NIAGARA COUNTY JUSTICE COURT

People v. Harvey[1]
(decided February 4, 2010)

Jon Harvey filed a pre-trial motion seeking to exclude the People's hearsay evidence against him—records regarding the maintenance and calibration of the breath test machine and the analysis of the breath test simulator solution[2] (hereinafter "Calibration Records")—in light of the Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts*.[3] The defendant claimed that the calibration records were "testimonial" hearsay and that admitting them without the ability to cross-examine the analysts who authored those records violated the Confrontation Clause of both the Sixth Amendment to the United States Constitution and article I, section 6 of the New York State Constitution.[4] The Niagara County Justice Court denied the defendant's motion, finding that the Supreme Court's holding in *Melendez-Diaz* did not impact its decision.[5] The court held that the calibration records were clearly non-testimonial hearsay, admissible under the business records exception, and therefore did not require the in-court testimony of the analysts who actually prepared the documents.[6]

In driving while intoxicated ("DWI") cases, before the results of a breathalyzer test may be introduced at trial, the prosecution must establish foundational evidence pertaining to the calibration and maintenance of the instrument used in performing the breathalyzer

[1] No. 09100144, 2010 WL 376935 (N.Y. Just. Ct. Feb. 4, 2010).

[2] *Id.* at *1.

[3] 129 S. Ct. 2527 (2009).

[4] *Harvey*, 2010 WL 376935, at *1. The Sixth Amendment to the United States Constitution states, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Article I, section 6 of the New York State Constitution 6 states, in relevant part, "In any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him or her."

[5] *Harvey*, 2010 WL 376935, at *1.

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

test.[7] The prosecution will commonly attempt to satisfy this requirement by producing the calibration and maintenance records associated with the instrument that produced the breathalyzer test results and seek to admit them under New York's business and government records exception to hearsay evidence.[8] Prior to *Harvey*, the Niagara County Justice Court addressed a Confrontation Clause challenge to the admissibility of these calibration records in *People v. Krueger*.[9] The defendant in *Krueger* argued that these records were testimonial hearsay under *Crawford v. Washington*,[10] and admitting them without allowing her the opportunity to cross-examine the persons who prepared them was a violation of her constitutional right to confront her accuser.[11] The court ruled that the records in question did not fall under the definition of "testimonial" statements, as they were "not affidavits and were made *before* the . . . arrest of the defendant."[12] The calibration records, the court maintained, were routinely kept business records that were not prepared specifically for the prosecution of the defendant.[13] Moreover, the state trooper that performed the breathalyzer test appeared to testify and was available for a thorough cross-examination regarding the procedure used to obtain the defendant's blood-alcohol content.[14] In light of these considerations, the court found that the admission of the calibration records did not violate the defendant's Sixth Amendment right to confrontation.[15]

In *Harvey*, the defendant filed a motion in limine asking the court to revisit its previous ruling in *Krueger* and find that the admission of the calibration records did indeed require that the defendant have an opportunity to cross-examine the analysts who prepared them.[16] The defendant argued that the Supreme Court's recent deci-

[7] People v. Freeland, 497 N.E.2d 673, 673 (N.Y. 1986).

[8] *Id.*

[9] 804 N.Y.S.2d 908 (Niagara Cnty. Just. Ct. 2005).

[10] 541 U.S. 36, 68-69 (2004) (holding that the Confrontation Clause requires a determination of whether the evidence sought to be admitted is testimonial or non-testimonial in character).

[11] *Krueger*, 804 N.Y.S.2d at 910.

[12] *Id.* at 913 (emphasis in the original).

[13] *Id.* at 912-13.

[14] *Id.* at 913.

