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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 9

ROBERT B. PEALER,

Appellant.

20 Eagle Street
Albany, New York 12207
January 3, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

JOHN A. CIRANDO, ESQ.
D.J. & J.A. CIRANDO, ESQS.
Attorneys for Appellant Pealer
101 South Salina Street
Suite 1010
Syracuse, NY 13202

JASON L. COOK, ESQ.
YATES COUNTY DISTRICT ATTORNEY
Attorneys for Respondent
Yates County Courthouse
415 Liberty Street
Penn Yan, NY 14527

Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 9, People v.
2 Pealer.

3 Counselor - - -

4 MR. CIRANDO: Good afternoon.

5 CHIEF JUDGE LIPPMAN: - - - would you like any
6 rebuttal time?

7 MR. CIRANDO: Yes, Your Honor, two minutes,
8 please.

9 CHIEF JUDGE LIPPMAN: Sure. Go ahead,
10 counselor.

11 MR. CIRANDO: May it please the Court, John
12 Cirando from Syracuse, New York, on behalf of the
13 defendant Robert Pealer.

14 The first issue I'd like to discuss this
15 afternoon concerns the right of confrontation.

16 CHIEF JUDGE LIPPMAN: What is the Crawford
17 problem here, counsel?

18 MR. CIRANDO: The Crawford problem here, Your
19 Honor, is that a breathalyzer only has one use. It's only
20 used for one thing, and that's to determine if a defendant
21 who's already been arrested is to be subject to any
22 additional charges.

23 JUDGE READ: Is it important that it could be
24 exculpatory or inculpatory?

25 MR. CIRANDO: No, Your Honor, because I don't

1 think there's any defendant is unarrested for driving
2 while intoxicated because of taking the breathalyzer test,
3 especially in view of the fact that what gets him to the -
4 - - what gets him to the police station to blow into the
5 machine is the fact that the officer basically has said,
6 under the common law theory, you're intoxica - - - or the
7 defendant's intoxicated.

8 JUDGE PIGOTT: Does that apply to radar guns
9 too? I mean, the argument that you're making, that you've
10 got to confront the person or - - -

11 MR. CIRANDO: It could be, yes, but I think the
12 consequences in radar guns are a little less - - -

13 JUDGE PIGOTT: It depends. If you've got a
14 commercial driver's license and one more stop - - -

15 MR. CIRANDO: One more.

16 JUDGE PIGOTT: - - - and you're out of work.

17 MR. CIRANDO: Yeah, but I've got the solution
18 for all of that. The solution is that the individual from
19 the department - - - in your case, Your Honor, the trooper
20 or the policeman with the radar gun - - - is the one that
21 goes to DCJS, is the one that goes to the state police lab
22 and calibrates under their supervision. So in that case
23 you have a live body, then, that can testify at the - - -

24 JUDGE SMITH: Well, wait a minute; you're saying
25 the supervisor can testify to what his subordinate did?

1 MR. CIRANDO: No. No, I'm saying that the
2 officer goes to the DCJS, goes to the crime lab and
3 calibrates the machine under the supervision of someone
4 there that knows how to do it or runs that simulator
5 solution.

6 JUDGE SMITH: So who testifies at trial?

7 MR. CIRANDO: The individual that certified that
8 simulator solution for that police department.

9 JUDGE SMITH: In your hypothetical, who
10 testifies?

11 MR. CIRANDO: The officer from that department
12 who went to Albany and certified the simulator solution
13 for that lot that the department is using.

14 JUDGE SMITH: So - - -

15 JUDGE PIGOTT: That's the six-month rule, right?
16 They have to test it; is it every six months?

17 MR. CIRANDO: The machine is every six months,
18 yes.

19 JUDGE PIGOTT: Yeah, and so you're saying that
20 somebody from, in this case - - -

21 MR. CIRANDO: The Penn Yan Police Department.

22 JUDGE PIGOTT: - - - yeah, goes to Albany with
23 this equipment under his arm or her arm, does this test
24 and brings it back. That person then can testify in any
25 and all DWI cases - - -

1 MR. CIRANDO: Yes.

2 JUDGE PIGOTT: - - - brought in - - -

3 CHIEF JUDGE LIPPMAN: Can there never be
4 business records that verify the accuracy of a particular
5 procedure or instrument in all circumstances? And what's
6 the dividing line, if there can be, in some circumstances?

