IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CT-00783-SCT

ANDREW MATTHIES a/k/a ANDREW K. MATTHIES

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	01/19/2010
TRIAL JUDGE:	HON. WILLIAM E. CHAPMAN, III
COURT FROM WHICH APPEALED:	MADISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	KEVIN DALE CAMP JOHN MICHAEL DUNCAN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	MICHAEL GUEST
NATURE OF THE CASE:	CRIMINAL - MISDEMEANOR
DISPOSITION:	AFFIRMED - 04/12/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

CARLSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. We granted certiorari in this case to address the issue of whether, in a driving-under-the-influence trial, the admission of intoxilyzer calibration records, in lieu of the live testimony of the person who calibrated the intoxilyzer, is a violation of the Confrontation Clause contained in the Sixth Amendment to the United States Constitution. Finding no constitutional violation, we affirm the judgments of the Court of Appeals and the Madison County Circuit Court.

FACTS AND PROCEEDINGS IN THE TRIAL COURT

¶2. Dr. Andrew K. Matthies lived in Ocean Springs and was stationed at Keesler Air Force Base in Biloxi; however, during the period of time relevant to today's discussion, Matthies was working a rotation as a resident surgeon at the University of Mississippi Medical Center (UMMC) in Jackson, fulfilling a six-week assignment. His temporary residence was at the Marriott Residence Inn on Centre Street in Ridgeland.

¶3. Matthies had met Jennifer Gedemer at work. Gedemer invited Matthies to a party hosted by her and her husband in their Madison County home. The party was to take place on Saturday evening, September 13, 2008. Around noon on September 13, 2008, Matthies had completed a thirty-hour shift at UMMC in the kidney transplant service, and he went to his hotel room, where he slept for approximately four hours. Upon awakening from his nap, Matthies prepared for the party and used MapQuest to locate the Gedemers' home, since he was unfamiliar with the Madison area. Matthies left his hotel room around 6:00 p.m. and traveled to the Gedemers' home for the party, arriving at approximately 6:30 p.m. By his own admission, Matthies consumed approximately four beers, along with some food. Approximately fifteen guests were in the Gedemers' home that evening.

¶4. Upon leaving the Gedemers' home alone, en route back to his hotel room in Ridgeland, Matthies traveled south on Old Canton Road in Madison. At the time, James Craft, a police officer for the City of Madison, was patrolling northbound on Old Canton Road, approaching Madison Avenue in the City of Madison. Craft observed a Toyota Camry traveling southbound on Old Canton Road, immediately south of the Old Canton

Road/Madison Avenue intersection. In this area of Old Canton Road, the posted speed limit was thirty miles per hour. According to Craft, the vehicle appeared to be traveling at an excessive rate of speed, and upon passing the vehicle, Craft activated the rear radar of his patrol car. The radar clocked the speed of the Toyota Camry at fifty-two miles per hour. Craft turned around and pursued the southbound Toyota Camry, eventually initiating a traffic stop on Old Canton Road near Calumet Drive at 11:43 p.m.

¶5. Upon request, the driver of the Toyota Camry produced a driver's license and proof of insurance, revealing the identity of the driver to be Matthies. Craft observed that Matthies's eyes were red, and Craft smelled an odor of alcohol coming from the interior of the vehicle. Upon interrogation, Matthies admitted to Craft that he had consumed "three or four beers" that evening, with the last beer being consumed about thirty minutes before the traffic stop. Matthies consented to a field sobriety test, including horizontal gaze nystagmus. (*See* ***Stodghill v. State***, 892 So. 2d 236, 238 n.3 (Miss. 2005)). After conducting this test, Craft suspected that Matthies was impaired due to alcohol and thus, administered the preliminary breath test, in which Matthies tested positive for the presence of alcohol in his system. Craft handcuffed Matthies and transported him to the City of Madison Police Department to conduct an intoxilyzer test.

¶6. Officer Craft is authorized to conduct tests on the equipment known as the Intoxilyzer-Alcohol Analyzer Model 8000. Craft followed the normal procedures in administering the intoxilyzer test on Matthies. These tests determined that Matthies had a blood alcohol content (BAC) of 0.11%, that being above the legal limit of 0.08% in the State of Mississippi.

