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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 39

CID C. FRANKLIN,

Respondent.

20 Eagle Street
Albany, New York
March 14, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE SHARON A. M. AARONS
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
ASSOCIATE JUDGE TRACEY A. BANNISTER

Appearances:

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Official court Transcriber



1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is People v. Franklin. Counsel?

3 MR. CASTELLANO: May it please the court. John
4 Castellano for the Office of Melinda Katz. I'd like to
5 reserve three minutes for rebuttal, if I may, Your Honor?

6 CHIEF JUDGE WILSON: Yes, sir.

7 MR. CASTELLANO: Thank you.

8 Your Honors, the defendant's statements that - -
9 - about his own residence in the CJA report were properly
10 admitted under the confrontation clause because that CJA
11 report had the primary purpose, not of producing evidence
12 against the defendant at trial; not of aiding in a police
13 investigation; not of gathering evidence for the
14 prosecution, but instead simply of providing information to
15 the arraigning judge for the - - - about the defendant's
16 community ties.

17 JUDGE SINGAS: So is the standard that you're
18 asking us to look at the primary purpose one?

19 MR. CASTELLANO: Yes, Your Honor. We are asking
20 to do that. And the reason that I am relying on that test
21 is because, among other reasons, Ohio v. Clark. In Ohio v.
22 Clark, long after the forensic cases, three years after
23 Williams v. Illinois, six members of the court signed on to
24 a decision that says that the primary purpose test is not
25 just important or even essential to the analysis, they say

1 it is a necessary condition of finding that a statement is
2 testimonial. So what they say is that only if a statement
3 has the primary purpose of actually producing an out-of-
4 court substitute for trial testimony, will it be deemed to
5 be testimony.

6 CHIEF JUDGE WILSON: So I'm wondering why you're
7 going through this whole confrontation clause analysis to
8 begin with. Because the statement you're talking about is
9 a statement of the defendants.

10 MR. CASTELLANO: Yes, Your Honor. Absolutely.
11 It is a statement - - -

12 CHIEF JUDGE WILSON: So why? I mean, it - - - it
13 - - -

14 MR. CASTELLANO: - - - of the defendant.

15 CHIEF JUDGE WILSON: So can you point me to a - -
16 - a case holding that the confrontation clause applies to a
17 statement of the defendant?

18 MR. CASTELLANO: I'm not aware of that case, Your
19 Honor.

20 CHIEF JUDGE WILSON: But at least - - -

21 JUDGE HALLIGAN: Is it clear - - -

22 CHIEF JUDGE WILSON: Yes. I'm sorry.

23 JUDGE HALLIGAN: No. Go ahead. Is it clear from
24 the record whether the statement is entirely the
25 defendant's as opposed to his mother's?

1 MR. CASTELLANO: There are - - - there are
2 actually two statements. So there are the statements of
3 the defendant and - - -

4 JUDGE HALLIGAN: I mean - - - I mean with respect
5 to the word "basement", which I take it as the point that's
6 in contention. Yes? Or BSMT, whatever the abbreviation
7 was.

8 MR. CASTELLANO: Correct.

9 JUDGE HALLIGAN: Is it clear from the record
10 whether or not all of the contents of the form come from
11 the defendant, as opposed to any of the contents coming
12 from his mother? Where in the record would I find that?

13 MR. CASTELLANO: The - - - in the - - - in the
14 description of the process of the protocols - - -

15 JUDGE HALLIGAN: Yeah.

16 MR. CASTELLANO: - - - by Oscar Morales, who's
17 the CJA supervisor. It says - - - and it says on the
18 document itself - - -

19 JUDGE HALLIGAN: Right.

20 MR. CASTELLANO: - - - actually, that all of the
21 information in white - - -

22 JUDGE HALLIGAN: Right.

23 MR. CASTELLANO: - - - is coming from the
24 defendant. And he says specifically that information is
25 put into a tablet, and that information is then - - - you

1 know, part of a program. And - - - and then there is the
2 telephone call to the mother for verification purposes.

3 JUDGE AARONS: Does - - -

4 JUDGE HALLIGAN: And so I - - -

5 JUDGE AARONS: I'm sorry.

6 JUDGE HALLIGAN: Go ahead.

7 JUDGE AARONS: Go ahead.

8 JUDGE HALLIGAN: I take it that because there was
9 no cross-examination of the person who actually took the
10 information, who did the interview, those statements from
11 Morales about the process are all we have to be clear that
12 there was no substantive information taken from the mother;
13 is that - - - is that right?

14 MR. CASTELLANO: Yes, Your Honor.

15 JUDGE HALLIGAN: Okay.

16 MR. CASTELLANO: Yes.

17 JUDGE GARCIA: Counsel, to go to the Chief
18 Judge's question in this record, did you make that
19 argument? Did the People make that argument that these are
20 the statements of the defendant admissions, or - - - is
21 that anywhere in the record when they did - - - when the
22 parties discuss whether this can come in?