7 MR. CIRANDO: Well, this is solely to be used at
8 trial. And I think that in Brown the court said, well,
9 one of the things is that that result was not solely to be
10 used at trial. So I think if it's not solely to be used
11 at trial, that would be a good demarcation line. But - -
12 -

13 JUDGE SMITH: So if the - - - what you're really
14 - - - aren't you really saying to police departments or
15 the guys in Albany who do the testing or whatever, saying
16 instead of doing these fancy certificates, just do things
17 that look like ordinary day-to-day maintenance records, so
18 we checked our machine today.

19 MR. CIRANDO: No, no. Well, we've got that;
20 that's Exhibit 9, I think. No, what I'm saying is we've
21 got a piece of paper that says somebody in Albany checked
22 the simulator solution and said it's working properly, and
23 then that piece of paper goes all around the department
24 for every case, instead of just taking Officer Smith,
25 sending him from Penn Yan down to Albany, he runs that

1 solution test - - -

2 JUDGE SMITH: Okay. So if - - -

3 MR. CIRANDO: - - - and says the lot is proper.

4 JUDGE SMITH: - - - if the Penn Yan Police
5 Department had thought of that idea, it would have solved
6 this problem. But they didn't, so instead of sending the
7 officer from Penn Yan to Albany, in this case, if they
8 want to get a conviction, they have to send a guy from
9 Albany down to Penn Yan or down to the courthouse?

10 MR. CIRANDO: Yes, that's the logical extension,
11 but I think the question, the original question, was how
12 can it practically be done, and the practicality would be
13 to do it the other way, not just have a paper - - -
14 because all of these other tests that we're talking about,
15 they can be used for other things. The DNA test, that can
16 be used for medicine, that can be used for ancestry, that
17 can be used for blood analysis. But - - -

18 JUDGE SMITH: But when you do a DNA on a sample
19 from a rape kit, you're not doing it for medical purposes.
20 I mean, that's testimonial, isn't it?

21 MR. CIRANDO: But it goes into a bank; that's
22 where they put it. You don't know what else is going to -
23 - - what other uses - - -

24 JUDGE GRAFFEO: I guess I'm having trouble under
25 - - -

1 MR. CIRANDO: - - - are going to come out of
2 that test.

3 JUDGE GRAFFEO: - - - under the rationale that
4 we used in the Rawlins case when we looked at the DNA data
5 and we said it's not - - - it's being analyzed, but not
6 directly linked to a particular defendant; it's a
7 scientific test. Isn't there a difference between the
8 calibration of the machine and then the actual use of the
9 machine linked to a particular driver?

10 MR. CIRANDO: That's what the Fourth Department
11 went off on, and I would say no, Your Honor, because the
12 sole purpose of using the machine - - - the sole purpose
13 of using the machine is accusatory. It's - - - the
14 individual or individuals who blow into that machine are
15 already under arrest, and it's whether you're going to be
16 prosecuted for additional crimes. So it's a step removed
17 from the DNA - - -

18 JUDGE GRAFFEO: Even - - -

19 MR. CIRANDO: - - - and the blood test.

20 JUDGE GRAFFEO: Even if the fact is that if it's
21 properly calibrated and the person blows, say, a .04, so
22 they're not even DWAI; they're exonerated, basically, or
23 they - - -

24 MR. CIRANDO: They're not exonerated. They're
25 still common law driving while intoxicated, so it doesn't

1 exonerate you. I think that's - - - with all due respect,
2 that's the fallacy, that you're exonerated with a low
3 test. You're not unar - - - there's nobody unarrested for
4 DWI because they've passed the test - - -

5 JUDGE SMITH: You're suggesting that under - - -

6 MR. CIRANDO: - - - they're already arrested on.

7 JUDGE SMITH: You're suggesting that even under
8 Rawlins, these documents should be kept out as
9 testimonial. Do you also argue that Rawlins was
10 essentially overruled by Melendez-Diaz?

11 MR. CIRANDO: Melendez-Diaz was the - - - was
12 the drugs - - - the specific analysis for the drugs, and -
13 - -

14 JUDGE GRAFFEO: The cocaine testing.

15 MR. CIRANDO: - - - the cocaine. I mean, that's
16 - - - in New York we allow that at the grand jury, but we
17 don't allow that at the - - - at trial. You have to have
18 the chemist there to - - -

19 JUDGE SMITH: Okay. But I guess what I'm - - -
20 I mean, as I - - - when I read Melendez-Diaz, it looks to
21 me like they're saying forget all about whether it's
22 accusatory or not; if it's evidence for the prosecution,
23 you've got to call a witness, that's all there is to it.
24 Is that the way you read it?