¶7. Matthies was charged with driving under the influence (DUI) (first offense) and entered a plea of nolo contendere to that charge in the City of Madison Municipal Court, Judge Cynthia Speetjens presiding. Judge Speetjens adjudicated Matthies guilty of the crime of DUI (first offense), and sentenced Matthies to suspended jail time, a fine, and court costs. Matthies also was required to satisfactorily complete the Mississippi Alcohol Safety Education Program (MASEP). Matthies then appealed to the County Court of Madison County and received a trial de novo conducted by Judge William S. Agin without a jury. During the bench trial, Officer Craft testified concerning the intoxilyzer test and Matthies's BAC. Intoxilyzer calibration certificates were admitted over Matthies's Confrontation-Clause objection. These certificates, each entitled "Intoxilyzer 8000 Calibration Certificate," and completed on September 1, 2008, and October 2, 2008, respectively, indicated, *inter alia*, that:

> The above instrument, used for breath analysis to determine alcohol content, was tested on below date and found to be in working condition. Calibration of instrument certified to meet acceptable standards of accuracy. This certificate approved by the Mississippi State Crime Laboratory pursuant to Implied Consent Act, Sec. 63-11-19, Mississippi Code of 1972, Annotated.

Both certificates were signed by Robert Bickley, who did not testify at the trial before Judge Agin.

¶8. At the county-court trial, Matthies also contested the prosecutor's allegation that his alcohol consumption that evening had caused him to be legally impaired to operate a motor vehicle. Without objection, Matthies testified at length, based on his medical expertise, on such matters as the effect of alcohol consumption on different people based on body mass

index, gender, food intake, and the amount of alcohol consumed over a certain period of time. Matthies also enumerated the medical reasons or conditions, other than alcohol consumption, that could cause a person to have red eyes. He explained the reasons why he had performed poorly during the horizontal-gaze nystagmus test (walk and turn, and one leg stand). Matthies explained that he had sports-related injuries, and his footwear caused an occasional loss of balance.

¶9. At the conclusion of the bench trial, Judge Agin found Matthies guilty of DUI (first offense) and sentenced Matthies, *inter alia*, to a forty-eight-hour jail sentence, suspended; completion of the MASEP program; unsupervised probation for a two-year period; and payment of certain costs, fees, and assessments, which were due within sixty days of the date of the judgment. Judge Agin's final judgment was dated July 14, 2009, and entered on July 15, 2009. Thereafter, Matthies timely filed an appeal to the Circuit Court of Madison County. In due course, under the provisions of Mississippi Code Section 11-51-81 (Rev. 2002), the Circuit Court of Madison County, sitting as an appellate court, Judge William E. Chapman, III, presiding, entered an Order and Opinion affirming the county-court conviction and remanding the case to the County Court of Madison County for execution of the county court's final judgment. Under the provisions of Section 11-51-81, Matthies filed a motion for allowance asking the circuit court to permit him to appeal the circuit court's judgment to this Court. On April 12, 2010, Judge Chapman entered an order allowing an appeal to this Court, and Matthies timely appealed to us. We assigned this case to the Court of Appeals.

¶10. Before proceeding further, we pause to note that, although Matthies's counsel and Judge Chapman correctly proceeded under Section 11-51-81 concerning permission to proceed to this Court on appeal after Judge Chapman, sitting as an appellate judge under the statute, had affirmed the county-court judgment, such permission is no longer required under the "three-court rule" based on our decision handed down more than seven months after Judge Chapman's entry of the order allowing an appeal to this Court. *See* ***Jones v. City of Ridgeland***, 48 So. 3d 530, 538-39 (Miss. 2010).

PROCEEDINGS IN THE COURT OF APPEALS

¶11. The Court of Appeals reviewed the recent caselaw of the United States Supreme Court in ***Crawford v. Washington***, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 129 S. Ct. 2527, 2531, 174 L. Ed. 2d 314 (2009), concerning testimonial statements. The Court of Appeals found the certificates in the instant case to be distinguishable from the records in those cases. *See* ***Matthies v. State***, 2010-KM-00783-COA, 2011 WL 2120060, *3 (¶13) (Miss. Ct. App. May 31, 2011).

¶12. Furthermore, since ***Melendez-Diaz*** did not expressly address the instant question, the Court of Appeals examined the persuasive opinions of other jurisdictions. The Court of Appeals determined that most courts which had examined the question of intoxilyzer calibration records had found them to be nontestimonial in nature. ***Matthies***, 2011 WL 2120060, *3 (¶11). The Court of Appeals found that the certificates at issue were nontestimonial, and therefore Matthies's Confrontation-Clause rights had not been violated. ***Matthies***, 2011 WL 2120060, *3 (¶14).