23 MR. CASTELLANO: We did not make the argument
24 that the declarant - - - the only declarant that matters is
25 the defendant. It was a - - - it was a kind of agreed by

1 all that the defendant's statement was an admission by a
2 party opponent and therefore admissible. Even the defense
3 attorney says, you know, my - - - my argument would be
4 hollow if you actually brought in the person who filled out
5 the form. But so his argument - - - so the argument is
6 directed. And just to be clear what we're arguing today is
7 that if you look - - - no matter which declarant you look
8 at, the statement did not have the primary purpose of
9 actually producing evidence against the defendant at trial,
10 which is the standard.

11 JUDGE AARONS: What - - - what the - - - whether
12 it's CJA or whether it's the probation department, because
13 depending on what region of the state you're in, different
14 people are used to gather the same information. This is
15 not just about where do you live, how long you live there.
16 It's about its community ties, his job, his drug use, the
17 extent of his - - - his residence, how long he's been
18 there. So it goes beyond. It's a conversation. The
19 interview is having a conversation, and it's gathering
20 information from it. Where in the record does it state
21 that the interviewer got basement from the defendant versus
22 the verification part where the mother says, yeah, he lives
23 with me, but he's in the basement. How do we know? How
24 does - - - how do we know that that wasn't coming from Ms.
25 - - - I think her name is Mapp.

1 MR. CASTELLANO: Yes.

2 JUDGE AARONS: Versus the defendant. He could
3 have - - - because in his pedigree information, I think to
4 the arresting officer, he just gives an address. He
5 doesn't qualify that by saying I'm in the basement. So
6 there's something between what he says to the interviewer
7 and what the interviewer gather from Ms. Mapp, that is not
8 clear in the record.

9 MR. CASTELLANO: I would disagree, Your Honor,
10 because there is testimony in the record that says that the
11 information that is on that part of the form, the white
12 part of the form, and it says it on the form itself is
13 directly from the defendant. And that information - - -

14 JUDGE AARONS: How does that Mr. Morales, who is
15 the person who is talking about the process, how does he
16 know what that interviewer meant when they put basement?
17 Was it an afterthought after they spoke with the Ms. Mapp,
18 or was that from the defendant directly?

19 MR. CASTELLANO: That was from the defendant
20 directly, because that is the protocol. Everything that
21 appears in the white part of this document, as the document
22 itself says, is directly from the defendant.

23 JUDGE AARONS: How does he know that the
24 interviewer followed the protocol?

25 MR. CASTELLANO: Well, that - - - and that is an

1 issue that is something that would apply to any business
2 record. We know the business records, because of Crawford
3 itself, are ordinarily nontestimonial, but for any business
4 record, you would always have that question. When you
5 introduce a business record, you talk about the protocols
6 of the business, how those entries are made into that
7 document. And then that is, I guess, you would call it
8 circumstantial evidence of - - - that the protocols were
9 followed. And that is what would have happened here.

10 JUDGE AARONS: Whether we accept it as a business
11 record or a public document, that's separate and apart in
12 whether or not the statement is there - - - in there is
13 testimonial. The two are separate.

14 MR. CASTELLANO: They - - - they are separate,
15 except that one of the indicators of whether a statement is
16 testimonial or not is whether it's a business record.
17 Crawford itself - - -

18 JUDGE CANNATARO: So based on what you just said,
19 Mr. Castellano, would be fair to say that even though the -
20 - - the information might be that this - - - the - - - the
21 information contained in the white section comes from the
22 defendant personally, that it's still subject to some sort
23 of credibility determination as to whether the proper
24 procedures were followed, and that's in fact where the
25 information is coming from?

1 MR. CASTELLANO: Well, and defense counsel argued
2 in summation, that we don't know where that information
3 came from. However, because we laid the foundation for it
4 as a business record, and because the purpose of the
5 document was simply to provide information to the court for
6 arraignment, it is not at - - -

7 JUDGE GARCIA: Go to that point and - - - and
8 your red light is on, but with the Chief Judge's
9 permission?

10 CHIEF JUDGE WILSON: Yes.

11 JUDGE GARCIA: Thank you. Let's talk for a
12 minute about the business record and the double hearsay
13 issue. So what is your response to the argument that - - -
14 okay, put aside the confrontation problem for a moment, but
15 that this is double hearsay?

16 MR. CASTELLANO: Both - - - from a - - - not from
17 a confrontation clause problem - - -

18 JUDGE GARCIA: Not from a - - -

19 MR. CASTELLANO: - - - from a business record
20 problem?

21 JUDGE GARCIA: Um-hum.

22 MR. CASTELLANO: The - - - the first level of
23 hearsay is the defendant's statement. That is - - - it is
24 admission by a party opponent. As long as you have the - -
25 - I think the objection is that defense counsel made in

1 their response - - -

2 JUDGE GARCIA: Again, I - - - the same response
3 then to that is where in the record do - - - does the - - -
4 do the People make that argument?

5 MR. CASTELLANO: Your Honor, I think that's from
6 the very beginning. From the very start of the - - -

7 JUDGE GARCIA: But I think they make it in terms
8 of a confrontation argument or - - - or something, but not
9 in terms of the business, right? That's how I read the
10 transcript and I may be wrong.

