness's silence.[98]

The Court of Appeals, in agreement with the trial court, held that sufficient evidence existed to show that the threats against the witness had scared him into silence.[99] In its reasoning, the court noted that the testimony of the two police officers regarding the out of court statements made by the witness, as well as the interviews of the witness's sister and mother, showed the witness had been ready to identify the defendant but was now scared into not testifying.[100] Even though the witness denied that threats were ever made against him, the court ruled in favor of the police officers in this credibility clash.[101] For this, the court looked at the trial court judge's observation that the witness at the *Sirois* hearing "appeared to be anxious, uncomfortable and forced in his responses, a demeanor inconsistent with truthfulness and consistent with a state of mind demonstrating fear of harm to his family or to himself if he should testify against [the defendant]."[102]

The court also held that the evidence sufficiently linked the threats to the defendant.[103] First, the defendant knew the witness from his small neighborhood.[104] Additionally, at the time of the threats, the defendant was out on bail and had the ability to make the

[94] *Id.* at 397.

[95] *Id.*

[96] *Cotto*, 699 N.E.2d at 397.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 398. *But see id.* at 404 (Smith, J., dissenting) (concluding that the evidence from the *Sirois* hearing of "unnamed individuals" who allegedly approached the witness's family, along with "word on the street," did not meet the clear and convincing standard).

[100] *Cotto*, 699 N.E.2d at 398 (majority opinion).

[101] *Id.*

[102] *Id.* (internal quotation marks omitted).

[103] *Id.*

[104] *Id.*

threats.[105] Moreover, the timing of the threats was important to the court's analysis as well, because immediately after it was revealed that the witness could implicate the defendant, the witness began to receive the threats.[106] This gave the "defendant uniquely good reason to want to intimidate [the witness]—and there was no suggestion that anyone else stood to gain from the witness's silence."[107] Lastly, the court noted that the defendant, at the time of the shooting, had previously threatened the witness when he pointed his gun at the witness.[108] The court concluded that the prosecution had met the clear and convincing standard, and therefore, it could use the witness's out of court statements against the defendant.[109]

IV. COMPARISON

The Appellate Division, First Department, in *Encarnacion* appears to have further lowered the evidentiary standard required in *Sirois* hearings, in its department. It did this in a case where it was not even necessary to decide the issue of whether the evidence met the burden.[110] Accordingly, the evidence in *Encarnacion* does not even rise to the reduced levels of clear and convincing that *Cotto* required.[111]

The court in *Encarnacion* relied heavily on the testimony of a biased mother, whose daughter was a victim of a heinous crime.[112]

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[105] *Cotto*, 699 N.E.2d at 398.

[106] *See id*. (stating that the threats began when it was revealed to the defendant that the witness could implicate him).

[107] *Id*.

[108] *Id.*

[109] *Id.* The dissent disagrees with the majority's holding that the evidence links the defendant to the witness's unavailability. *Cotto*, 699 N.E.2d at 404 (Smith, J., dissenting). The dissent stated:

> There is no proof that a "contract" existed on the witness. There is no proof that the defendant or anyone acting on his behalf ever spoke to the witness's sister. Although defendant was out on bail, there is no proof that he or anyone associated with him made any contact with the witness.

Id.

[110] *See Encarnacion*, 926 N.Y.S.2d at 457 (McGuire, J., concurring) (stating that the majority knows it does not have to resolve this issue but does so nonetheless).

[111] *See id.* at 458 ("[T]here is no credible evidence that defendant knew about, condoned or encouraged the alleged threat.").

[112] *See id.* at 454 (majority opinion) (using only Nancy's testimony to describe how the

This differs drastically from what the courts in *Geraci* and *Cotto* relied on in making their decisions. In *Geraci*, the court relied primarily on the testimony of police and the actual witness in reaching its holding.[113] In that case, the investigators' meetings with the witness and witness's actual testimony revealed that the defendant had come in contact with the witness and that the defendant's uncle was paying off the witness.[114] In *Cotto*, the court took the word of the police over the other witnesses in the *Sirois* hearing, finding credibility issues with the witness's family.[115] However, in *Encarnacion*, the key testimony provided at the hearing was that of the victim's own mother.[116] Foregoing the obvious bias a mother would have against the man she believed conducted a vicious and savage crime against her daughter, and that Nancy contradicted her own testimony,[117] the only other witness at the hearing was a detective who testified that Ofelia told him that she was still in love with the defendant, she refused to testify against him, and that she hopes he "gets out."[118]

The alleged 1,000 phone calls from the defendant to the witness and the phone conversation between them does not provide enough evidence, either on its own or combined with other evidence, to rise to the level of clear and convincing.[119] In *Geraci*, the court found actual evidence of misconduct in the payment of the witness,[120] which differs strongly from merely finding a large number of phone calls from the defendant to the witness. In *Cotto*, the court saw that

clear and convincing burden was met).

