STATE OF NEW YORK

Supreme Court

COUNTY OF MONROE — Fourth Department

MICHAEL C. GREEN,

Petitioner,

vs.

JOHN L. DeMARCO,

Respondent.

Index No. 2205/09951

BRIEF

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SUPREME COURT COUNTY OF MONROE
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-VS-

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SUMMARY

In a complaint against a Justice of the Court of the Town of Irondequoit, the Monroe County District Attorney's Office seeks a Declaratory Judgment holding that the introduction of certified breath documents used in the prosecution of driving while intoxicated cases does not violate the Confrontation Clause of the United States Constitution as interpreted by the United States Supreme Court in *Crawford v Washington*, 541 US 36 (2004). The complaint further asks the Court to declare that the said Justice may no longer preclude such documents at driving while intoxicated trials over which he presides. For the reasons set forth below, we submit that the Court should do neither.

ARGUMENT

In plain language, the issue at hand is whether breath test documents, which are necessary at trial to admit the results obtained from breath tests, are "testimonial" within the meaning of *Crawford v Washington*, and as such require that the declarant be available for cross-examination. Without question, the key to *Crawford's* applicability, then, will be the definition of the term "testimonial."

Unfortunately, in deciding *Crawford*, the Supreme Court expressly left "for another day a comprehensive definition of 'testimonial'" (124 S.Ct. at 1374). Nevertheless, the Court did leave some clues:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v Illinois,* 502 US 346, 365, 112 SCt 736, 116 LEd2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "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," Brief for National Association of Criminal Defense Lawyers, *et al.* as *Amici Curiae* 3. These formulations all share a common nucleus and then define the clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition — for example, *ex parte* testimony at a preliminary hearing.

124 S.Ct at 1364.

Consider the foregoing along with the Court's broad declaration regarding that which is testimonial:

> 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 not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Id.

In *People v Rogers*, 8 AD3rd 888, 780 NYS2d 393 (NY App Div, 2004) the issue was whether or not the prosecution could introduce the blood alcohol content of an alleged rape victim, with mere documentation, to prove the victim's inability to consent. The New York State Appellate Division, 3rd Department, held that the State could not. They held it was a violation of

Crawford and the Sixth Amendment inasmuch as the defendant could not cross-examine the technician on the issue of blood alcohol content.

While not a driving while intoxicated case, *Rogers* deals with the core issue in an alcohol related operating offense; intoxication, and the introduction of the blood alcohol content (BAC) test result against a defendant. It is difficult to conceive of a non-driving while intoxicated case that could be more directly on point in this regard, as cross-examination about the blood alcohol content is the crux of the issue before us in the *People v Orpin* case.

As a practical matter, it should be recognized from the start that when a defendant is on trial for a so-called *per se* §1192(2) violation, the only determinative issue, aside from operation of the vehicle itself, is the reliability and accuracy of the breath test result admitted into evidence against the defendant. By necessary implication then, the proper working order of the breath test instrument is paramount.

The breath test operator who operates the instrument cannot prove an §1192(2) violation without the results produced by that machine. It is, in essence, nothing less than the whole of the People's case in such instances.

Within New York State, as of this writing, there are three driving while intoxicated prosecutions that have written decisions regarding this admissibility issue: an Irondequoit Town Court case, *People v Orpin*, out of which the immediate suit arises; a downstate matter, *People v Kanhai*, 2005 NY Slip Op. 25182, Crim Ct., City of NY, Queens Co.; and the recently decided Rochester City Court case of *People v Fisher*, decision dated Oct, 25, 2005, *Rochester Daily Record*, November 7, 2005.

While *Orpin* holds admissibility turns on the aforementioned right of confrontation,

Kanhai finds the documents may be admitted if litigation was not their sole purpose when made. With all due respect to the *Kanhai* court, it appears as though their analysis boils down to making a "distinction without a difference." Indeed, the court in *Kanhai* stated:

> All are records of tests conducted at regularly scheduled intervals, by a police department, which is a "business," as a regular part of its business of maintaining highway safety. None were made specifically for this litigation, and none contain opinions or testimony, they are simply memoralizations of tests conducted.

Obviously, this statement merely begs the question, for what is at issue is exactly whether "memoralizations of tests conducted" *is* in fact testimony, *since it is the quality of the performance of the tests themselves that is precisely in issue.* There can be no real difference, for purposes of Sixth Amendment analysis, between one who signs off on a form saying these machines are working properly, and one who takes the stand at trial and utters the same declaration out loud.