[15] *Id.*

[16] *Harvey*, 2010 WL 376935, at *1.

sion in *Melendez-Diaz* mandated that the prosecution produce the analysts to testify to preserve the defendant's right to confront his accusers.[17] The court denied the defendant's motion, maintaining that the defendant misread *Melendez-Diaz*, and that the decision "reaffirm[ed] the Supreme Court's position regarding business records," and that such records " 'are generally admissible absent confrontation not because they qualify under an exception,' " but because they were created solely for the administration purposes of the business, and thus were non-testimonial.[18]

The Confrontation Clause of the Sixth Amendment preserves the right for all criminal defendants to confront their accusers.[19] It has been argued, however, that certain evidence that is admissible pursuant to the hearsay exceptions under either federal or state rules of evidence eliminates this right, and it follows that the admission of said evidence may constitute a violation of the Sixth Amendment.[20] The Supreme Court has acknowledged this tension between the hearsay exceptions of the federal and states' respective rules of evidence and a defendant's constitutional right to confront his accusers.[21] Accordingly, the Supreme Court has set forth criteria for evaluating alleged Confrontation Clause violations in order to ensure that the framers' intent to require confrontation has been met.[22]

The landmark case surrounding Confrontation Clause challenges to the admissibility of evidence under hearsay exceptions is *Crawford v. Washington.*[23] In *Crawford*, the defendant was charged with assault and attempted murder.[24] At trial, over the defendant's objections, the prosecution was permitted to introduce evidence of a recorded statement given by the defendant's wife to the police in order to contradict the defendant's claim of self-defense.[25] The defendant argued that admitting this statement violated his right to confront

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[17] *Id.*

[18] *Id.* at *2-3 (quoting *Melendez-Diaz*, 129 S. Ct. at 2539) (alteration to the original).

[19] *Crawford*, 541 U.S. at 42.

[20] *See id.* at 40; *Melendez-Diaz*, 129 S. Ct. at 2531; Davis v. Washington, 547 U.S. 813, 817-20 (2006); FED. R. EVID. 803-04; N.Y. C.P.L.R. 4518-20 (McKinney 2010).

[21] *See Crawford*, 541 U.S. at 42.

[22] *See id.* at 68.

[23] 541 U.S. 36 (2004).

[24] *Id.* at 40.

[25] *Id.*

the witnesses against him.[26] Justice Scalia, writing for the majority, set forth in great detail the historical background surrounding the Confrontation Clause in order to evaluate the framers' intent.[27] Although the Supreme Court conceded that the case could be resolved according to the rule set forth in *Ohio v. Roberts*,[28] it departed from the *Roberts* standard and determined that Confrontation Clause challenges surrounding evidence admitted pursuant to hearsay exceptions should be decided by giving attention to the character of the evidence sought to be admitted.[29]

The Court in *Crawford* held that, "[w]here *testimonial* evidence is at issue . . . , the *Sixth Amendment* demands what the common law required," and, in order for such evidence to become admissible, the declarant must be unavailable to testify and the defendant must have had a prior opportunity to cross-examine the declarant.[30] In so holding, the Court declined the opportunity to provide a comprehensive definition of what would constitute testimonial evidence.[31] Nonetheless, the Supreme Court did identify three broad categories of evidence that shall constitute the core group of that distinction.[32] Ultimately, the Court in *Crawford* felt that the purpose of the Confrontation Clause was to ensure the reliability of testimonial evidence by allowing a criminal defendant to cross-examine the wit-

[26] *Id.* The trial court's ruling that there was no constitutional violation was reversed on appeal and the Supreme Court granted certiorari to review the lower courts' decisions. *Id.* at 41-42.

[27] *See Crawford*, 541 U.S. at 43-50.

[28] 448 U.S. 56, 66 (1980) (holding that the right to confrontation is not violated if the statement is within a "firmly rooted hearsay exception" or carries an "adequate 'indicia of reliability' "). The Court in *Crawford* determined that this rule for evaluating Confrontation Clause challenges to hearsay exceptions failed to carry out the framer's intent and could likely result in being both over and under-inclusive in allowing the admission of hearsay evidence. *Crawford*, 541 U.S. at 60.

[29] *Crawford*, 541 U.S. at 68. The Supreme Court admits that "not all hearsay [evidence] implicates the *Sixth Amendment's* core concerns," and evidence sought to be admitted under a hearsay exception must be evaluated to determine whether it is testimonial or non-testimonial in character. *Id.* at 51 (emphasis in the original) (alteration to the original).

[30] *Id.* at 68 (emphasis added).