[113] *See Geraci*, 649 N.E.2d at 819 (noting only the testimony of two investigators and the witness as testifying at the *Sirois* hearing).

[114] *Id.* at 819-820 (making reference to a meeting between an investigator and witness about a friend who had come in contact with the defendant's uncle).

[115] *See Cotto*, 699 N.E.2d at 398 (noting a "credibility clash" between the police and witness's family that was resolved in favor of the police by the trial judge).

[116] *See Encarnacion*, 926 N.Y.S.2d at 458 (McGuire, J., concurring) (stating that only two witnesses actually testified at the *Sirois* hearing, while the police officer's testimony provided "little if anything").

[117] *See id.* (noting that Nancy on cross, stated "that the defendant had never threatened [Ofelia]," and "testified that Ofelia had said that a friend, not friends, of defendant had made such a statement to her").

[118] *Id.*

[119] *See id.* at 460 (stating that the number of phone calls had "little or no probative value").

[120] *See Geraci*, 649 N.E.2d at 824 ("The existence of a financial arrangement made by defendant's uncle that directly benefitted defendant was certainly a circumstance that bore directly on whether the intimidation and bribery had been initiated or approved by defendant.").

the timing of threats coincided with the timing of the witness and defendant meeting one another.[121] This too is different from merely receiving phone calls after a crime. Encarnacion was in prison and accused of a viscous crime, so it is more than reasonable that he would want to contact his girlfriend. Arguably, if Encarnacion's side of the phone conversation were to be overheard and revealed that he was attempting to induce Ofelia not to testify, then the sheer number of phone calls would most likely rise to the level of clear and convincing. However, Nancy only testified to Ofelia's side of the conversation.[122] More so, the trial court's findings do not indicate that the conversation between Ofelia and Encarnacion, to which Nancy testified to, even took place.[123]

Finally, the court in *Encarnacion* found through Nancy's testimony that the defendant, through his friends, threatened Ofelia.[124] However, Nancy's testimony was inconsistent throughout the hearing.[125] The statement, regarding the defendant's friends threatening the witness, ultimately comes "down to an in-court statement by [Nancy] about an out-of-court statement her daughter assertedly made about an out-of-court statement assertedly made by unidentified persons about an out-of-court statement assertedly made by the defendant."[126] Allowing such statements into evidence is questionable.[127]

The First Department, in furtherance of the *Cotto* decision, continued to lower the evidentiary standards required to meet the clear and convincing standard in a *Sirois* hearing. The court in *Encarnacion* sacrificed the confrontation protections that should have been afforded to Encarnacion through inconsistent and vague testimony. Trial courts in the First Department will now feel compelled to continue the trend of their higher courts and further lower the re-

[121] *Cotto*, 699 N.E.2d at 398.

[122] *Encarnacion*, 926 N.Y.S.2d at 459 (McGuire, J., concurring).

[123] *See id.* (regarding Nancy's testimony between Ofelia and Encarnacion, the concurrence noted that "[t]he trial court's written opinion does not mention such a discussion," nor does it even show that the conversation had occurred).

[124] *Id.* at 454 (majority opinion).

[125] *See id.* at 458 (McGuire, J., concurring) (stating that Nancy changed her testimony several times to friends, including saying that the defendant never threatened the witness, and that there was only one friend, not multiple, who made the threats).

[126] *Id.* at 458-59.

[127] *See Encarnacion*, 926 N.Y.S.2d at 458-59 ("Any conclusion that this is competent evidence would be at least a controversial one.").

quired evidentiary standard. Although the evidentiary standard required in *Sirois* hearings remains expressly clear and convincing, the evidence required to meet that threshold has clearly diminished.