Perhaps more instructive, however, is the contention in *Kanhai* that such tests are administered "as a regular part of its business of maintaining highway safety." Exactly how does the police department "maintain highway safety" with these tests? The only sensible answer, of course, is by *arresting and prosecuting those suspected of driving while intoxicated.*

While it is certainly true that the tests are conducted so that the government knows the instruments are in proper working order, the important inquiry is *why* the government would want to know if the instruments are in proper working order. The answer is because the State will want to submit the results obtained from such machines in future litigation, or use the results obtained from those machines in deciding which matters to litigate. There is simply no other reason the State would be concerned with the reliability of the instruments. Indeed, if not for

their potential use in driving while intoxicated trials, it is difficult to conceive why the government would be interested in their degree of accuracy at all. Put another way, if not for potential litigation, what would be the harm in instruments that delivered wholly inaccurate results?

These tests are conducted for purposes of introduction at trial, *period.* To pretend otherwise is, at best, cynical. As such, they are testimonial - in whatever sense one wishes to conceive the term - and should be subject to the rigors of cross-examination. In *Orpin*, the court properly precluded admission of the test results in the absence of live testimony concerning calibration and maintenance of the breath test machinery. In contrast, the obfuscation exercised by the *Kanhai* court is little more than a vocabulary game meant to dispense, perhaps, with the unpleasantness attendant with a contradictory ruling. Admittedly, requiring the State to produce witnesses for cross-examination is a heavy burden when one considers the number of prosecutions for driving while intoxicated throughout New York. But just such an unavoidable eventuality was - if not actually discussed - undoubtedly considered and rejected as a sufficient basis to deny a constitutional right by the Fourth Department, Appellate Division, in the recently decided *People v Pacer*, 796 NYS 2d 787, 2005 NY Slip Op. 04761.

In *Pacer*, the defendant appealed from a judgment convicting him of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree (Vehicle and Traffic Law § 511[3][a][I]). A case of first impression in an Appellate Court in New York, the defendant argued that his Sixth Amendment right to confrontation was violated by the receipt in evidence of an "affidavit of regularity/proof of mailing" sworn to by an employee of the New York State Department of Motor Vehicles. As in *Orpin*, the defendant previously had not been afforded the

opportunity to cross-examine the employee who had sworn to the document. Although *Crawford v Washington*, 541 US 36, 124 SCt 1354, 158 LEd2d 177, had not yet even been decided when the case was tried, the Appellate Division held that *Crawford* sets forth "a new rule for the conduct of criminal prosecutions" and thus must be applied retroactively to the case, which was "pending on direct review" (*Griffith v Kentucky*, 479 US 314, 328, 107 SCt 708, 93 LEd2d 649; *see*, *People v Ryan*, 17 AD3d 1, 3 n. 1, 790 NYS2d 723).

It then applied *Crawford*, holding that any testimonial evidence from a non-appearing witness violates a defendant's right to confrontation where it is not established that the non-appearing witness was unavailable and that defendant had a prior opportunity to cross-examine the non-appearing witness, and accordingly reversed that part of the County Court judgment convicting defendant of that offense and that a new trial be granted on that count of the indictment.

It is difficult, if not impossible, to imagine what kind of constitutional distinction can be drawn between the non-available witness who swore to the affidavit in *Pacer* and the non-available, technical staff in Albany that create reports used against defendants in driving while intoxicated cases. As in *Pacer*, which involved an employee of the New York State Department of Motor Vehicles, the individuals employed by the State Division of Criminal Justice Services are likewise not "accusers" in the restrictive term urged by those who would follow the reasoning employed by the *Kanhai* court.

It is for this reason that the analysis in *Pacer* also proves fatal to the reasoning relied upon by the Rochester City Court in *People v Fisher*. As with *Kanhai*, the court in *Fisher* held that the calibration tests were conducted in the regular course of business. Ignoring, for the moment,

the obvious fact that the "business" of the New York State Division of Criminal Justice Services is precisely to make sure the machines work properly for potential use in future litigation against criminal defendants, it is instructive to note that the *Fisher* court echoes the sentiment supplied in *Kanhai*:

> " The technicians who created the reports memorialized their results before any member of law enforcement accused the defendant of driving with a blood alcohol level above a .08%. "

(*Fisher* at 12.)