[31] *Id.*

[32] *See id.* at 51-52. The three categories enumerated by the Court were: (1) "*ex parte* in-court testimony or its functional equivalent"; (2) "extrajudicial statements . . . , 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." *Crawford*, 541 U.S. at 51-52 (internal citations omitted).

nesses against him.[33] Although the rules of evidence surrounding hearsay exceptions purport to accomplish the same, the best way to ensure reliability of the evidence was to allow the defendant to confront the source.[34] The Court noted that whatever additional evidence this term may encompass, at a minimum, it shall apply "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[35]

The absence of a comprehensive definition of testimonial evidence by the Supreme Court in *Crawford* created the distinct possibility that the lower courts applying its holding would encounter uncertainty when faced with challenges to admissible hearsay that comprise the periphery of testimonial evidence. Indeed, the lack of a definition has required the Court to periodically expand upon the *Crawford* holding in order to provide some guidance to the lower courts in evaluating the character of certain admissible hearsay evidence.

For example, in *Davis v. Washington*,[36] the Supreme Court was called upon to further expand upon its holding in *Crawford* and determine whether all statements made to law enforcement personnel fell under the category of "police interrogation" and were thus subject to the restrictions imposed by the Confrontation Clause.[37] The Court recognized that its previous decision did not fully "define what [the Court] meant by [police] 'interrogations.' "[38] This lack of clarity required the Supreme Court to provide for a more functional definition of testimonial statements.[39] In doing so, the Court focused on the circumstances surrounding the statements at issue and the declarant's

[33] *Id.* at 68-69. "[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61.

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

[35] *Id.* at 68.

[36] 547 U.S. 813 (2006).

[37] *Id.* at 817.

[38] *Id.* at 823 (alteration to the original). The Court maintained that the facts pertaining to the challenge presented before the Court in *Crawford* did not require a comprehensive definition. *Id.* On the other hand, the issues before the Court in *Davis* were not as clear and required a more intensive analysis of the facts and circumstances surrounding the statements. *Id.*

[39] *Davis*, 547 U.S. at 823.

primary purpose for giving them.[40] While some of the statements made during a call to a 911 operator were procured to meet an ongoing emergency, the statements given to police responding to the domestic disturbance report, on the other hand, were procured when there was no such ongoing emergency.[41] This distinction controlled whether the statements were characterized as testimonial or non-testimonial.[42] As a result, the Supreme Court held that if a statement made to police personnel, when viewed objectively, indicates that it was made to "enable police assistance to meet an ongoing emergency," and not to establish past events, then the statement is non-testimonial.[43] However, to the contrary, the statement is testimonial when there is no emergency situation and the speaker is describing past events that, viewed objectively, would indicate a "primary purpose . . . to establish or prove past events potentially relevant to later criminal prosecution."[44]

Again, the Court confined its reasoning to statements made to law enforcement personnel and did not attempt to clarify what would constitute a testimonial statement when it was made to someone other than law enforcement personnel, or clarify how *Crawford* would apply to other hearsay exceptions. Thus, following *Davis*, the full impact of the *Crawford* decision on the admissibility of hearsay evidence remained primed for further review.

Most recently, in *Melendez-Diaz v. Massachusetts*,[45] the Supreme Court was faced with a Confrontation Clause challenge to a

[40] *Id.* at 826. At issue in *Davis* was whether statements made during a call to a 911 operator constituted testimonial evidence. *Id.* at 817. In its companion case, *Hammon v. Indiana*, the evidence at issue concerned statements made to police responding to a domestic disturbance report. *Id.* at 819-20.

[41] *Id.* at 827, 829.

[42] *Davis*, 547 U.S. at 822. "[T]he initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827. The Court distinguished these statements from the one elicited in *Crawford*, because in *Davis* the declarant was not speaking about earlier events and "the nature of what was asked and answered," to the objective viewer, were such that "the elicited statements were necessary to be able to *resolve* the present emergency," and not for the purposes of subsequent prosecution. *Id.* These distinctions, however, were not present in the companion case, *Hammon*, where there was no emergency and the purpose of the questioning was to establish past events to be used at a later criminal proceeding. *Id.* at 829.

[43] *Id.* at 822.