V. DNA AND THE CONFRONTATION CLAUSE

The defendant in this case, on appeal, objected to a witness being allowed to testify against him, using DNA tests that the witness had not personally conducted.[128] The First Department declined review of this issue because it was not specifically objected to on the same grounds raised on appeal.[129] However, the court rejected it on the merits in an alternative holding.[130]

To begin its analysis, the court in *Encarnacion* first determined whether DNA analysis was testimonial.[131] The court noted that the Supreme Court of the United States defined testimonial as, " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' "[132] As per the rule set down by the Supreme Court, "if the statement is testimonial it cannot be used unless the declarant is unavailable at trial and the defendant has had an opportunity to cross-examine the same prior to trial."[133]

In comparing DNA test results to that of other laboratory results, the court in *Encarnacion* stated, "The admission in evidence of documents evincing the results of laboratory testing performed on narcotics recovered from a criminal defendant, without concomitantly producing those who performed the testing at trial, violates the Confrontation Clause."[134] Continuing its analogy to other types of lab reports, the court noted that "reports evincing the results of fingerprint analysis performed on a defendant's fingerprints and those recovered at the scene of a crime, without producing the person who performed the analysis both invokes and violates the Confrontation Clause."[135]

[128] *Id.* at 454 (majority opinion).

[129] *Id.*

[130] *Id.* at 454-55.

[131] *Id.* at 455.

[132] Crawford v. Washington, 541 U.S. 36, 51 (2004) (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (alteration in original).

[133] *Encarnacion*, 926 N.Y.S.2d at 455 (citing Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531 (2009)).

[134] *Id.* (citing *Melendez-Diaz*, 129 S. Ct. at 2531).

[135] *Id.* (citing People v. Rawlins, 884 N.E.2d 1019, 1033 (N.Y. 2008)).

The court differentiated DNA results from other lab test results by holding that DNA tests "contain non-identifying raw data . . . and thus, standing alone, and in the absence of expert opinion linking the results to the defendant, shed no light on the guilt of the accused."[136] Therefore, the court held that a DNA analyst can testify regarding a DNA analysis in which he or she did not personally conduct.[137]

A. Federal DNA

The Supreme Court in *Crawford v. Washington*,[138] established the initial guidelines for determining if testimony regarding DNA analysis by a person who did not personally perform the test violated the Confrontation Clause.[139] In *Crawford*, the prosecution sought to use a tape-recorded statement of the defendant's wife without the defendant's ability to cross-examine her.[140] The Court, through looking at the history of the Confrontation Clause, found that the meaning of the Sixth Amendment supported two inferences.[141] The first "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused."[142] Second, the Framers believed that testimonial statements of a witness should not be used against a defendant unless there was a previous opportunity to cross-examine the witness.[143] Next, the Court defined the term testimony by applying its dictionary meaning, " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' "[144] Therefore, the Court stated, "An 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

[136] *Id.* at 456 (citing People v Brown, 918 N.E.2d 927, 931 (N.Y. 2009)).

[137] *Id.*

[138] 541 U.S. 36 (2004).

[139] *Id.* at 42. A jury convicted the defendant of assault after a Washington State trial court allowed the prosecution to play for the jury a tape-recorded statement of the defendant's wife "to the police describing the stabbing, even though he had no opportunity for cross-examination." *Id.* at 38.

[140] *Id.* at 42.

[141] *Id.* at 47-50.

[142] *Crawford*, 541 U.S. at 50.

[143] *Id.* at 53-54.

[144] *Id.* at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (alteration in original).

not."[145] The Court in this part of its analysis defined the differences between statements that are testimonial and those that are non-testimonial, by creating three classes of testimonial statements:

> (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 affidavits, depositions, prior testimony, or confessions; and
> (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[146]

Because the prosecution admitted the witness's testimonial statement against the defendant and gave no opportunity for cross-examination, the Court held that there was a violation of the defendant's Sixth Amendment rights.[147]

The Supreme Court broadened the definition of testimonial when it decided *Melendez-Diaz v. Massachusetts*[148] and held that certificates of analysis are testimonial.[149] In *Melendez-Diaz*, a Massachusetts trial court found the defendant guilty of drug related charges after admitting into evidence three certificates of analysis showing the substance in the defendant's possession had been cocaine.[150] Pursuant to Massachusetts law, the Massachusetts Department of Public Health was required to have the certificates notarized and sworn to by their analysts.[151] The defendant objected to the introduction of the certificates, asserting that analysts were now required to testify in person after the ruling in *Crawford*.[152] Both the appellate and su-

