

A newsletter by **Taheri & Todoro, P.C.**, devoted to Driving While Intoxicated law in New York State
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Are Breath Test Scores Admissible after *Crawford*? It Depends...

In *Crawford v. Washington*, 541 US 36 (2004), the US Supreme Court overturned its previous decision in *Ohio v. Roberts*, 448 US 56 (1980) regarding a defendant's Sixth Amendment right to confront his or her accuser. In *Crawford*, the US Supreme Court determined that with regards to testimonial statements, the defendant had a right to cross-examine the witness absent witness unavailability and a prior opportunity to cross-examine that witness. It rejected the "indicia of reliability" tests established by *Ohio v. Roberts* with regards to the admittance of testimonial evidence without the opportunity to cross-examine the witness. The application of the *Crawford* decision by lower courts has impacted all types of cases.

This includes DWI cases. When seeking admittance of the breath test in DWI cases, the prosecution in New York State traditionally has relied upon documents entitled the "Record of Inspection, Maintenance and Calibration" and the "Certification of Analysis of the 0.10% Breath Alcohol Simulator Solution." These documents are used to satisfy the requirements of New York State case law such as *People v. Freeland*, 68 N.Y.2d 699 (1986), where the Court of Appeals held that before a court may admit the breath test score, the prosecution must establish a foundation by introducing "evidence from which the trier of fact could reasonably conclude, inter alia, that the testing device was in proper working order at the time the test was administered to the defendant... and that the chemicals used in conducting the test were of a proper kind and mixed in proper portions." There have been two recent decisions from trial courts of concurrent

jurisdiction regarding the admissibility of these documents in light of the *Crawford* decision. Based on our research, these two cases currently constitute the only written decisions in New York State specifically addressing the application of *Crawford* to the breath test documents.

The courts' come to different conclusions regarding the admissibility of the breath test documents post-*Crawford*. In *People v. Kanhai*, 2005 NY Slip Op. 25182, Crim. Ct., City of NY, Queens Co., 5/2/05, the court found that the documents should continue to be admitted much as they were previously. On the other hand, in *People v. Orpin*, 2005 NY Slip Op. 25212, Justice Ct., Tn. of Irondequoit, Monroe Co., 5/18/05, the court – while noting the difficulty it would impose on the prosecution – found that *Crawford* now requires testimony from the personnel who performed these tests before the breath test documents may be admitted.

In their analysis, both *Kanhai* and *Orpin* agree on several points, with the most relevant being:

1. The breath test documents are "business records" under CPLR 4518 and are therefore otherwise admissible under the business records exception to the hearsay rule;
2. That their qualification as "business records" under NYS law in and of itself is not enough to make the documents admissible in light of *Crawford*.

While agreeing on these points, the cases then diverge in their analysis.

In *Kanhai*, the Criminal Court of New York City examined a number of pre-*Crawford* New York State cases to support the position that, although

the breath test documents are used in litigation, they were *not* prepared for a specific case. As a result, New York State law allows the documents to be admitted if litigation "was not their sole purpose when made," *Kanhai, supra*. The trial court went on to find:

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 memorializations of tests conducted. Indeed, the proper operation of the machine in question is important not just to persons arrested and on trial, but also to persons who may be stopped for driving while intoxicated and tested who are not, in fact, in violation of the law. Given that the tests were conducted for purposes other than that of this litigation, they are admissible as business records.

The Irondequoit Justice Court in *Orpin*, however, came to a different conclusion. In refusing to admit the documents, the court in *Orpin*, in quoting *Crawford*, noted the US Supreme Court's concern that the "involvement of government offices in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." As a result, *Crawford* indicated that business records are subject to the same confrontation demands as other out-of-court statements.

The court went on to note that the breath test documents specifically refer to breath testing devices on their face and that individuals who prepared the reports "must have known that these reports would be used in criminal

prosecutions. It is difficult to conceive of any purpose in preparing these documents other than for use in DWI cases” and because the documents “are testimonial in nature, they cannot be admitted under the *Confrontation Clause*.”