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

[45] 129 S. Ct. 2527 (2009).

forensics report that indicated that the substance in the defendant's possession was cocaine.[46] The Court determined that the forensics report, simply stated, was the equivalent of a sworn statement " 'made for the purpose of establishing or proving some fact.' "[47] Notably, the fact to be proven—that the substance the defendant possessed was cocaine—was a crucial fact essential to prove the defendant's guilt and obtain a conviction.[48] Therefore, the documents sought to be introduced by the prosecution were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' "[49] As a result, the Court found that "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the *Sixth Amendment*."[50] It followed that the forensics report was inadmissible unless the prosecution was able to show, as per *Crawford*, "that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them."[51] However, in so ruling, the Supreme Court noted that not everyone "whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case," and that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."[52]

Following the decision in *Melendez-Diaz*, it was fairly certain that the limits of the Supreme Court's latest interpretation of Confrontation Clause jurisprudence would be tested and subjected to interpretation by the federal courts. For example, in *United States v. Bacas*,[53] a defendant charged with a speeding violation challenged the admission of the certificates of accuracy that purported to establish the proper operation of the radar device that was used to deter-

[46] *Id.* at 2530.

[47] *Id.* at 2532 (quoting *Crawford*, 541 U.S. at 51). The Court determined that the documents at issue, namely affidavits, fell within the "core class of testimonial statements" described in *Crawford*. *Id.*

[48] *Id.*

[49] *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Davis*, 547 U.S. at 830).

[50] *Id.*

[51] *Id.* The Court reasoned that "[c]onfrontation is one means of assuring accurate forensic analysis," and "is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 2536-37.

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

[53] 662 F. Supp. 2d 481 (E.D. Va. 2009).

mine the defendant's rate of speed.[54] Although the officer who tested the accuracy of the radar device testified at trial and was subject to cross-examination, the individual who calibrated the device did not appear at trial.[55] Relying on *Melendez-Diaz*, the defendant challenged that the certificates were testimonial hearsay, and admitting them without producing the preparer for cross-examination violated his Sixth Amendment right to confront his accuser.[56] In finding no constitutional violation, the court distinguished the records before it from those in *Melendez-Diaz*, finding that the certificates offered only information of the proper calibration of the equipment and were not specifically related to the defendant before the court.[57] Moreover, the technicians performing the calibration were unaware that any of their records would be involved in litigation.[58] The court concluded that the challenged certificates were non-testimonial in nature "because they lack[ed] the primary purpose of proving past events potentially relevant to later criminal prosecution against [the] particular defendant," and thus, were admissible.[59]

The Supreme Court has not decided the precise issue presented in *Harvey*, and until then, the lower courts are responsible for synthesizing *Crawford* and *Melendez-Diaz* and applying a similar analysis when determining the outcome. For example, in *United States v. Griffin*,[60] a defendant charged with driving under the influence of alcohol ("DUI") filed a pretrial motion to exclude the calibration and maintenance records of the breathalyzer used to administer his breath test.[61] In evaluating the defendant's motion, the federal district court recognized the Supreme Court's recent decision in *Melendez-Diaz*, but found the documents presented before the court easily distinguishable.[62] It was quite apparent "that a Certificate of Accuracy, introduced only to verify the calibration of a testing device used by law enforcement, does not constitute testimony 'against' a defendant in the same way as a certificate of analysis offered to es-

[54] *Id.* at 483.
[55] *Id.* at 483-84.
[56] *Id.* at 483.
[57] *Id.* at 485-86.
[58] *Bacas*, 662 F. Supp. 2d at 485.
[59] *Id.* at 486.
[60] No. 3:09MJ308, 2009 WL 3064757 (E.D. Va. Sept. 22, 2009).
[61] *Id.* at *1.
[62] *Id.* at *2.

tablish an element of an offense."[63] Unlike the records in *Melendez-Diaz*, the Certificate of Accuracy "only conveys information regarding the calibration and proper operation of the [breathalyzer]," and that "[t]he " 'primary purpose' of calibration certificates . . . is not 'to establish or prove past events potentially relevant to later criminal prosecution.' "[64] Furthermore, the court emphasized that the arresting officer who performed the breath test would testify at trial and was available for cross-examination by the defendant "to verify . . . that proper procedures were followed to ensure an accurate result."[65] The records sought to be admitted did nothing more than "certify that routine calibration testing has been performed on [the device], without regard to the certificate's use against any particular defendant, or [its] introduction to prove any element of an offense."[66] Accordingly, the federal district court found the calibration records for the breathalyzer to be non-testimonial evidence that did not require confrontation.[67]

In addition to the protection provided by the Sixth Amendment, the New York State Constitution contains an analogous clause which also preserves a criminal defendant's right to confront his accuser.[68] However, New York's protection is not limited to criminal proceedings but is also applicable to civil suits.[69] Not surprisingly, following the decision in *Melendez-Diaz*, New York courts have already been called upon to interpret its implications.