[145] *Id.*
[146] *Id.* at 51-52 (alteration in original) (citations omitted).
[147] *Crawford*, 541 U.S. at 68.
[148] 129 S. Ct. 2527 (2009).
[149] *Id.* at 2531-32.
[150] *Id.* at 2530-31.
[151] *Id.* at 2531.
[152] *Id.*

preme courts in Massachusetts rejected the defendant's claim that his Sixth Amendment right had been violated.[153]

The Supreme Court held that the certificates of analysis were actually affidavits and thus, "were testimonial statements[] and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial."[154] In referring to the "core class of testimonial statements" the Court laid out in *Crawford*, the Court stated that the documents in this case caused little doubt that they fall within those classes and thus, "are quite plainly affidavits."[155]

After *Encarnacion* was decided in New York, the United States Supreme Court decided an important case regarding forensic analysts used to convict a defendant of aggravated DWI in *Bullcoming v. New Mexico*.[156] In *Bullcoming*, the defendant, after a DWI arrest, had a forensic laboratory report used against him at trial, which stated that his blood-alcohol level was above the legal limit.[157] The prosecution, instead of calling to the stand the person who signed the actual certification, called a different analyst who was familiar with the methods used by the laboratory, but had not actually taken part in the analysis used against the defendant.[158]

The United States Supreme Court granted certiorari to determine if the Confrontation Clause allowed the introduction of a forensic laboratory report by an analyst who did not personally perform, observe, or certify the forensic laboratory test.[159] The Court reiterated its holding from *Crawford* and stated that an out-of-court testimonial statement may not be used against a defendant at trial unless the defendant had a prior opportunity for cross-examination of the witness and the witness is unavailable.[160] The Court in its reasoning stated that the analyst's certification "reported more than a machine-

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

[154] *Id*. at 2532 (citing *Crawford*, 541 U.S. at 54).

[155] *Id.*

[156] 131 S. Ct. 2705, 2710 (2011).

[157] *Id.* at 2709.

[158] *Id.*

[159] *Id.* at 2713.

[160] *Id.* Therefore, the Court reversed the judgment of the New Mexico Supreme Court. *Bullcoming*, 131 S. Ct. at 2713.

generated number."[161] The analyst had, in fact, certified to receiving the defendant's blood sample with an unbroken seal, that he checked that the sample number and report number matched, and that he followed proper protocol.[162] From this, the Court stated, "These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination."[163]

B. New York and DNA

Prior to *Melendez-Diaz*, the New York Court of Appeals decided the case *People v. Meekins*[164] and held that DNA data generated by a private lab was not testimonial in nature.[165] In *Meekins*, the defendant was convicted by jury trial of sodomy and sexual abuse in the first-degree, along with robbery in the third-degree.[166] The prosecution at trial introduced a private laboratory's DNA report of samples from the victim's rape kit.[167]

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[161] *Id*. at 2714.

[162] *Id.*

[163] *Id.*

[164] 884 N.E.2d 1019 (N.Y. 2008).

[165] *Id.* at 1034.

[166] *Id.* at 1024.

[167] *Id.* To testify regarding this report, the prosecution called "two experts in DNA analysis and forensic biology: Judith Floyd, employed by Gene Screen, the private laboratory, and Kyra Keblish, employed by the Office of the Chief Medical Examiner, neither of whom personally performed the actual testing." *Id.* In the testimony of Floyd, she:

> [T]estified that she supervised the technicians who performed the testing in this case and performed a final review of their results[,] . . . [and she] explained that the lab issued a statement in its report indicating that a DNA profile originated from a male [that] was obtained from the sperm fraction of the oral swab in the rape kit and that the lab didn't do any comparisons of the results, but instead sent the report to the Medical Examiner's office for that task.

Rawlins, 884 N.E.2d at 1024 (internal quotation marks omitted).