DISCUSSION

¶13. In his petition for writ of certiorari, Matthies argues that the intoxilyzer certificates presented at his trial were testimonial in nature and thus subject to the protections of the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and Article 3, Section 26 of the Mississippi Constitution. The Attorney General did not oppose granting certiorari and invited this Court "to uphold the integrity of the decision of the Court of Appeals," since the case requires the resolution of a substantial question of law of general significance. *See* M.R.A.P. 17(a). We granted the petition so this Court could address the question in the light of recent United States Supreme Court decisions.

¶14. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. It is applicable to the states through the Fourteenth Amendment. ***Pointer v. Texas***, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d. 923 (1965). Matthies admits that this Court has rejected his argument in the past. ***Harkins v. State***, 735 So. 2d 317, 319 (Miss. 1999). In ***Harkins***, this Court determined that admitting the "calibration certificates [for the intoxilyzer] without testimony from the calibration officer does not, in general, violate . . . the confrontation clauses in the Mississippi or United States constitutions. . . ." ***Harkins***, 735 So. 2d at 321. However, Matthies urges this Court to consider more recent precedent from the United States Supreme Court post-***Harkins***.

¶15. In ***Crawford v. Washington***, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court introduced the rule that, when an out-of-court statement is

testimonial, it is inadmissible unless (1) the declarant is unable to testify, and (2) the defendant had a prior opportunity to examine the defendant. The Supreme Court has not provided a comprehensive definition of "testimonial" statements, complicating Confrontation-Clause analysis. However, the Supreme Court did note that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." ***Crawford***, 541 U.S. at 68.

¶16. In ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 129 S. Ct. 2527, 2531, 174 L. Ed. 2d 314 (2009), a Supreme Court plurality held that a Confrontation-Clause violation occurred when "certificates of analysis" of the chemical content of a drug were admitted without the testimony of the lab analyst who prepared them. ***Melendez-Diaz*** involved certificates of analysis finding that a suspicious substance was cocaine, with these certificates being sworn to by analysts at a state laboratory. ***Id.*** at 2531. The analysts who examined the substance did not appear in person at trial. ***Id.*** The Supreme Court found that these certificates were testimonial, and that the defendant's Confrontation-Clause rights were violated, since these analysts did not testify. ***Id.*** at 2542. But the Supreme Court also stated that it does "not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." ***Id.*** at 2532, n.1.

¶17. The Court of Appeals did not address the United States Supreme Court's decision in ***Bullcoming v. New Mexico***, __U.S.__, 131 S. Ct. 2705, 2706, 180 L. Ed. 2d 610 (2011). However, there is good reason for this. The Court of Appeals' decision in today's case was handed down on May 31, 2011, and ***Bullcoming*** was not decided until June 23, 2011. Matthies's counsel filed a motion for rehearing with the Court of Appeals on June 13, 2011, ten days before ***Bullcoming*** was decided. Although the Court of Appeals did not enter an order denying Matthies's motion for rehearing until September 27, 2011, which was more than three months after ***Bullcoming*** was decided, Matthies made no effort between June 23, 2011, and September 27, 2011, to inform the Court of Appeals of the United States Supreme Court's decision in ***Bullcoming***. No supplemental brief nor any supplemental pleading was filed by Matthies to call to the Court of Appeals' attention this intervening decision by the Supreme Court. It is incumbent upon a party on appeal to provide to the appellate court citation to authority in support of the party's argument. *See, e.g.*, ***Knight v. Terrell***, 961 So. 2d 30, 32 (Miss. 2007); ***Rigby v. State***, 826 So. 2d 694, 707-08 (Miss. 2002).

¶18. For the first time, in his petition for writ of certiorari, Matthies cites ***Bullcoming*** as authority for his Confrontation-Clause argument. ***Bullcoming*** affirmed that certificates relating to the analysis of the BAC level in a defendant's blood may be testimonial in nature. ***Id.*** at 2711. Unlike the instant case, however, the test in ***Bullcoming*** involved a forensic laboratory report of the defendant's blood. ***Id***. Where the analyst who had administered that test was not called at trial, but instead replaced by a different scientist who had neither observed nor reviewed the test, the defendant's Confrontation-Clause rights were violated.