Recently, New York's highest court, in *People v. Brown*,[70] addressed a Sixth Amendment challenge to forensic records sought to be admitted by the prosecution under the business records exception to New York's rules of evidence.[71] At issue was "a DNA report containing machine-generated raw data, graphs and charts of the . . . [de-

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[63] *Id.*

[64] *Id.* (quoting *Davis*, 547 U.S. at 822).

[65] *Griffin*, 2009 WL 3064757, at *2.

[66] *Id.* at *3 (alteration to the original).

[67] *Id.*

[68] *Melendez-Diaz*, 129 S. Ct. at 2531 (citing Pointer v. Texas, 380 U.S. 400, 403 (1965)). Article I, section 6 of the New York Constitution states in, pertinent part, "In any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him or her."

[69] *See* N.Y. CONST. art. I, § 6.

[70] 918 N.E.2d 927 (N.Y. 2009).

[71] *Id.* at 928.

fendant's] DNA characteristics."[72] The defendant objected to the introduction of this report, arguing that the report was "testimonial evidence" which did not allow the defendant the opportunity to cross-examine the preparer, and therefore was a violation of the Confrontation Clause of the Sixth Amendment.[73] The New York Court of Appeals distinguished *Brown* from the Supreme Court's *Melendez-Diaz* holding, finding "[t]here were no conclusions, interpretations or comparisons apparent in the report."[74] It followed that the only testimony the technicians would be able to provide was "how they performed certain procedures," and that it was clear from the holding in *Melendez-Diaz* that "not everyone 'whose testimony may be relevant . . . must appear in person as part of the prosecution's case.' "[75]

In July 2010, a New York appellate court addressed the precise challenge presented in *Harvey*. In *People v. Lent*,[76] the defendant appealed his conviction for driving while intoxicated asserting, among other things, that the admission at trial of "certified copies of the simulator solution certification and the calibration/maintenance documentation in relation to the breath test instrument," without producing the analysts for cross-examination, violated the defendant's right to confrontation under the Sixth Amendment.[77] The court conceded that the "personnel responsible for calibrating and maintaining breath test machines are not 'independent of law enforcement,' " and the business records exception would not preclude scrutiny to evaluate whether the reports rise to the level of "testimonial evidence" that would eliminate the hearsay exception and require confrontation.[78] However, although "the purpose of accurate breath-alcohol measuring machines is to produce evidence that may be used at trial, the calibration and maintenance documents in relation to the machines are not testimonial."[79] The court reasoned that the records were not a product of police interrogation—they were not created to gather incriminating evidence against a particular individual, "they [did] not involve opinions or conclusions relevant to a particular in-

[72] *Id.* at 929 (alteration to the original).
[73] *Id.*
[74] *Id.* at 931.
[75] *Brown*, 918 N.E.2d at 931-32 (quoting *Melendez-Diaz*, 129 S. Ct. at 2532 n.1).
[76] 908 N.Y.S.2d 804 (App. Term 2d Dep't 2010).
[77] *Id.* at 807.
[78] *Id.* at 808.
[79] *Id.*

vestigation," and the records themselves were not "a direct accusation of an essential element of any offense."[80] Therefore, it followed that the calibration and maintenance records were non-testimonial evidence and may be admissible under the business records hearsay exception without violating the Confrontation Clause of the Sixth Amendment.[81]

