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Commentary

Tale of Two Standards in DWI Cases

By Mitchell Ignatoff

A recent Appellate Division decision underscores the inconsistency in the application of the Sixth Amendment to drunken driving cases.

In *State v. Berezansky*, 386 N.J. Super. 84, issued on June 6, the defendant's blood-alcohol level, determined by a blood test, registered at .33 percent. Relying on *Crawford v. Washington*, 541 U.S. 36 (2004), the Appellate Division said the lab technician must testify at trial and be subject to cross examination. His report was not admissible as a substitute for his testimony.

Yet when a defendant's breath, rather than blood, is analyzed for alcohol, municipal courts routinely refuse to require the state to produce the witnesses who wrote the documents that show the breath-testing machine was working, relying on the business-records exception in *State v. McGeary*, 129 N.J. Super. 219 (App. Div., 1974). This is a clear violation of the defendant's Sixth Amendment right to be confronted with the witnesses against him.

That right was elaborated on in *Crawford*, which held that a witness against the accused is someone who bears testimony and that a testimonial statement is an out-of-court statement made to prove a fact in court.

Crawford held that the Confrontation Clause bars use of out-

of-court statements for the purpose of proving a fact in court as evidence against the accused. These are affidavits, depositions, statements taken by police, prior testimony or confessions the accused did not have prior opportunity to cross examine.

The Confrontation Clause's "ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross examination," the Court said.

Crawford continued, "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising."

In drunken driving prosecutions, the state must establish that the breath-testing device was working. It does so by using affidavits from the director of the lab where a simulator solution was tested. (A simulator solution is a known value of alcohol, such as .04 percent, which should produce the same reading in a functioning breath-testing machine.) The state also uses affidavits from the state police officer who tested the device. (With the new breath-testing device, the Alcotest, the manufacturer certifies that certain parts functioned correctly.) These affidavits and certifications are testimonial statements because they are used to prove the machine was working. Under *Crawford*,

they are inadmissible. The state must use witnesses.

In *State v. Godshalk*, 381 N.J. Super. 326, a 2005 Law Division case, the defendant objected to the admission of the Breathalyzer inspection certificates as barred by *Crawford*. The court ruled that *Crawford* does not apply to business records, and the certificates are business records. *Berezansky* certainly disagrees with this holding.

While *Crawford* used business records as an example of nontestimonial statements, it did not overrule (nor even cite to) *Palmer v. Hoffman*, 318 U.S. 109 (1943). There, the Court barred admissibility of a railroad engineer's routine accident report because the engineer, who had not been cross examined, died. *Palmer* held that business records are made for the systematic conduct of the business as a business; records prepared in anticipation of litigation do not fit that definition.

Crawford bases its holding on what the founding fathers likely intended when they wrote the Confrontation Clause, relying on English common law at the time the Constitution was written. At that time, the business-record exception to the hearsay rule provided that records of regularly conducted activity are admissible only if the recorder and his informant are unavailable. Clearly, witnesses in drunken driving cases are available, though it may be difficult to produce them.

Certifications in drunken driving cases are used to show the machine was working properly and are prepared in anticipation of litigation. They are used

Ignatoff, a certified criminal trial attorney, heads a firm in Middlesex.

to establish a fact in court. They are inadmissible.

This does not mean readings from a breath-testing machine are inadmissible. It does mean that the state must use witnesses, including employees of the manufacturer, to establish that it was functioning correctly at the time.

Last Jan. 10, the state Supreme

Court said that until it rules in *State v. Chun*, on the Alcotest's reliability, Alcotest readings are admissible but execution of sentence is stayed for first-time offenders.

Municipal courts continue to say that the stay applies and that they cannot require the state to bring in witnesses to show that the machine was working

properly. This is nonsense. The New Jersey Supreme Court has no power to suspend the operation of the Sixth Amendment. If the state is going to use Alcotest readings at trial, it must prove that the machine was working. *Crawford* and *Berezansky* require that the state use witnesses, not statements made to substitute for testifying. ■