Id. at 2718. The instant case is distinguished from ***Bullcoming*** in that it relates to the analyst who prepared certificates of the calibration for the intoxilyzer device, not the analyst who conducted the intoxilyzer test itself. Neither ***Melendez-Diaz***, nor ***Bullcoming***, nor any other United States Supreme Court case expressly addresses the issue of whether intoxilyzer calibration records are testimonial in nature.

¶19. However, the Court of Appeals examined the application to this question in a number of other jurisdictions in the wake of ***Melendez-Diaz***. The Court of Appeals found that the wide majority of appellate courts examining this question found such records to be nontestimonial. ***Matthies,*** 2011 WL 2120060, *3 (¶11) (citing ***United States v. Forstell,*** 656 F. Supp. 2d 578, 580-82 (E.D.Va. 2009); ***State v. Linder***, 227 Ariz. 69, 252 P.3d 1033, 1035-1036 (Ariz. App. Div. 1, 2010); ***Jacobson v. State***, 306 Ga. App. 815, 703 S.E.2d 376, 379 (Ga. App. 2010); ***People v. Jacobs***, 405 Ill. App. 3d 210, 345 Ill. Dec. 335, 939 N.E.2d 64, 71-72 (Ill. App. 4 Dist., 2010); ***Ramirez v. State***, 928 N.E.2d 214, 219-20 (Ind. App. 2010); ***State v. Johnson,*** 43 Kan. App. 2d 815, 233 P.3d 290, 299 (Kan. App. 2010); ***Settlemire v. State,*** 323 S.W.3d 520, 521-22 (Tex. App. 2010); ***State v. Bergin,*** 231 Or. App. 36, 217 P.3d 1087, 1089 (Or. App. 2009); and ***Hamilton v. State,*** __ P. 3d __ (2010), 2010 WL 4260608, *3 (Alaska Ct. App. Oct. 27, 2010) (unreported decision)). *But see* ***United States v. Gorder***, 726 F. Supp. 2d 1307, 1314 (D. Utah 2010) (finding "Intoxilyzer 8000 Operational Checklist" testimonial). In particular, the Court of Appeals cited the persuasive authority of ***Ramirez***, 928 N.E.2d at 219, for the proposition that, as calibration records are completed in advance of specific drunk-driving incidents, they are not testimonial in nature. ***Matthies***,

2011 WL 2120060, *3 (¶12). The Court of Appeals determined that "[c]ourts having occasion to consider intoxilyzer inspection, maintenance, or calibration records post-***Melendez-Diaz*** have almost uniformly agreed that such records are nontestimonial in nature." ***Matthies***, 2011 WL 2120060, *3 (¶11). We agree with the Court of Appeals. Accordingly, today, we specifically state that records pertaining to intoxilyzer inspection, maintenance, or calibration are indeed nontestimonial in nature, and thus, their admission into evidence is not violative of the Confrontation Clause of the Sixth Amendment. We are firmly convinced that our decision today is not in conflict with ***Crawford***, ***Melendez-Diaz***, or ***Bullcoming***.

¶20. Officer Craft, who administered all relevant tests on Matthies, testified at trial. Robert Bickley, the individual not testifying at trial, only calibrated the intoxilyzer. ***Melendez-Diaz*** explicitly held that "it is not the case, that anyone whose testimony may be relevant in establishing the . . . accuracy of the testing device, must appear in person as part of the prosecution's case." ***Melendez-Diaz***, 129 S. Ct. at 2532, n.1.

¶21. The opposite holding – that the testimony of an individual as far removed from the prosecution as the calibrator of the intoxilyzer, is required at trial – would dramatically expand the holdings of ***Crawford, Melendez-Diaz***, and ***Bullcoming***. This interpretation of these cases has been rejected by almost every appellate court that has examined this question.

CONCLUSION

¶22. While we agree with the discussion and disposition of the Court of Appeals in today's case, we chose to take this opportunity to address this particular issue in the wake of the

United States Supreme Court's decisions, not only in the recently-decided ***Bullcoming***, but also in ***Crawford*** and ***Melendez-Diaz***. We have found that intoxilyzer calibration certificates are nontestimonial in nature. Therefore, Matthies's Confrontation-Clause rights were not violated. The judgments of the Court of Appeals and the Madison County Circuit Court are affirmed.