11 JUDGE HALLIGAN: The - - - the - - - if I may,
12 Chief, just briefly - - -

13 CHIEF JUDGE WILSON: Of course.

14 JUDGE HALLIGAN: - - - to follow up? The only
15 place I see in your briefs where it looked to me like you
16 were suggesting you preserved it, but I'm not sure if this
17 is what you're referring to, is in your reply at page 27,
18 note 5, where you say, "The prosecutor argued throughout
19 the colloquy that the purpose of introducing the report was
20 to admit defendant's self-reporting of the place."

21 MR. CASTELLANO: Exactly.

22 JUDGE HALLIGAN: Is that - - - is that intended
23 to - - - should we read that or can we read that as
24 preserving the argument in response to the - - - the
25 hearsay problem?

1 MR. CASTELLANO: Yes, Your Honor.

2 JUDGE HALLIGAN: That it is the defendant's own
3 statement?

4 MR. CASTELLANO: That was really throughout the
5 colloquy, from the very beginning. She says this is for
6 the purpose of self-report - - - of the defendant's self-
7 report. That's an admission by a party opponent, and that
8 would fall within - - - and - - - and in every other part
9 of the - - -

10 JUDGE HALLIGAN: And with respect to the mother.

11 MR. CASTELLANO: Yes.

12 JUDGE HALLIGAN: If we were to conclude that the
13 record - - - that Morales's testimony doesn't sufficiently
14 pin down whether basement came from the mother or the
15 father, do you concede that there is no ground on which the
16 mother's statement could have been admitted? What about
17 the hearsay objection vis-a-vis her testimony?

18 MR. CASTELLANO: The - - - the business records
19 hearsay exception? The - - - that statement was admissible
20 as part of the - - - as a public record. In other words,
21 as part of the public record. The only objection that was
22 made to the public record hearsay exception in the trial
23 court was that the CJA official was not a court official.
24 And that is conceded now by the defense in their brief. On
25 page 22, they specifically say that the CJA official was a

1 public official, and they cite the very case that we cited
2 in the trial court. So I from hearsay - - -

3 JUDGE HALLIGAN: I thought you were proceeding -
4 - -

5 MR. CASTELLANO: Yes, Your Honor.

6 JUDGE HALLIGAN: - - - just now on the view that
7 it was a business record, not a public record - - -

8 MR. CASTELLANO: It's both.

9 JUDGE HALLIGAN: - - - which I think is distinct.

10 MR. CASTELLANO: In - - - in fact, the trial
11 court found that it was both a business record and a public
12 record.

13 JUDGE HALLIGAN: But so nothing specific. You
14 were explaining to us, I think, that with respect to the
15 defendant's statements in the course of the interview, that
16 those are his own statements and whether that's preserved
17 or not, we would have to, I think, ascertain. But if we
18 were to conclude that the mother - - - or there's an open
19 question about whether the mother provided substantive
20 information on the form, not just verifying it, is that not
21 hearsay as well? And if so is there a response to that?

22 MR. CASTELLANO: That would - - - that could be
23 hearsay. Nevertheless, it is admissible on this record as
24 a public record, independent of the business records
25 exception.

1 JUDGE HALLIGAN: So your view is that a public
2 record has - - - you - - - there's no hearsay objection
3 that lies to a public record?

4 MR. CASTELLANO: I'm not saying that there's no
5 hearsay objection that lies. I'm saying that there wasn't
6 a hearsay objection made.

7 JUDGE CANNATARO: Was this an argument that was
8 developed on the record in the trial court? Whether it's a
9 public record? You said that the court made a finding that
10 it was both. So I assume it was argued - - -

11 MR. CASTELLANO: Yes.

12 JUDGE CANNATARO: - - - in the - - - in the
13 record?

14 MR. CASTELLANO: It was, Your Honor.

15 JUDGE CANNATARO: And your position here is that
16 the - - - all the requirements for admission of a public
17 record were met?

18 MR. CASTELLANO: My position here is that the
19 only objection that was raised by the defense counsel in
20 the trial court was that the CJA official was not a public
21 official - - - was not a court official, is specifically
22 what he said.

23 JUDGE CANNATARO: So we have some unpreserved - -
24 - we might have some unpreserved other aspects of what
25 constitutes a public record?

1 MR. CASTELLANO: Correct, Your Honor. And for
2 that, if you reverse the Appellate Division, we can
3 consider those unpreserved arguments. We're not contesting
4 that. But this court, of course, could not consider those
5 unpreserved arguments.

6 CHIEF JUDGE WILSON: Thank you, Counsel. Sorry.
7 You have a question?

8 JUDGE AARONS: Just one last thing. Didn't the
9 record - - - didn't counsel raise the objection that it's
10 not a business record, it's not a public record, it's
11 bolstering. And the last objection was it violated the
12 confrontation clause? There were four areas in which
13 counsel made an objection.