While the court in *Orpin* did not directly address the decision in *Kanhai*, it did examine a similar decision by the New Mexico Supreme Court regarding the admissibility of a blood alcohol report in a DWI case. As in *Kanhai*, the court in *State v. Dedman*, 2004 NMSC 37 (NM 2004), rationalized that a report prepared by the Scientific Laboratory Division of the New Mexico Department of Health was admissible because:

the report was prepared by the an employee of the Department of Health, not law enforcement personnel, and though it was prepared for trial, “the process is routine, non-adversarial, and made to ensure an accurate measurement,” *Dedman*, 102 P.3d at 636. “While a government officer prepared the report,” the court stated, “she is not producing testimony for trial.” *Id.*

In rejecting this analysis, the court in *Orpin* noted that “*Dedman*’s emphasis on the routine and nonadversarial nature of the test are the very type of substantive reliability concerns rejected by *Crawford* in overturning *Ohio v. Roberts*. Again, *Crawford* held that the *Confrontation Clause*’s guarantee is procedural – entitling the defendant to cross examination – rather than substantive in nature. *Crawford*, 124 S.Ct. at 1370.”

In summary, the main differences between these cases are:

1. *Kanhai*, without any analysis of this point, found that the information on the breath test

documents was not testimonial.¹ *Orpin*, also without any analysis, found that the information on the documents was testimonial. For example, the calibration results performed by the lab technician are testimonial and require that the technician be subject to cross-examination to be admitted. *Crawford* itself explicitly declined to define what constitutes testimonial statements, and these cases are of little help with this issue.²

2. *Kanhai*, relying on pre-*Crawford* New York State cases, found that the documents were admissible because they were not prepared for a specific case, were prepared by a police department,³ and were merely records of tests

¹It should be noted, however, that *Kanhai* indicates the documents are non-testimonial in that they do not “contain opinions or “testimony”; they are simply memorializations of tests conducted.” Although *Kanhai* implies it, the fact that they are test records does not necessarily make them “non-testimonial.” In *People v. Rogers*, 2004 NY App. Div. LEXIS 8851 (3d Dept. 2004) – a post-*Crawford* decision – the Appellate Division Court explicitly noted that the defendant “had a right, pursuant to the *Confrontation Clause*, to cross-examine regarding the testing methodology.”

²While not explicitly defining testimonial statements, *Crawford* does provide a list of “various formulations of this core class of ‘testimonial’ statements.” One of the definitions included in *Crawford* is “statements that were made under circumstances which would lead an objective witness reasonably to believe the statement would be available to use at a later trial.” This definition would appear to be at odds with the conclusion in *Kanhai* that such statements are admissible if use in litigation was foreseeable, but not their only purpose.

³Although this is a direct quote from *Kanhai*, it should be noted that these documents are not actually prepared by a police department, but instead by the New

York State Division of Criminal Justice Services. *Orpin*, while noting that from a practical point of view these documents have no use besides litigation, rejected the type of analysis proposed by *Kanhai* and the prior New York State cases based on *Crawford*’s “substantive reliability concerns” regarding such analyses.

Conclusion

We have reviewed both of these cases and found them to be well-written and thought out. As defense attorneys, perhaps we tend to see the flaws in *Kanhai* moreso than in *Orpin*, but arguments could be made for both positions. To us, the *Kanhai* analysis bears a strong resemblance to the type of analysis made under *Roberts v. Ohio* that has been recently rejected by the US Supreme Court in *Crawford*. On the other hand, *Orpin* could be more explicit in its analysis of prior New York State law regarding the use of breath test documents in litigation in light of *Crawford*. We have been practicing criminal law for over twenty-five years combined, and, as with the judge in *Orpin*, have never come across anyone who has actually seen the breath test documents used for any other purpose except in DWI trials.

York State Division of Criminal Justice Services.