¶23. **CONVICTION OF DRIVING UNDER THE INFLUENCE, FIRST OFFENSE, AND SENTENCE OF FORTY-EIGHT (48) HOURS IN THE MADISON COUNTY JAIL, SUSPENDED, TWO (2) YEARS UNSUPERVISED PROBATION UNLESS SOONER INVOKED WITH SPECIFIC CONDITIONS, PAY COURT COSTS, FEES, AND ASSESSMENTS, AND PAY A FINE OF $700, AFFIRMED.**

WALLER, C.J., RANDOLPH, LAMAR AND PIERCE, JJ., CONCUR. CHANDLER, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, P.J., KITCHENS AND KING, JJ.

CHANDLER, JUSTICE, DISSENTING:

¶24. Because I would find that intoxilyzer calibration records are the functional equivalent of live, in-court testimony, I would hold that they are testimonial in nature, and that their admission at Matthies's trial violated the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution. I would reverse and remand for a new trial.

¶25. In ***Crawford v. Washington***, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that the Confrontation Clause bars admission of out-of-court, "testimonial" hearsay statements against a criminal defendant, unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. ***Id.*** at 68, 124 S. Ct. at 1374. The "core class of 'testimonial' statements"

under the Confrontation Clause includes "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." ***Id.*** at 52, 124 S. Ct. at 1364. In ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the Court found that three sworn "certificates of analysis" reporting that a seized substance was found to be cocaine were within the "core class of 'testimonial' statements" covered by the Confrontation Clause. ***Id.*** at 2532. The Court found that the affidavits provided testimony against the defendant, that the affidavits did not qualify as business records because the primary reason for their creation was for use in court, and that confrontation is a means of assuring accuracy in forensic analysis. ***Id.*** at 2533, 2538, 2536. The Court held that "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." ***Id.*** at 2542.

¶26. Applying ***Melendez-Diaz***, I would find that the calibration records of the intoxilyzer machine were testimonial in nature. As in ***Melendez-Diaz***, the calibration records provided testimony against Matthies. Mississippi Code Section 63-11-19 provides that "[t]he State Crime Laboratory shall make periodic, but not less frequently then quarterly, tests of the . . . machines . . . used in making chemical analysis of a person's breath as shall be necessary to ensure the accuracy thereof, and shall issue its certificate to verify the accuracy of the same." Miss. Code Ann. § 63-11-19 (Supp. 2011). The calibration records for the machine used in testing the defendant's blood-alcohol level are of central importance to the prosecution of every DUI case involving such a test. This Court has held that intoxilyzer

results are inadmissible without evidence establishing proper calibration because "there is no support for the accuracy of [intoxilyzer] results absent evidence of proper certification." ***Johnston v. State***, 567 So. 2d 237, 239 (Miss. 1990). In numerous cases, the question of whether a testing device was properly calibrated has been a hotly litigated, outcome-determinative issue. *See* ***Johnston***, 567 So. 2d at 239; ***McIlwain v. State***, 700 So. 2d 586, 591 (Miss. 1997); ***Young v. City of Brookhaven***, 693 So. 2d 1355, 1361-62 (Miss. 1997); ***Dobbins v. City of Starkville***, 938 So. 2d 296, 297 (Miss. Ct. App. 2006).

¶27. Moreover, the certificates of calibration were created under circumstances that would "lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ***Crawford***, 541 U.S. at 52, 124 S. Ct. at 1354. Section 63-11-19 requires the calibration of an intoxilyzer machine to occur at least quarterly, with a certificate to issue "to verify the accuracy of the same." Miss. Code Ann. § 63-11-19 (Rev. 2004). Proof that an intoxilyzer was properly calibrated is a foundation for the admission of intoxilyzer test results. ***Johnston***, 567 So. 2d at 239. Thus, calibration records are prepared and kept in anticipation of litigation, under circumstances that would lead an objective witness to believe they would be used at a later trial. ***Crawford***, 541 U.S. at 52, 124 S. Ct. at 1354.

¶28. Another factor supporting the conclusion that calibration records are testimonial is that, as ***Melendez-Diaz*** recognizes, forensic analysis is subject to error that may be revealed in cross-examination. ***Melendez-Diaz***, 129 S. Ct. at 2536. "Forensic evidence is not uniquely immune from the risk of manipulation." ***Id.*** "Serious deficiencies have been found in the forensic evidence used in criminal trials." ***Id.*** at 2537. The Court recognized that

these deficiencies can be caused by fraudulent or incompetent analysts, or those under pressure from law enforcement. ***Id.*** The solution to these intrinsic problems is testing the evidence "in the crucible of confrontation," because "confrontation is one means of assuring accurate forensic analysis." ***Id.*** at 1236, 1237. I find that this analysis aptly applies to those who calibrate intoxilyzer machines, in addition to those who perform the actual testing. Cross-examination may reveal the lack of proper training or a deficiency in judgment of the individual who calibrated the machine. *See* ***Melendez-Diaz***, 129 S. Ct. at 2537.