25 MR. CIRANDO: I - - - to me it was - - - the

1 sole purpose was to use the trial against the defendant,
2 the sole purpose of the item. In this case, the sole
3 purpose of that machine, using any part of that machine is
4 against the defendant at trial. There's no other purpose
5 that we use breathalyzers for.

6 JUDGE GRAFFEO: Mr. Cirando, in your experience,
7 who calibrates these machines?

8 MR. CIRANDO: It's calibrated at the - - -

9 JUDGE GRAFFEO: Are they done by police agencies
10 - - -

11 MR. CIRANDO: State - - -

12 JUDGE GRAFFEO: - - - or are there company
13 representatives that come in and do it?

14 MR. CIRANDO: In this case, the state police
15 certified Exhibit number - - - bear with me here - - -
16 Exhibit number 7 and 8 was at the Division - - - I'm
17 sorry, the Division of Criminal Justice Services.

18 JUDGE PIGOTT: You know - - - I don't know if
19 you argued the case, but if it's beyond the six months,
20 you win, right? I mean, it can't come in because it's not
21 certified.

22 MR. CIRANDO: If I was sitting there I'd say it
23 goes to the weight.

24 JUDGE PIGOTT: But you're over there.

25 MR. CIRANDO: But over here I say it can't come

1 in.

2 JUDGE PIGOTT: So I mean, I guess the point is
3 that it's really a blind test. I mean, they certify it,
4 and happy trails for six months, and then you've got to
5 bring it back.

6 MR. CIRANDO: And then one of the exhibits was -
7 - - one of their individuals, one of the police agency
8 people ran a test on the machine with the solution - - -
9 the weekly test or the bi-weekly test. So they're always
10 testing them. That was done by the individual locally.
11 But in the first instance, when I was thinking of what to
12 say, in the first instance is, Judge Smith, do I want
13 everybody to keep driving around from Albany to every DWI
14 trial? No, because there's another way it can be done,
15 and that way can - - - that other way satisfies the
16 Crawford requirement because - - -

17 JUDGE PIGOTT: Can the person who does that
18 interim testing satisfy you - - - satisfy the defense? In
19 other words, you get it certified on January 1st and then
20 every two or three weeks somebody sets doing it at the
21 police headquarters.

22 MR. CIRANDO: That's their local guy that does
23 it, and he - - -

24 JUDGE PIGOTT: He or she can testify.

25 MR. CIRANDO: He should - - - they should

1 testify as well, in my mind.

2 JUDGE PIGOTT: If that person testifies, is that
3 it, or do you need both?

4 MR. CIRANDO: You need both.

5 JUDGE PIGOTT: Well, you're saying you need the
6 Albany person, and if you can't get the Albany person,
7 then go down there personally and - - -

8 MR. CIRANDO: Do it yourself.

9 JUDGE PIGOTT: - - - then you can come back and
10 testify. All right.

11 MR. CIRANDO: Right. Or - - -

12 JUDGE PIGOTT: After that, somebody else does
13 this interim test. Can you just use the interim person or
14 do you need the first person and the interim person,
15 assuming they're different?

16 MR. CIRANDO: I think you need both.

17 JUDGE PIGOTT: Okay.

18 CHIEF JUDGE LIPPMAN: But you always need a live
19 person?

20 MR. CIRANDO: Live people, yes, yes, because
21 we're - - - I don't mean to repeat myself, but all we're
22 doing is zeroing in on - - -

23 JUDGE PIGOTT: Before - - -

24 MR. CIRANDO: - - - the defendant.

25 JUDGE PIGOTT: Before you have to sit down - - -

1 MR. CIRANDO: Yes, Your Honor.

2 JUDGE PIGOTT: - - - the probable cause for the
3 stop, are you spending any time or have any interest in -
4 - -

5 MR. CIRANDO: Yes, Your Honor, I'd - - - it's
6 the most ridiculous basis I've ever seen for a stop of a
7 motor vehicle.