Next, Keblish testified that her office received the "raw data," and from that she "interpreted the graphical data by 'wean[ing] out what peaks might not be DNA, because there are times that peaks will show up in the data that are not actually . . . DNA alleles or DNA peaks.' " *Id.* at 1025 (alteration in original). Subsequently, Keblish matched the defendant's DNA to that of the sample. *Id.* She also testified "that the DNA report and related files were prepared in the regular course of business of the medical examiner's office and its contracted agencies." *Id.* (internal quotation marks omitted). The First Department held that the DNA report was actually a business record and "business records are by their nature . . . not testimonial"; therefore, the court affirmed the decision. *Id.* (quoting *Crawford*, 541 U.S. at 56) (internal quotation marks omitted).

The New York Court of Appeals held that the DNA report was "not directly accusatory" and therefore, admissible.[168] In its reasoning, the court stated that the DNA report contained "raw data [that] was in the form of non[-]identifying graphical information."[169] Therefore, because the lab company "did not determine whether the data it collected matched [defendant] or any other suspect . . . and [did not] do any comparisons of the results," any results from the DNA tests "shed no light on the guilt of the accused in the absence of an expert's opinion."[170] The court—in admitting that the analysts could have made errors in the testing procedures itself—noted that allowing subsequent reviewers, who are familiar with the laboratory's protocol, the ability to verify another analyst's work under oath will allow a proper cross-examination to show that proper protocol was followed.[171] Therefore, the court affirmed the decision and ruled that DNA reports were not testimonial.[172]

Despite the Court's decision in *Melendez-Diaz*, the New York Court of Appeals came to the same conclusion in *People v. Brown*.[173] In *Brown*, the defendant raped a nine-year old girl and struck her on the head with a brick when she resisted.[174] When the victim awoke, she was brought to the hospital and was given "a rape kit that was later sent to [Office of the Chief Medical Examiner]."[175] Based on an analysis by a lab technician at the Office of the Chief Medical Examiner ("OCME"), it was determined that the profiles were a match occurring in one out of one trillion males."[176] The OCME witness

[168] *Rawlins*, 884 N.E.2d at 1035.

[169] *Id.* at 1034.

[170] *Id.* at 1035.

[171] *Id.*

[172] *See id.* (affirming the decision of the trial court).

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

[174] *Id.* at 928.

[175] *Id.* The rape kit was not processed until "almost nine-years after the crime," due to a backlog. *Id.* at 928. The Office of the Chief Medical Examiner ("OCME") "sent the rape kit, along with 225 others, to Bode Technology, one of at least three of its subcontracting laboratories, for testing." *Id.* at 928-29. The lab produced a "DNA report containing machine-generated raw data, graphs and charts" and "isolated a male DNA specimen from the rape kit." *Brown*, 918 N.E.2d at 929. Maryland police during a routine search of a DNA data bank "registered a cold hit, linking defendant's DNA to the profile found in the victim's rape kit." *Id.* (internal quotation marks omitted). At the OCME, "a forensic biologist/criminalist . . . compared defendant's DNA characteristics to the specimen from the victim's rape kit." *Id.*

[176] *Id.*

testified that the DNA report she received from laboratory:

> [C]onsisted merely of raw data and contained no conclusions other than noting that there was a male specimen found in the victim's rape kit[,] . . . [and] [s]he stated that she drew her own scientific conclusions from analyzing the data and defendant's DNA profile . . . . The court then admitted the report into evidence.[177]

The New York Court of Appeals held that the DNA report from the laboratory "consisted of merely machine-generated graphs, charges and numerical data," was not testimonial, and did not contain conclusions or other interpretations.[178]

The court distinguished this case from *Melendez-Diaz* and held that the report from the private laboratory was not testimonial. In *Brown*, it was the forensic biologist on the stand, who analyzed and came to her own conclusions from the data from the private laboratory's report that linked the defendant to the crime, unlike in *Melendez-Diaz*, where the certificates of analysis showed the substance in the defendant's possession was cocaine.[179] Therefore, the defendant could directly cross-examine the person linking him to the crime.[180]

The court then discussed this case under several noted factors used in a *Crawford* analysis:

> (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.[181]

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[177] *Id.* at 130.

[178] *Brown*, 918 N.E.2d at 931 (internal quotation marks omitted). The New York Court of Appeals previously held in *People v. Rawlins*, 884 N.E.2d 1019 (N.Y. 2008), that "fingerprint analysis was 'testimonial' because it was prepared by police solely to be entered at the subsequent trial against the defendant, and it was therefore offered upon a purely accusatory basis to establish defendant's identity at trial." *Brown*, 918 N.E.2d at 931 (citing *Rawlins*, 884 N.E.2d at 1033).