Although the majority of New York courts faced with this particular challenge have also found such records to be non-testimonial,[82] the issue has been decided to the contrary and the calibration records have been precluded based on a finding that the records were indeed testimonial.[83] For example, in *People v. Carreira*,[84] a lower New York court recently held that these records are testimonial in nature and subject to Confrontation Clause limitations.[85] In *Carreira*, the court had a fundamentally different interpretation of the Supreme Court's rulings in *Crawford* and *Melendez-Diaz*, and sustained the defendant's pretrial motion to exclude the calibration and maintenance records of the breath test instrument.[86] The court maintained that because the "entire purpose [of the records] is to help provide reliable evidence for prosecuting DWI suspects," and they were created for the specific purpose of litigation, it rendered them, as per *Melendez-Diaz*, unable to avoid confrontation.[87] In so holding, the Watertown City Court rejected the reasoning of courts that found the records to be non-testimonial because it felt those courts "ignored *Crawford's* 'prepared for litigation' language, which clearly impicate[d] the documents in question," and that their rationale failed to recognize that these types of records were not "typical business records."[88] The court showed a marked concern over the reliability of these records due to recent reported improprieties within the state police lab as well as concerns about the simulator solution, which

[80] *Id.* at 808-09.

[81] *Lent*, 908 N.Y.S.2d at 808-09.

[82] *See* People v. Kelly, No. 2007NY078228, 2009 WL5183779, at *4 (N.Y. Cnty. Crim. Ct. Dec. 22, 2009); People v. Kanhai, 797 N.Y.S.2d 870, 875 (Queens Cnty. Crim. Ct. 2005).

[83] *See* People v. Heyanka, 886 N.Y.S.2d 801, 801-02 (Suffolk Cnty. Dist. Ct. 2009).

[84] 893 N.Y.S.2d 844 (Watertown City Ct. 2010).

[85] *Id.* at 846.

[86] *Id.* at 847.

[87] *Id.* at 848-49 (alteration to the original).

[88] *Id.* at 847.

presumably influenced its decision.[89] Ultimately, the court in *Carreira* determined that the admission of the calibration records under the business records exception posed too much of a risk of unreliability to be exempt from the mandates of the Confrontation Clause of the Sixth Amendment.[90]

After evaluating the federal and New York State judicial history surrounding Confrontation Clause challenges to a breath test instrument's calibration and maintenance records, it is hard not to notice that the majority of the courts have held that the records are nontestimonial in nature. However, equally important is the fact that the Supreme Court has not ruled precisely on this issue. Thus, a court may be persuaded by the overall judicial majority, but not necessarily bound by the decisions. Clearly, the absence of a complete determination by the Supreme Court allows for a divide among the various jurisdictions, and it is reasonable to conclude that the Court will need to address this issue sometime in the future in order to provide some stability in the law.

However, until the Supreme Court decides the issue presented here, the onus is on the lower courts to make sense of the Court's reasoning in *Crawford*, *Davis*, and *Melendez-Diaz*. The Niagara County Justice Court in *Harvey* gave due deference to these decisions in its opinion.[91] While the court was critical of the defendant's interpretation of *Melendez-Diaz*,[92] the written opinion by the court also seems to stray from the reasoning of the Supreme Court in determining the outcome. Although the end result could remain the same, the court in *Harvey* gave too much credit to the fact that the calibration records fell under New York's business records exception to hearsay. Interpreting *Melendez-Diaz* to suggest that the Supreme Court has reaffirmed the admissibility of *all* business records clearly undermines the substance of the Court's reasoning. An important aspect of the Court's decision was that not all evidence admissible under the business records exception is consistent with the right provided by the Confrontation Clause. Even though the Supreme Court suggested that most hearsay under the business records exception would be

[89] *Carreira*, 893 N.Y.S.2d at 850-51.
[90] *Id.* at 851.
[91] *See supra* notes 5-6 and accompanying text.
[92] *See supra* note 18 and accompanying text.

found to be admissible without requiring cross-examination,[93] courts are still required to examine such evidence for its intended purpose and effect to determine if they are indeed non-testimonial.

The court's opinion in *Harvey* does not get into such an inquiry and instead relies on its prior ruling and the majority of decisions set forth by the other courts in New York.[94] Finding the calibration records to be non-testimonial is not troubling, but the court's reasoning would be much more persuasive had it explicitly distinguished its case from the issue presented in *Melendez-Diaz*. Instead, the court said the records in question were non-testimonial because the Supreme Court said that most business records would be found to be non-testimonial.[95] While that may be true, the Court still has provided the lower courts with a sufficient framework that requires the courts to make an inquiry into the circumstances surrounding the preparation of such records.