14 MR. CASTELLANO: Just as far - - - just to focus
15 on the hearsay exception of a public record. There was
16 only one thing that he argued with regard to that and that
17 - - - that - - - that was that the CJA official was not a
18 public - - - a public official within the meaning of the
19 public records clause, and that - - - and everything else
20 is unpreserved. And the court found it was a public record
21 and therefore the exception would apply. Thank you, Your
22 Honors.

23 MS. KON: Good afternoon. Hannah Kon for
24 respondent Cid Franklin.

25 Usually in constructive possession cases, an



1 officer gets up and testifies about all the things they
2 found near the gun, the defendant's license, and his ConEd
3 bill, and the mail with his name and address on it, and all
4 these things, none of which implicate the confrontation
5 clause. And the only reason we're here is because they
6 didn't find anything near the gun that tied Mr. Franklin -
7 - -

8 JUDGE AARONS: So what makes the CJA testimonial
9 - - - the CJA report?

10 MS. KON: I'm sorry?

11 JUDGE AARONS: What makes the CJA report
12 testimonial?

13 MS. KON: Right. So the CJA report is a document
14 that is made - - - you know, after the client has been
15 arrested and accused. It's made for use in a court
16 proceeding, so it's extremely solemn. It's very formal.
17 That's what you know, Crawford tells us, are the key
18 attributes - - -

19 JUDGE AARONS: Does it have a permanency in the
20 proceeding? From the beginning of the proceeding did the -
21 - - from what Mr. Morales said that the - - - the person's
22 using a laptop, taking information as they ask the
23 questions from the defendant, then they load it on a
24 computer, and then there's a verification process. And the
25 court, the prosecution, and the defense that becomes a

1 permanent part that the defendant filed. It follows him
2 throughout the entire prosecution. Is that correct?

3 MS. KON: That's absolutely correct.

4 JUDGE AARONS: So based on the criteria that it
5 has to be, as far as the primary purpose used for at trial,
6 when does - - - what does the at trial? Have we have
7 defined what at trial means? Is it that stage or is it the
8 guilt stage; what does at trial mean?

9 MS. KON: Well - - - well, first, I respectfully
10 disagree that the primary purpose test is applicable here
11 or that it requires something to be used at trial. You
12 know, in - - - in Crawford, which this court just relied on
13 a couple of - - - a couple months ago to define testimonial
14 in People v. Ortega, the court gave kind of two ends of a
15 spectrum of testimonial and nontestimonial. And on the one
16 end you have things that are always testimonial, things
17 that are - - - you know, pre-trial statements and things
18 set in preliminary hearings, affidavits. And then you have
19 things that are never going to be testimonial, like offhand
20 remarks. And I think that the primary purpose test is a
21 tool to decide all the stuff that falls in the middle of
22 that. But you don't need to apply the primary purpose test
23 when you have something that is - - - so clearly falls
24 within a testimonial. This is made for use by the court.

25 CHIEF JUDGE WILSON: Let me - - - let me ask you

1 the same question that I started with earlier, which is do
2 you know of a case you can point me to that holds that a
3 defendant's own statement made out-of-court, is subject to
4 confrontation clause analysis?

5 MS. KON: I believe in the brief there were
6 several cases that we cited about defendants with
7 interpreters, and they did find that it was subject to
8 confrontation.

9 CHIEF JUDGE WILSON: That's because there's an
10 interpreter in the middle there. Right?

11 MS. KON: Right. And here you have the CJA
12 representative in the middle. The CJA representative is
13 the one who's deciding what to put on that form. The
14 defendant doesn't see the form as the CJA representative is
15 filling it out or after.

16 CHIEF JUDGE WILSON: So your view, just to give
17 you a different example - - - let's take this out of the
18 CJA context for a minute - - - is if Mr. Franklin had
19 called up the cable company and asked for cable service in
20 the basement apartment, and the operator of the cable
21 company wrote down in the application, that's where the
22 service is going. And they sent a crew out there and he
23 got cable service, that that record could not be admitted
24 against him unless you could get past the confrontation
25 clause analysis?

1 MS. KON: No, Your Honor, because someone who is
2 making a report for cable, that's a - - - isn't making
3 something for use in a court, right? So the difference is
4 - - -

5 CHIEF JUDGE WILSON: No. But that - - - that is
6 the confrontation clause analysis that you're going through
7 then. You're saying that wouldn't just go through a normal
8 hearsay exception analysis?

9 MS. KON: Right. But I guess I would just say
10 that it wouldn't be testimonial. Correct.

11 JUDGE GARCIA: So what would the remedy be
12 usually if it's a confrontation clause violation, to pick
13 up on the Chief Judge's issue? Okay? So the People say,
14 fine, we're going to call the defendant, because he's the
15 declarant, right? And he takes the Fifth, I'm imagining.
16 So what happens then?

17 MS. KON: Then they can't use the information.
18 But I don't think that this was the - - - my client's
19 statement.

20 JUDGE GARCIA: But why can't they use it because
21 he's unavailable?

22 MS. KON: Well, I think that where all of this -
23 - - this entire line of questioning about whether it's his
24 statement is assuming that it is, in fact, his statement.
25 That any of the stuff on the form is his statement. We

1 don't know that.