[179] *Melendez-Diaz*, 129 S. Ct. at 2530.

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

[181] *Id.* (citing People v. Freycinet, 892 N.E.2d 843, 845-46 (N.Y. 2008)).

Regarding the first factor, the court noted that the private laboratory was independent of both the police department and District Attorney's Office.[182] Second, there was no subjective analysis because the report did not contain any apparent conclusions, interpretations, or even comparisons.[183] Third, the report was produced prior to the defendant being a suspect and thus there could not have been a bias in favor of law-enforcement.[184] Regarding the final guideline, the court held that unlike the analysis at issue in *Melendez-Diaz*, it was the testifying analyst who actually linked the defendant to the crime.[185]

V. ANALYSIS

After *Meekins* and *Brown*, the First Department's decision in *Encarnacion* is unsurprising.[186] The surprising aspect of the ruling is that the court decided to rule on this case while *Bullcoming* was pending before the Supreme Court.[187] Many of the arguments discussed in *Encarnacion* were brought up in *Bullcoming*, and thus, the First Department now seems in dispute with the Supreme Court.[188]

The court in *Encarnacion* in holding that DNA reports are not testimonial, relied on *Brown* and *Meekins*, in which the New York Court of Appeals held that DNA reports are not accusatory because they only contain raw data which is non-identifying in the form of a DNA profile.[189] Consequently, the DNA reports "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."[190] Similarly, in *Bullcoming*, the prosecution argued that the witness's affir-

[182] *Id.* at 932.

[183] *Id.*

[184] *Id.*

[185] *Brown*, 918 N.E.2d at 931. The court also held that the private laboratory's documents were admissible under New York's business records rule. *Id.* at 932.

[186] *Compare id.* at 931-32 (holding that a DNA analyst's testimony, regarding a DNA test the analyst did not personally perform, was not testimonial), *with Encarnacion*, 926 N.Y.S.2d at 456 (holding the testimony of a DNA analyst who testified regarding DNA tests she both did and did not personally conduct was admissible).

[187] *Compare Encarnacion*, 926 N.Y.S.2d at 446 (decided June 23, 2011), *with Bullcoming*, 131 S. Ct. 2705 (decided June 23, 2011 with arguments beginning on March 2, 2011).

[188] *Compare Encarnacion*, 926 N.Y.S.2d at 456 (holding that non-identifying raw data is not accusatory), *with Bullcoming*, 131 S. Ct. at 2715 (holding that certifying to a machine-generated number is testimonial).

[189] *Encarnacion*, 926 N.Y.S.2d at 456.

[190] *Rawlins*, 884 N.E.2d at 1035.

mations were not accusatory.[191] In contradiction to *Brown* and *Meekins*, the Court in *Bullcoming*, regarding raw data, stated that the technician who certifies a test of machine-generated numbers, does more than merely certify as to the numbers, the technician also certifies that evidentiary procedures and proper protocol were followed.[192] Therefore, the human actions taken in the testing procedure are also shown by a DNA report.[193] Accordingly, this shows that the raw data arguments in *Bullcoming* are too similar to the arguments in *Encarnacion* to be simply ignored.

The DNA reports from *Encarnacion* are testimonial by Supreme Court standards even without citing to *Bullcoming*. First, DNA reports fit into the categorical definition of testimonial set out by *Crawford*, which says, "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are testimonial.[194] The technician in *Encarnacion* worked at the OCME, knew that the items came from a crime scene, and if not told about the exact crime could easily deduce that it was a serious crime.[195] Similar to the facts in *Crawford*, the DNA technicians were employees of a government agency that supported the police, though they were not police.[196] Thus, the historical argument from *Crawford* which states, "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,"[197] would be violated.

The witness from OCME testified regarding results she had not personally conducted or supervised;[198] therefore, she should not have been allowed to testify at trial.[199] The New York court in *Mee-*

[191] *Bullcoming*, 131 S. Ct. at 2717 (internal quotation marks omitted).

[192] *Id.* at 2714.