8 JUDGE PIGOTT: If somebody had a New York Giants
9 sticker on their back window, they would be subject to a
10 violation and they could be stopped and - - -

11 MR. CIRANDO: That's why I don't have one.

12 JUDGE PIGOTT: Oh, I - - -

13 MR. CIRANDO: I have it on my left - - -

14 JUDGE SMITH: Because the same rule would apply
15 to a Bills sticker.

16 MR. CIRANDO: Bills fans, yes.

17 JUDGE PIGOTT: Not in Yates County.

18 MR. CIRANDO: Not in - - - well, maybe not in
19 Yates County, but you can - - -

20 CHIEF JUDGE LIPPMAN: Does it matter the motive
21 of the policeman, though, if it's a violation?

22 MR. CIRANDO: What bothers - - -

23 CHIEF JUDGE LIPPMAN: Having a sticker on your
24 back violates - - - why - - - do we look beyond as to why
25 exactly the policeman really stopped them?

1 MR. CIRANDO: In this instance, yes, because
2 consider the whole narrative. There was a call - - -

3 CHIEF JUDGE LIPPMAN: Right.

4 MR. CIRANDO: - - - that there was a grey Subaru
5 with so-and-so and he was intoxicated, and he's got a
6 sticker on his back window. So that's the car. And we'll
7 follow the car for roughly four minutes, turns and
8 everything, and there's no violations, vehicular
9 violations or driving violations. I think then you do
10 look at the motive.

11 CHIEF JUDGE LIPPMAN: Even if the sticker itself
12 is a violation?

13 MR. CIRANDO: Well, when you get into the
14 sticker itself being a violation, when you look at the
15 legislative history and the purpose of the law, the
16 purpose of the law is to - - - not to have anything that's
17 going to obstruct vision. This sticker - - -

18 JUDGE SMITH: Do you argue that there was no
19 violation? I mean, if there was no violation, the stop is
20 bad.

21 MR. CIRANDO: I can't argue that, Judge. I
22 can't stand here and then shave tomorrow morning and say
23 there was nothing. But I can say this: we don't know
24 what happened to that. That ticket just sort of went out,
25 and it's out in the clouds someplace.

1 CHIEF JUDGE LIPPMAN: Okay - - -

2 MR. CIRANDO: Thank you.

3 CHIEF JUDGE LIPPMAN: - - - thanks, counselor.

4 Okay.

5 Counselor?

6 JUDGE GRAFFEO: Counsel, before you - - -

7 MR. COOK: Good afternoon.

8 JUDGE GRAFFEO: - - - jump into your argument,
9 can you explain the calibration process? Are all these
10 machines around New York State calibrated at the Division
11 of Criminal Justice Services?

12 MR. COOK: Yes, every six months. Within every
13 six months every machine is calibrated at - - - by DCJS,
14 and there's a distinction - - -

15 JUDGE GRAFFEO: At only one office? Their
16 office - - - well, I guess now they're in Albany; they're
17 going to the Alfred E. Smith building from Stuyvesant
18 Plaza.

19 MR. COOK: Correct.

20 JUDGE GRAFFEO: So all the machines around the
21 state - - -

22 MR. COOK: Are calibrated by DCJS within - - -

23 JUDGE GRAFFEO: They're brought there?

24 MR. COOK: Yes.

25 JUDGE GRAFFEO: Okay.

1 MR. COOK: Physically brought to be calibrated.
2 And there's a distinction; certainly the People's 7 and 8
3 were the machine itself, the calibration documents itself.
4 Exhibit 6 - - -

5 CHIEF JUDGE LIPPMAN: Why shouldn't the - - -

6 MR. COOK: - - - was the simulator solution.

7 CHIEF JUDGE LIPPMAN: Why shouldn't the
8 defendant have a live person to confront in this - - -

9 MR. COOK: Because admission of all of these
10 documents was completely consistent with this court's
11 prior rulings in Rawlins and Brown, and completely
12 consistent with what the Supreme Court has ruled in
13 Melendez, in Crawford, and as recently as the - - -

14 JUDGE SMITH: Explain how it's consistent with
15 Melendez-Diaz; that's the one that gives me a hard time.

16 MR. COOK: Yes, very clear distinction, because
17 in Melendez-Diaz it was the weight of the cocaine,
18 analyzing that that was an element of the crime. So in
19 Melendez-Diaz you have a defendant in Massachusetts who's
20 on trial for cocaine possession.

21 JUDGE SMITH: I mean, I see that you can
22 distinguish Melendez-Diaz on the facts, but when you look
23 at what the Supreme Court said, they were pretty strong;
24 said look, there are only two kinds of witnesses: defense
25 witnesses and prosecutions witnesses. There aren't some

1 third kind that aren't accusers. Doesn't that contradict
2 what we said in Rawlins?