2 JUDGE HALLIGAN: So why isn't the Morales
3 testimony sufficient on that point about the process?

4 MS. KON: Because he wasn't - - - he wasn't
5 there. Because you need to call the person who - - - who
6 actually - - - you know, spoke to these people. As anyone
7 who's been in arraignments know, that protocol isn't
8 followed in every single case. We have humans here.
9 Humans are doing these interviews. Sometimes they're under
10 a lot of time pressure. And whenever you introduce - - -
11 introduce humans, you - - - you introduce variation and you
12 introduce - - -

13 CHIEF JUDGE WILSON: So that's actually - - -
14 that's actually an interesting point. Because that was, I
15 think, referred to below as well. That, if you had
16 actually called the person - - - if People had called the
17 person who had filled out the form, there'd be no issue
18 here? Is that - - - I think I heard you sort of say the
19 same thing.

20 MS. KON: Well, I think that if they had called
21 the CJA representative who filled out the form, that
22 representative could testify about some of the information
23 in the form. The representative, I don't think, could say,
24 you know what his mother said, because that would be
25 hearsay. But I do think that - - -

1 CHIEF JUDGE WILSON: Right. But that - - - but
2 I'm - - - I thought I understood you, and I thought I
3 understand counsel below to have said, had they called the
4 person who filled out the form, who was speaking to Mr.
5 Franklin, right? And filled out the form there would then
6 - - -

7 MS. KON: Allegedly.

8 CHIEF JUDGE WILSON: Sorry?

9 MS. KON: Sorry. Just - - - if he was speaking
10 to Mr. Franklin. I just don't want to assume that.

11 CHIEF JUDGE WILSON: Okay. Had there been such a
12 person who did that, right? That if that is what was in
13 the form, there would be no issue here at all? Not simply
14 no confrontation - - - not simply no hearsay issue, but
15 also no confrontation clause issue. Did I misunderstand
16 that?

17 MS. KON: I don't think so. If you called the
18 actual person who filled out the form there, I don't
19 believe there would be a confrontation clause.

20 CHIEF JUDGE WILSON: And so why would there be no
21 confrontation clause issue in that case?

22 MS. KON: Because you could cross-examine the
23 declarant - - - the person who filled out the form is the
24 declarant, and could cross - - -

25 CHIEF JUDGE WILSON: Wasn't it the - - - well, so

1 you're not saying the declarant here is Mr. Franklin?

2 MS. KON: No, I don't think the declarant here is
3 Mr. Franklin.

4 JUDGE HALLIGAN: But what statements - - - I - -
5 - I - - - I suppose you have a question about whether the
6 statements were the mother's or the son's, but whose
7 statements were they, if not one of those two?

8 MS. KON: You know, that's the problem. We don't
9 know. We don't know who else that - - - you know, the CJA
10 representatives are in the courthouse all day. We don't
11 know who else he could have spoken to - - -

12 JUDGE GARCIA: No. But I think she means in
13 terms of the confrontation clause, I think, Judge Halligan
14 is asking. So whose statements are we concerned about in
15 terms of the confrontation clause?

16 MS. KON: I think that - - - so we're concerned
17 with the actual person who filled out the form. And I
18 don't - - - I would want to ask that person where he or she
19 got that information. Because - - -

20 JUDGE GARCIA: But isn't that a standard business
21 records cross, not a confrontation problem?

22 MS. KON: No. And I would also add that this
23 does not fall within the business record exception to the
24 hearsay rule, because even assuming that it was his
25 stepmother or Mr. Franklin that gave this information, they

1 don't have any business obligation or duty to report. So
2 it's not - - -

3 JUDGE HALLIGAN: But that - - - that goes to, I
4 think, to whether there's hearsay within the business
5 record. Does that go to whether it's a business record?

6 MS. KON: Yeah. Yes, I do. I - - - I believe
7 that under - - -

8 JUDGE HALLIGAN: You can't have a business record
9 that has information within it that comes from someone
10 else, even if that person is not someone under a duty to
11 have - - - you know, filled out that form or duty to the
12 company or the employer? I thought you could - - - you
13 could have that. The question then was whether you have a
14 hearsay objection to the substance of that information
15 within the business record.

16 MS. KON: Right. So the substance of the
17 information could not come in. But that's what we're
18 concerned about.

19 JUDGE HALLIGAN: Okay. But - - - but you're not
20 - - - you're not - - - I don't take it to be your argument
21 but tell me if I'm misunderstanding. That it is in some
22 respect, not a business record. I take it your objection
23 is to what you view as hearsay within the business record,
24 is that right?

25 MS. KON: Yes. The information in the form could

1 not come in.

2 JUDGE SINGAS: So the defendant's statement is
3 hearsay, is what you're arguing?

4 MS. KON: No. But I don't know that it is the
5 defendant's statement here. That's - - - the problem is
6 that we don't know that it is the defendant - - -

7 JUDGE CANNATARO: Well, Counsel, if the court is
8 satisfied - - - you know, leaving - - - leaving that part
9 out of it. If, as a general rule, a business record that
10 contains hearsay within it, you would have to remove or - -
11 - or make some sort of remedy for the hearsay within the
12 business record. However, one of the exceptions to hearsay
13 is an admission. And that information, to the extent the
14 court was satisfied that it came from the defendant, would
15 then become an admission within the business record; would
16 it not?