[193] *Id.*

[194] *Cf. Melendez-Diaz*, 129 S. Ct. at 2531 (quoting *Crawford*, 541 U.S. at 52) (noting that the DNA reports used in *Crawford*, that were collected from the crime scene by police and sent to a lab for analysis, are similar to *Melendez-Diaz*, where officers sent what they believed to be drugs to a lab after a drug arrest).

[195] *See Encarnacion*, 926 N.Y.S.2d at 456 (describing how the items sent to the lab from the crime scene contained not only bloody clothing, but also bloody knives; therefore, it would be a fair assumption to think that a crime was committed).

[196] *Id.*

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

[198] *Encarnacion*, 926 N.Y.S.2d at 456.

[199] *See Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring) ("It would be a differ-

kins is able to find support for allowing a witness who did not personally conduct the laboratory test through Justice Sotomayor's concurring opinion in *Bullcoming*,[200] however, the *Encarnacion* and *Brown* decisions do not.[201] Agreeably, the testifying lab technician from *Encarnacion* is fully aware of the procedures her fellow lab employee conducted; however, "the [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."[202]

It is worth noting that the Supreme Court in *Williams v. Illinois*[203] will finally resolve the DNA issue.[204] Based on the decision in *Bullcoming*, it seems logical that the Court when deciding *Williams* will hold that DNA reports are testimonial and cannot be admitted into evidence without confrontation.[205] Even federal circuits that once held DNA test results to be non-testimonial have changed course after *Bullcoming* noting that DNA results are at times imperfect.[206] Furthermore, regarding forensic testing, the Supreme Court has noted that "human error can occur at each step"[207] and "[c]onfrontation is one means of assuring accurate forensic analy-

ent case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results.").

[200] *Compare Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring) (noting that the analyst in *Bullcoming* had no direct involvement in the test and thus was unable to testify, but, "It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report"), *with Rawlins*, 884 N.E.2d at 1034 (noting that the analyst testifying was the supervisor of the analyst who conducted the test).

[201] *Compare Brown*, 918 N.E.2d 927, 929 (stating that where the analyst testified regarding the DNA results did not even work at the lab which did the testing), *with Encarnacion*, 926 N.Y.S.2d at 456 (stating that the analyst who testified regarding DNA results had not personally conducted all the tests of the results in which she was testifying).

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

[203] 131 S. Ct. 2974 (2011).

[204] The question on petition for certiorari in *Williams* is whether Illinois's law of allowing a DNA analyst to testify, regarding a DNA test he or she did not personally perform, violates the Confrontation Clause. SCOTUSBLOG (Nov. 15, 2011, 8:19 PM), http://www.scotusblog.com/case-files/cases/williams-v-illinois/?wpmp_switcher=desktop.

[205] *See Bullcoming*, 131 S. Ct. at 2715 ("[T]he comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment . . . .").

[206] *Compare* United States v. Washington, 498 F.3d 225, 230 (4th Cir. 2007) ("[R]aw data generated by the machines were not the statements of technicians."), *with* United States v. Bonner, 648 F.3d 209, 215 (4th Cir. 2011) (using arguments from *Bullcoming* about the possible errors that could be found in forensic science in comparison with DNA evidence).

[207] *Bullcoming*, 131 S. Ct. at 2711.

sis."[208] Therefore, it is more than likely that the Supreme Court will continue its trend and ensure that defendants are protected with confrontation against reports that are made through a process of imperfect human procedures. The Court will do so by ruling that a lab technician who performed the DNA test must testify, or at the minimum a direct supervisor at trial. The question of how many technicians may a supervisor have under his or her control and still be able to testify at trial may possibly still be left open after *Williams*.

VI. CONCLUSION

In conclusion, the First Department in *Encarnacion* made two highly controversial holdings on issues that did not need to be decided.[209] First, the court's holding continues the decline of what amounts to clear and convincing in New York. Second, the court's holding now seems to be in contradiction with the Supreme Court's decision in *Bullcoming*. When the Supreme Court decides the DNA issue in *Williams*, it will most likely overrule the decision in *Encarnacion*.

Anthony Fasano[*]

[208] *Melendez-Diaz*, 129 S. Ct. at 2536.

[209] *See Encarnacion*, 926 N.Y.S.2d at 457 (McGuire, J., concurring) (stating that there was no need to resolve the issue).

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