¶29. The Court in ***Melendez-Diaz*** further found that the affidavits in question were not business records that are exempt from Confrontation Clause scrutiny. ***Id.*** at 2538. Even if a document is kept in the regular course of business, "if the regularly conducted business activity is the production of evidence for use at trial," they are subject to the Confrontation Clause. ***Id.*** By statute, intoxilyzer calibration records are prepared by personnel at the State Crime Laboratory. Miss. Code Ann. § 63-11-19 (Rev. 2004). These records are prepared and kept in anticipation of litigation. *See* ***Johnston***, 567 So. 2d at 239 (proof of calibration of an intoxilyzer machine is foundational to the admission of test results). As another court that reached the same conclusion has recognized, "[calibration] records lack the presumption of neutrality typical business records enjoy because they are created by law enforcement personnel for law enforcement personnel and therefore may not be prepared with the same objectivity as records created by a third party truly indifferent to the outcomes of criminal prosecutions." ***People v. Carreira***, 893 N.Y.S. 2d 844 (N.Y. City Ct. 2010). Therefore,

calibration records are not "business records" that are exempt from Confrontation Clause scrutiny.

¶30. I address the majority's reliance on a footnote in the ***Melendez-Diaz*** opinion. This footnote rejected the notion that "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or *accuracy of the testing device*, must appear in person as part of the prosecution's case." ***Melendez-Diaz***, 129 S. Ct. at 2532 n.1 (emphasis added). The footnote goes on to state that "[a]dditionally, documents prepared in the regular course of equipment maintenance *may* well qualify as nontestimonial records." ***Id.*** (emphasis added). I note that the Court added this footnote in response to the dissenting opinion's accusation that the majority's analysis would require live testimony from the person who had calibrated the machine, as well as all other persons involved in the test.[1] Contrary to the majority's reasoning, the footnote did not create a blanket rule of

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[1] The dissent specifically found that a certificate of calibration would be testimonial under ***Crawford v. Washington***, stating:

> Consider the independent contractor who has calibrated the testing machine. At least in a routine case, where the machine's result appears unmistakable, that result's accuracy depends entirely on the machine's calibration. The calibration, in turn, can be proved only by the contractor's certification that he or she did the job properly. That certification appears to be a testimonial statement under the Court's definition: It is a formal, out-of-court statement, offered for the truth of the matter asserted, and made for the purpose of later prosecution. It is not clear, under the Court's ruling, why the independent contractor is not also an analyst.

Melendez-Diaz, 129 S. Ct. at 2545 (Kennedy, J., dissenting) (citation omitted).

admissibility for any hearsay evidence relevant to establishing the accuracy of a testing device. It merely stated that such evidence will not be deemed testimonial in every case. ***Id.***

¶31. Additionally, Article 3, Section 26 of the Mississippi Constitution secures a right of the accused "to be confronted by the witnesses against him." Miss. Const. art 3, § 26. The decisions of the United States Supreme Court do not restrict rights afforded by the Mississippi Constitution. "It is a basic principle of our Federal Republic that a sovereign state may place greater restrictions on the exercise of its own power than does the Federal Constitution." ***McCrory v. State***, 342 So. 2d 897, 900 (Miss. 1977). I would find that, because intoxilyzer calibration records are prepared and kept in anticipation of litigation, under circumstances that would lead an objective witness to believe they would be available for use at a later trial, they are testimonial in nature and their admission at Matthies's trial violated Article 3, Section 26.

¶32. It is a fact that intoxilyzer calibration records are central to most DUI prosecutions; without these records, the intoxylizer test results, which are often the most probative evidence against the defendant, are inadmissible. ***Johnston***, 567 So. 2d at 239. In my opinion, intoxilyzer calibration records are an obvious substitute for live testimony, and they are testimonial in nature. Because I would reverse and remand for a new trial, I respectfully dissent.

DICKINSON, P.J., KITCHENS AND KING, JJ., JOIN THIS OPINION.