It is worth noting, however, that the Niagara County Justice Court's ruling in *Krueger*, decided pre-*Melendez-Diaz*, was based upon the appropriate inquiry and the records were evaluated in a manner that was consistent with the Supreme Court's Confrontation Clause jurisprudence.[96] The court addressed the relevant circumstances surrounding the preparation of the breath test calibration records and determined that they were not prepared with the specific intent to prosecute any particular defendant, including the defendant before the court.[97] Indeed, it was this determination that supported the court's ruling that the calibration records were non-testimonial hearsay admissible under *Crawford*. Similarly, the majority of New York courts, including the New York appellate court in *Lent*, have also found the records admissible without violating the defendant's right to confrontation, each emphasizing that the neutrality of the records towards the prosecution of any particular case renders the evidence non-testimonial.[98] The decision in *Melendez-Diaz* does not undermine this approach, but instead enforces it.

However, the lack of binding precedent allows for conflicting

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[93] *See supra* note 52 and accompanying text.
[94] *See supra* notes 5-6 and accompanying text.
[95] *See supra* note 18 and accompanying text.
[96] *See supra* notes 9-15 and accompanying text.
[97] *Id.*
[98] *See supra* notes 76-82 and accompanying text.

views among the courts, as illustrated in *Carreira*.[99] While the Watertown City Court seemingly performed a similar inquiry into the circumstances, the court's analysis resulted in a determination that the calibration records were testimonial and subject to the restrictions of the Confrontation Clause.[100] Clearly, its departure from the majority of New York courts was merely a matter of perspective on the purpose and effect of the records in question. In ruling that the Confrontation Clause required the analysts to testify in court, the court in *Carreira* asserted that the calibration procedures were indeed performed solely for the purposes of litigation.[101] While the records may not be designed to prosecute a particular defendant, the breath test instrument's calibration records are necessary for the prosecution of all defendants where breath tests are performed.[102] In other words, inherent in any given calibration is the future prosecution of a defendant. Furthermore, the court's concern with the potential for unreliable records from either crime lab improprieties or other issues should not be dismissed summarily.[103] Where liberty interests are at stake, the reliability of evidence utilized to establish guilt is paramount. Even though this is clearly the minority view, the court's reasoning does not necessarily seem to be inconsistent with either *Crawford* or *Melendez-Diaz*.

The existence of these conflicting viewpoints suggests that this issue is ripe for review by the Supreme Court and the New York Court of Appeals. Clearly, it should be no surprise that the use of breath test results has been more prevalent with the seemingly infinite amount of DWI arrests that take place each day, especially in New York. It is likely that the void in the law, with regard to the admissibility of the calibration records, will continue to subject the courts to regular challenges in order to test a particular court's perspective on the issue.

Undoubtedly, the court in *Harvey* and other courts facing these challenges would have preferred to have the issues surrounding the admission of breath test calibration records pre-determined by the Supreme Court, so that they would have limited discretion in evaluat-

[99] *See supra* notes 84-90 and accompanying text.
[100] *Id.*
[101] *See supra* note 87 and accompanying text.
[102] *Id.*
[103] *See supra* note 89 and accompanying text.

ing the challenge. However, that has not been the case with many Confrontation Clause challenges to admissible hearsay evidence in the aftermath of *Crawford*. Not surprisingly, the Supreme Court has been reluctant to draw all encompassing, bright line rules in this area, and has generally confined all of its decisions to the facts at hand. Indeed, the seemingly infinite sources of hearsay evidence that may possibly be admitted into court makes the thought of bright line rules impossible to create. Nonetheless, establishing binding precedent to finally determine this particular issue would be in no way trivial.

In the meantime, the courts will continue to have to address these issues according to the criteria already provided. Just because the court in *Carreira* currently is in the minority on this issue, does not necessarily make it any more probable that it is wrong in its analysis and the majority of New York courts are correct in theirs. The conflict between the hearsay exceptions and the emerging case law surrounding the Confrontation Clause necessarily creates the divide among the courts and time will dictate whether this issue will be settled by the court that binds all.

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