17 MS. KON: Well, information, if it did come from
18 the defendant, but not information that came from the
19 mother, for example. And there's a lot of information on
20 that form beyond just the BSMT, which is obviously very
21 damaging. But also, you know, the fact that he lived there
22 for three years, that's - - - that's very prejudicial too.
23 He's much more likely to know about a gun in a storage
24 closet if he lived there for three years.

25 JUDGE CANNATARO: But the operative information

1 for purposes of this appeal is simply, where does he
2 reside? It - - - it - - -

3 MS. KON: I'm sorry?

4 JUDGE CANNATARO: Is it - - - isn't the question
5 here his residence and nothing more than that?

6 MS. KON: No. The question is admission of - - -
7 of the form. And on the form there are several pieces of
8 really damaging, prejudicial information. And in fact,
9 this was the - - - again, really the only evidence that - -
10 - that tied him to the basement.

11 JUDGE GARCIA: Counsel, the - - - and I think
12 that's the key point in the back and forth in the colloquy,
13 the defense lawyer focuses on BASMT or whatever the
14 abbreviation is. But if we have a double hearsay problem
15 here and you have a business record - - - let's assume this
16 is a business record - - - but you have statements from a
17 third-party on - - - not under a business obligation to
18 report, right? One of the exceptions we've been talking
19 about is statement against interest, statement of the party
20 opponent - - - this defendant. But another hearsay
21 exception in that context, as I understand it, is, did the
22 person with the business duty verify the information that
23 comes in? So for example, you pull in - - - you come into
24 a hotel, you register, you give your name and home address,
25 I ask for your license. That's hearsay, right? I'm



1 writing it on the form. You just want to come in the
2 hotel. But I ask for your license, and I look at the
3 license and I say, okay, that's the address. And - - - and
4 - - - you know, information, and I put it in there. Do you
5 agree with that?

6 MS. KON: I think so. I'm sorry. I'm having
7 trouble following.

8 JUDGE GARCIA: One of the ways to get around a
9 double hearsay - - - to satisfy a double hearsay problem
10 with a business record, is if the person recording the
11 information - - - who has a business duty to record - - -

12 MS. KON: Right.

13 JUDGE GARCIA: - - - taking information from a
14 third-party, makes sufficient efforts to verify the third-
15 party information. Do you agree with that general rule?

16 MS. KON: Yeah. If the - - -

17 JUDGE GARCIA: So my example was a hotel clerk
18 takes the license and verifies your name, and let's assume
19 the address is on the license. So that would be a
20 verification, right?

21 MS. KON: Right.

22 JUDGE GARCIA: Why can't we look at this record
23 as the defendant provides this information about his
24 address and the mother verifies it?

25 MS. KON: Because we don't know that a) it was

1 him who provided it, and we don't know what the mother
2 verified. Did she verify BSMT? Did she verify three
3 years?

4 JUDGE GARCIA: If she didn't verify BSMT, and he
5 wrote it, then why do we have her as a problem here then?
6 So you're saying, okay, so BSMT isn't verified. That would
7 be your position?

8 MS. KON: I - - - I don't think. Right. We
9 don't know what's verified, and we don't know that it came
10 from my client.

11 JUDGE CANNATARO: And your argument for purposes
12 of the business record issue, is that if the preparer of
13 the document had been called, then we would have been able
14 to verify those facts?

15 MS. KON: I think - - - I think some cross-
16 examination - - -

17 JUDGE HALLIGAN: Did you - - -

18 MS. KON: - - - could have revealed that. Yeah.

19 JUDGE HALLIGAN: - - - did you - - -

20 JUDGE CANNATARO: Some cross-examination could
21 have also questioned that, couldn't it?

22 MS. KON: Right. But I think that in this case
23 we don't have any of that information. And there was a
24 significant confrontation clause problem here because this
25 is a form that is - - - you know, it's created for use in a



1 prosecutorial proceeding that is testimonial and forms that
2 are - - - are being used during a prosecution, during a
3 court proceeding, made for that purpose, are very solemn,
4 and they are subject to confrontation.

5 JUDGE SINGAS: This form wasn't made for purpose
6 of prosecution to elicit evidence. This form was to help
7 judges in verifying community ties when they're setting
8 bail. Just because it's relevant, it becomes relevant at
9 some point later. It's not the same thing. This wasn't -
10 - - this isn't a prosecution document.

11 MS. KON: You know, I disagree with some of that.
12 I think that - - - respectfully, I think that this does
13 very much have a prosecution purpose. This is - - - an
14 arraignment is a very - - - is a prosecutorial setting.
15 But beyond that, you know, what is the purpose of these
16 forms? What is the purpose of gathering all this
17 information? It's to make sure that defendants show up for
18 trial. It's to make sure we can prosecute them.

