

NEW JERSEY LAWYER

Crawford and New Jersey: Perfect together?

In *Crawford v. Washington*, 541 U.S. 36, Justice Antonin Scalia revolutionized the confrontation clause by continuing his emphasis on the process of a criminal trial, a revolution begun by *Apprendi v. N.J.* and *Blakely v. Washington*.

In overruling *Ohio v. Roberts*, Scalia stated, "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation ... [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 evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

To emphasize his point, Scalia wrote, "The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial finding of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one."

The principle evil the confrontation clause targeted was the use of *ex parte* examinations as evidence against the accused; that is, statements made out of court for the purpose of proving a fact in court where the maker of the statement is not subject to

cross-examination by the accused. Scalia defines "witnesses against the accused" in the confrontation clause as someone who bears testimony. Testimony in *Crawford* is defined as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."

The definition of testimony subject to the confrontation clause's guarantee of an opportunity to cross-examine is the crucial part of *Crawford*. It is a solemn declaration for establishing a fact in court. It does not include mere offhand remarks or excited utterances. It does include affidavits, custodial examinations, prior testimony that could not be cross-examined, depositions and confessions. Note that it

is not to whom the statement is made that makes it testimonial, but the purpose of the statement's maker. If the statement is made to prove a fact in court, it is testimonial. In other words, if the document (statement) was prepared in anticipation of

criminal litigation, it is testimonial. The state must produce the statement's maker to be cross-examined at trial.

So what documents does *Crawford* prevent from being introduced into evidence? Lab reports are statements by a technician that a substance tested is a controlled dangerous substance (CDS) or alcohol. To get this into evidence, the state must produce the technician for cross-examination.

What about the 1,000-foot map in drug or alcohol cases? Such a map is a statement about the location of streets and roads and is prepared solely for criminal litigation. The state must produce the map maker to be cross-examined to get the map into evidence.

What about the Alcotest or Breathalyzer? The certification of analysis of the breath-alcohol simulator solution is clearly an affidavit, prepared in anticipation of criminal litigation and is used as a substitute for the testimony of the laboratory technician who selected the representative samples from the manufacturer's lot and tested them on a gas chromatograph. It also is a substitute for the technician's testimony that the machines and tests used were accurate and properly calibrated, and the procedures followed in performing these tests were accurate and appropriate. This technician must be produced for cross-examination if the state wants to admit Breathalyzer or Alcotest readings into evidence.

The state can make the argument that the simulator-solution affidavit was not prepared in anticipation of criminal litigation. However, the sole purpose of the Alcotest or Breathalyzer is to test the blood of the accused; these machines exist solely for criminal litigation.

In reality, a machine is a series of statements by persons with knowledge of the device. In the case of the Breathalyzer or Alcotest, these statements were made in anticipation of litigation. *Crawford* requires that for the state to get this machine's result into evidence, a witness must testify what it is, what it does and how it operates. The witness also must be subject to cross-examination, and it doesn't matter who employs the statement-maker or to whom the statement is made. Therefore, employees of Draeger Safety, the Pittsburgh-based manufacturer of Alcotest, who certify parts of the device must be brought into court for cross-examination.

In *State v. Berezansky*, 386 N.J. Super. 84, the court held the laboratory certificate of the state lab could not be admitted into evidence under the business-record or official-record exception to the hearsay rule; the state must call the technician as a witness to get the certificate into evidence. The simulator-solution certification for the Alcotest is just a lab certificate. For the state to prove the Alcotest was in proper working order when a defendant was given the test, it must call the technician who tested the ampoules.

Produce witnesses

Since Draeger certifies parts of the Alcotest, it must produce witnesses to prove the machine was in proper working order. The same is true of the coordinator of the linearity tests. Since



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the Alcotest is a computer, the state must produce a witness to demonstrate the software is not biased. Thus, for every drunken driving prosecution, the state must produce four to eight witnesses to prove the machine was in proper working order and to permit the defendant to confront their accusers.

The state's argument is based on necessity: We spent all this money, we trained all these people, this is the only way to prosecute drunken drivers. This is nonsense. Blood tests work well. The state would have to pay hospitals a few more dollars for phlebotomists and buy a few more gas chromatographs to analyze all the blood samples. Blood tests require

only one to two witnesses to admit them into evidence: the person who drew the blood and the lab technician.

The state's other argument is that Alcotest is scientifically reliable. It may well be, but it is reliable only if it was in proper working order. The state must prove that at each trial.

What if the courts find Alcotest scientifically reliable? According to *Crawford*, such a finding cannot substitute for the process of confrontation. A judicial finding of reliability does not satisfy the confrontation clause. Being subject to cross-examination goes a long way toward ensuring accuracy. No one wants to look like a fool in court.