As we have seen with the earlier discussion of *Kanhai*, the conclusion is that the "memorialized" results are not testimonial. The decision in *Fisher* rests upon the legal fiction that it is someone other than those that certify the that machines work properly that is, in fact, making the "accusation" a defendant was over the legal limit when operating a motor vehicle.

For, in the final analysis, it is in reality not the breath test operator or "BTO" that accuses the defendant of anything in a driving while intoxicated trial. At most, all he or she can do is testify that a Datamaster printout ticket is the one issued by the instrument after he or she pushed the "start" button. The only individuals who can testify as to the blood alcohol content of any defendant are those who can testify that the instrument worked properly: those who inspect, maintain, and calibrate the machines. Those individuals are the employees of the New York Division of Criminal Justice Services and, for the simulator solution, the New York State Police Forensic Investigation Center.

In fact, the quandary faced by the defendant in *Orpin*, and by extension the defense bar, may be summarized easily by way of a simple fact pattern. Suppose a motorist is stopped at a checkpoint and is arrested after refusing to both perform any field sobriety tests or answer any

questions put to him by the arresting officer. However, he does agree to blow into the Datamaster breath test machine and provides a breath sample that registers a .08% blood alcohol content. He is subsequently charged with only with one count of Driving While Intoxicated as a §1192(2) violation.

In the above fact pattern, who is the defense attorney to cross-examine? Who is the defendant's "accuser" for purposes of Sixth Amendment confrontation? If a defendant does not believe the machine recorded an accurate result, what is his recourse? It is pointless to cross-examine the breath test operator, as he can only testify as to what buttons he pushed, and to what the printout ticket read, not to whether the instrument works properly. The operator, for the most part, is not a scientist or doctor, and in reality has no idea whether the test results are accurate or not. If one is not allowed to cross-examine those people who can truly testify as to the maintenance of the instrument, then of what use is cross-examination? How is the defendant to show the result is inaccurate, that calibration was not conducted properly? How would one demonstrate the science behind such tests is faulty?

The obvious answer, of course, is that the defendant cannot, which is, presumably, just fine with the People.

With all due respect to the court in *Fisher*, its contention that the breath test result is only "circumstantial" proof of the charge before the finder of fact is misleading. It is not merely circumstantial proof of guilt for such a charge, it is the *only possible proof* of such a charge at all, *in principle*. If a dastardly villain in Albany set out to fabricate the results, no amount of honest inquiry directed at the BTO would be sufficient to exonerate the defendant on a *per se* 1192 charge.

While the petitioner may argue that the particular document was not prepared for a particular defendant, such borders on what is essentially a trivial distinction. Petitioner illogically posits that if the Department of Criminal Justice Services inspected and calibrated the machine on each occasion that a test is given, a far more reliable procedure, the results would be *in*admissable. Whether it is prepared for a particular case or not is without significance. To say otherwise ignores both the obvious and *Crawford.* The purpose of the services performed by the Department of Criminal Justice Services is to establish for the jury, beyond a reasonable doubt, that the machine was in proper working order (see, *People v Freeland*, 68 NY2d 699, 506 NYS2d 306; *People v Donaldson*, 36 AD2d 37, 319 NYS2d 172) so that the results may be admitted *in each particular case.* When the materials are prepared is without consequence; the document is testimonial.

Petitioner argues with seeming force that a decision from this Court upholding Judge DeMarco's decision would render driving while intoxicated prosecutions prohibitively expensive. There is absolutely no merit to this contention. Breath test machine technicians are trained and certified by the manufacturer. National Patent Analytical Systems, for instance, sponsors a course for approximately One Thousand Dollars ($1,000), which this writer has taken. All that would be required to satisfy *Crawford* would be to mandate that breath test operators attend such a course. This would enable the breath test operators to be cross-examined and respond based upon his or her review of the documentation prepared by the technician in Albany when he or she serviced the machine. Such a process instituted statewide would require the expenditure of less than One Hundred Thousand Dollars ($100,000), could be completed within a matter of months, and would enable cross-examination in the same fashion as that of physicians

in a personal injury case.[1] Clearly this is a rather inconsequential expense when weighed against the mighty purpose the 6th Amendment was designed to protect.

CONCLUSION

The judgement of the Irondequoit Town Court should be affirmed.

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Respectfully submitted,

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[1]As this court is well aware, in personal injury cases, doctors and other expert witnesses frequently base their opinion upon a review of the medical records and other pertinent documents. This routinely occurs in cross-examination of the defense expert, who, although not a treating physician will form his or her opinions based upon the records with which he or she has provided prior to trial.