19 JUDGE AARONS: What is the purpose of keeping it
20 in the file and making it a permanent part of the record?

21 MS. KON: Well, I would argue that that - - -
22 that weighs more heavily in favor that this is - - - is
23 testimonial, right? It follows the defendant through.
24 It's given to the prosecutor. It's given to the judge.
25 You know, for all those reasons. I would also just add

1 that, you know - - -

2 JUDGE GARCIA: What is the purpose - - - the
3 arguable purpose that the document's prepared for?

4 MS. KON: What is the reason?

5 JUDGE GARCIA: Purpose. Yeah. Why do they do
6 this?

7 MS. KON: To advise the court during arraignment.

8 JUDGE GARCIA: Right.

9 MS. KON: So - - -

10 JUDGE GARCIA: And that goes to bail conditions
11 and those types of things, conditions of release?

12 MS. KON: Yes.

13 JUDGE GARCIA: So is it possible there would be
14 another motion for bail or an adjustment of conditions that
15 this might be relevant to?

16 MS. KON: Probably. Yes.

17 JUDGE GARCIA: And that might be a reason to keep
18 it in the file, right?

19 MS. KON: Maybe.

20 JUDGE HALLIGAN: Do you - - - do you disagree
21 with your adversary's position that the People adequately
22 preserve the argument that the declarant made these
23 statements? The brief references several points about the
24 defendant's self-reporting.

25 MS. KON: No, I don't think so because - - -

1 JUDGE HALLIGAN: So why isn't that enough?

2 MS. KON: Why isn't it enough that they mentioned
3 at the trial that he self-reported? Because - - -

4 JUDGE HALLIGAN: In the course of discussing - -
5 - you know, I think, in the course of - - - you can correct
6 me if I'm wrong. I think in the course of discussing,
7 though, whether it was appropriate to admit the form.

8 MS. KON: Because you can have information in a
9 form that comes from one source, but the declarant of the
10 form is another source. And they were never arguing that
11 the CJA - - - that the information only came from the
12 defendant. In fact, they said, oh, hey, the - - - the form
13 is admissible under the business record rule because, you
14 know, the CJA rep has a business obligation, and the CJA
15 rep, you know, is a public official. So if this - - - if
16 this document only contains information from my client, as
17 they contend, I actually think that that creates more
18 problems for them than it solves. And - - - and no, it - -
19 - it was not preserved. They certainly never argued that -
20 - - that this didn't violate the confrontation clause
21 because it was his statement. I do just want to add very
22 quickly. We don't believe that the primary purpose test
23 should apply here for all the reasons we said. You know,
24 very recently the Supreme Court in Hemphill said that
25 confrontation applied to - - - you know, a plea colloquy.

1 And the purpose of the plea colloquy was certainly not to
2 be used later in another defendant's trial.

3 JUDGE AARONS: Would it make a difference if the
4 defendant allegedly gave those statements, but there was no
5 verification, because that form is created and is a
6 permanent part of the court files. Would your argument be
7 different as far as confrontation? And it would be, as you
8 said, a party admission, because there's only two people in
9 that conversation; there's not a third person. Would it
10 change?

11 MS. KON: No. Because again, I think we're still
12 assuming that there are only two people involved.

13 JUDGE AARONS: No, I'm saying if there was no
14 verification. There was no one to verify and the form
15 indicates, he didn't have a number for me, there's no one
16 to verify; would that make a difference?

17 MS. KON: I don't believe so because I think that
18 the CJA representative could have still gotten that
19 information from somewhere else, and - - - and we just
20 don't know. And I - - - you know, Mr. Franklin was
21 acquitted of the intent to use. He was never seen with a
22 gun. And he was tried and convicted - - - you know,
23 despite the fact that his father had a gun license. He was
24 tried and convicted based on BSMT. And I think that we - -
25 - I think the prosecution can do a little better before we

1 send someone away for four years and take a - - - you know,
2 a father away from his son. So I'd ask that this court
3 affirm the Appellate Division. And if this court decides
4 to reverse, I'd ask that you remand it so that the
5 Appellate Division can decide the claims on appeal that
6 were not reached.

7 CHIEF JUDGE WILSON: Thank you.

8 MS. KON: Thank you.

9 MR. CASTELLANO: Your Honors, I'd just like to
10 start out by saying that Your Honor Judge Garcia's question
11 were - - - were actually part of the colloquy during the
12 discussion of the business records. So in other words, the
13 ADA at trial specifically said that the reason that it was
14 reliable was because there was a verification by the
15 mother. So that argument was preserved, was made with
16 regard to the - - - the business records foundation for
17 this document. Secondly as far as the applicability of the
18 primary purpose test, I would point the court to Ohio v.
19 Clark, which is after Williams v. Illinois, where six
20 members of the court say in the nonforensic context, they
21 say that that test is a necessary condition. Not just
22 important but a necessary condition. So only if a
23 statement has the primary purpose of acting as a - - - a
24 substitute for trial testimony, will it be deemed to be
25 testimonial.

