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Commentary

N.J. Due for Overhaul of DWI Prosecutions

By Mitchell Ignatoff

Two cases before the New Jersey Supreme Court have the potential to change the way drunken-driving cases are handled.

In *State v. Dorman*, the Court agreed to consider whether the breath-testing inspection certificate prepared by a state police coordinator is a testimonial statement under the U.S. Supreme Court landmark ruling in *Crawford v. Washington*. There, the justices held that written statements made to prove a fact in court are not admissible in criminal prosecutions. The witness who made the statement must testify.

The second case before the New Jersey justices, *State v. Sweet*, raises the issue of whether the Guth Laboratories Inc. certificate also used in DWI cases is testimonial under *Crawford*.

But the real issue is not whether these documents are testimonial under *Crawford*, but whether ruling that they are would frustrate enforcement of the DWI laws. It would not, but it would point up the need to replace the Breathalyzer and the Alcotest with blood testing.

In *Dorman*, the Appellate Division said the Confrontation Clause only applies when the witness statement is prepared for the purpose of proving an element of the offense. Since a state police coordinator's statement — verifying the proper operation of the Breathalyzer or Alcotest — is not prepared with a specific defendant in

mind, its use without cross-examination is not barred by the Confrontation Clause, the appeals court said.

It is true that a coordinator's statement — and the Guth Labs employee's statement — is not made with a specific case in mind. But what *Dorman* is really saying is that a witness statement must be accusatory to violate the clause. However, the clause says "the accused shall enjoy the right to ... be confronted with the witnesses against him." The constitution's framers could have said the accused shall have the right to be confronted with his accusers, but they used the broader term witnesses instead.

The Guth Labs certificate at the heart of *Sweet* is a statement signed by a lab employee verifying that a glass ampule used in the Breathalyzer contains the proper composition and amount of a potassium dichromate solution. The solution darkens when alcohol in a defendant's breath is blown through it. As with the state police coordinator's statement, DWI defendants are not permitted to cross-examine the lab employee who signed the statement.

The logistics for the state are burdensome. For each Breathalyzer prosecution, the state has to present three witnesses: the Guth employee, a state police coordinator and a state lab employee who analyzed the control sample.

Getting the Guth employee into court for each DWI prosecution is difficult. Guth is a private company in Harrisburg, Pa. But it is not equipped to send an employee to testify in the more than 110,000 DWI prosecutions since *Crawford* was decided in 2004.

The logistics of getting witnesses into court are even more burdensome in Alcotest prosecutions. To show that the device is working properly, the manufacturer, Draeger Safety Diagnostics Inc. of Durango, Colo., has eight employees sign certificates to that effect. And that means those eight would have to testify in court.

Blood testing, on the other hand, involves only two people, both of whom who are relatively local — the person who drew the blood and the state lab person who analyzed it. In *State v. Berezansky*, also before the Court, the attorney general is seeking procedural rules to prevent the state's witness from having to testify in municipal court, which often holds sessions at night. The Appellate Division found in *Berezansky* that witnesses must go to court in DWI cases that rely on blood tests. The state is seeking mandatory depositions of those witnesses in lieu of live testimony in court.

The state's complaints about having its witnesses go all over the state, often at night, are valid. This can be solved by hearing all DWI prosecutions in the 21 county trial courts, rather than in the 567 municipal courts. And Superior Court operates only during the day. The Court clearly has the power to make such a change.

Our Supreme Court is faced with an historic moment. Many appeals courts across the country have said that the witness statement must be accusatory to be barred by the Confrontation Clause. New Jersey's Supreme Court should decide that witnesses include everyone, not just accusers. ■

Ignatoff, a certified criminal trial attorney, is a solo in Middlesex.