1 JUDGE AARONS: What does it mean at trial?

2 MR. CASTELLANO: At trial, I think means at
3 trial. In other words, a determination of guilt or
4 innocence.

5 JUDGE AARONS: Has any court defined what that
6 means?

7 MR. CASTELLANO: Sorry?

8 JUDGE AARONS: Has any court defined what that
9 means?

10 MR. CASTELLANO: Well, the courts have certainly
11 applied it in a number of contexts and in no context that
12 I'm aware of, have they said that the - - - that means at
13 any court proceeding - - - at a court proceeding where you
14 don't even necessarily have a right of confrontation. At
15 arraignment, you don't have a right of confrontation. You
16 have due process rights, no doubt, but you don't have a
17 right to cross-examine whoever it is who comes into court
18 and may make a statement at that point in time. At a trial
19 you do. That's the nature of the Sixth Amendment right.
20 It is a trial confrontation right.

21 JUDGE CANNATARO: But we might be able to debate
22 whether the CJA form was intended for use at trial, as a
23 lot of these questions have brought out. But is - - -
24 would there be any debate that it - - - that it's not
25 intended for use testimonially?

1 MR. CASTELLANO: It's not intended - - - it is
2 not intended for use testimonially, because testimonial
3 means according to Ohio v. Clark, six judges of the court
4 says that it means that it is a substitute for trial
5 testimony. Those - - - they use those exact words.

6 JUDGE CANNATARO: Right.

7 MR. CASTELLANO: But even if you were not to
8 apply the primary purpose test, and if you were just to
9 look at all of the facts and circumstances here, if I just
10 may have a moment with regard to that? You have Morales'
11 testimony. You have actually a statement on the report
12 itself. There's a legend on the report itself that says
13 the purpose of this - - - or the - - - this report
14 considers community ties and bench warrant history. It
15 does not consider, according to the legend on the document
16 itself, it does not consider weight of the evidence.

17 JUDGE HALLIGAN: What about - - - what about
18 counsel's comment that there's no way to know for sure
19 whether or not the CJA interviewer was talking to her
20 client, as opposed to someone else without the ability to
21 cross him or her?

22 MR. CASTELLANO: The protocols that were laid out
23 by the CJA supervisor. The regular business protocols of
24 the CJA agency established that that statement in this
25 white area of the form were - - - came directly from the

1 defendant, and then there were follow-up questions on
2 redirect that said that as far as the mother's verification
3 - - -

4 JUDGE HALLIGAN: But I took her to be saying
5 maybe it was someone else altogether - - - maybe I
6 misunderstood - - - but that you can't be certain who it
7 was without speaking with her?

8 MR. CASTELLANO: But you - - - you can, based on
9 the protocols, based on Morales' testimony. Because it
10 specifically says that information, that specific question
11 is asked of Morales. Where does that information about
12 residence come from? That comes from the defendant while
13 the CJA interviewer is sitting in court - - - not sitting
14 in court. Sitting in the cell with the defendant and - - -
15 and inputting that information on the tablet. It's all - -
16 - happens together. It all happens at the same time. It
17 is near the time, as any business record would be?

18 JUDGE AARONS: My last question to you is based
19 on the standard on - - - which talks about under the
20 circumstance would lead an objective witness, to reasonable
21 - - - to believe that the statement would be available for
22 use at a later trial. Why wouldn't the - - - the
23 interviewer - - - objective person naturally wouldn't
24 believe that it would be used for later proceedings?

25 MR. CASTELLANO: While that is one possible test

1 - - -

2 JUDGE AARONS: Since they're making it a
3 permanent part of the file?

4 MR. CASTELLANO: I understand, Your Honors. A
5 couple of things about that. One, and I'll just refer to
6 that as a reasonable expectation test. That test is - - -
7 has been used in the forensic context. In the non-forensic
8 context, every single decision, no court has used it. The
9 Supreme Court, this court has not used the reasonable
10 expectation test in the non-forensic context. Not Davis v.
11 Washington, Michigan v. Bryant, People v. Dooth, People v.
12 Peeler. In addition to that, the test has a danger of
13 swallowing the whole primary purpose rule. And I think
14 that's why it's not used because what it says is, if you
15 look at it as a - - - broadly as a foreseeability issue, is
16 it foreseeable that this could be used at trial? Then it
17 completely swallows the primary purpose test, because
18 primary purpose says it has to be the intent, the purpose
19 to be used at trial. And so it would cover the reasonable
20 expectation test, all of that plus a whole lot more. We
21 would need the primary purpose tests. And yet the primary
22 purpose test is the test that the - - - six members of the
23 court have signed on to in the nonforensic context. With
24 that, I could - - - I - - - I would also like to point out
25 in Ohio v. Clark that the - - - the court says that

1 statements that are made to someone who is not principally
2 charged with the uncovering or prosecution of a crime are
3 much less likely to be testimonial than otherwise.

4 So these are all the facts and circumstances that
5 you could point to, with or without the primary purpose
6 test that point to the statement being nontestimonial.

7 Thank you.

8 CHIEF JUDGE WILSON: Thank you, Counsel.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Cid C. Franklin, No. 39 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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