3 MR. COOK: Well, I think in Brown and Rawlins
4 you established those four factors, and certainly Brown
5 was a post-Melendez case, and nothing that came out that
6 you established in Brown changed any of the four factors,
7 but whether - - - and certainly I would concede the first
8 factor in Brown. The state police and DCJS have a law
9 enforcement connection, and that's the first factor. But
10 whether it reflects objective facts, if you look at the
11 documents, People's 7, 8 and 6 - - - 6, 7, and 8 that were
12 admitted here, they are as objective as you could be.
13 There's no spicing-up any of the thing that you would
14 expect with testimony. They are just very specific, very
15 objective data. Whether they're biased - - - there's no
16 suggestion that any of this has been biased - - - and
17 whether it accuses the defendant. And I think on that
18 point, I would - - -

19 JUDGE SMITH: But in Melendez-Diaz, the court
20 rejects the idea that because the evidence isn't prone to
21 distortion and manipulation or is the result of neutral
22 scientific testing, that that means it's immune from the
23 confrontation clause.

24 MR. COOK: That's certainly true, but in
25 Melendez-Diaz, they were certificates that they found to

1 be actual affidavits, that they found that were actual
2 testimonial. And in Melendez-Diaz, Judge Scalia - - -
3 Justice Scalia noted equipment maintenance may well
4 qualify as nontestimonial. And that's certainly entirely
5 what the Fourth Department - - -

6 JUDGE SMITH: Obviously some maintenance records
7 aren't designed for the primary purpose of use in a
8 criminal proceeding; isn't that what they meant when they
9 said equipment maintenance records are okay?

10 MR. COOK: Well, I think a distinction is - - -
11 and Judge Read, you hit on this earlier, that there's a
12 distinction between use of the machine, use of this
13 machine on any defendant, whether it's in Erie County or
14 any county, versus the records.

15 And if I can address defense counsel's argument,
16 no one is going to be unarrested. If someone is in a bar
17 and hasn't slept for two days and is feeling sick, and
18 then they have the misfortune of running into someone who
19 spills their drink all over them, and then they leave - -
20 -

21 JUDGE SMITH: This happens frequently, I gather.

22 MR. COOK: No, no, no.

23 JUDGE PIGOTT: Finger Lakes Community College.

24 MR. COOK: No, but - - - and they get arrested
25 for common law DWI and then submit to a test, and they

1 take the test and it comes back, because the machine is
2 accurately calibrated and working properly and has gone
3 through all of these tests, and they are an .02 - - - an
4 .02, because they've had one drink. Now, certainly the
5 police officer made a mistake. It's a fallible human
6 judgment that has been reflected in all these rulings that
7 I have reflected. But who is going - - - what is that
8 going to show as to incriminating or exculpatory - - -

9 JUDGE PIGOTT: Well, let me ask you this in a
10 rather broad way. Wouldn't you worry about even a .02
11 with an officer that would stop you for having a Finger
12 Lakes Community College Sticker on your car at 1:48 in the
13 morning? I mean, the seatbelt stops are a little
14 troubling, but it is a violation; it's a safety violation
15 and it happens.

16 MR. COOK: Sure. Sure.

17 JUDGE PIGOTT: But I can't think of a car I've
18 owned - - - well, except the one I've got now, but I mean,
19 every one of my kids, everybody - - - you drive down the
20 throughway, I mean, this is not a violation that people
21 generally stop people for. So it looked an awful lot like
22 a pretext stop.

23 MR. COOK: I understand that, and I think the
24 test that this court has articulated, both in Robinson
25 from 2001, and in Wright from 2002, both of which were

1 relatively minor things, equipment violations - - -

2 JUDGE SMITH: And I guess - - -

3 MR. COOK: - - - muffler violations.

4 JUDGE SMITH: - - - isn't the problem that yes,
5 we say in Robinson that the officer's motive doesn't
6 matter, but aren't you really pushing the envelope? I
7 mean, the trouble with making a rule like that is we
8 didn't realize what kind of crazy pretexts these guys were
9 going to think up. I mean, a sticker on the back window?

10 MR. COOK: Well, I think that the danger you get
11 into - - - the danger you avoided by Robinson, and the
12 danger you would get into if you changed the rule on
13 Robinson, is you would get into this reasonable police
14 officer standard. Is the Giants sticker in the back
15 window a see-through sticker like some college sticker or
16 - - -

17 JUDGE PIGOTT: They're per se.

18 MR. COOK: - - - or per se - - - or is it - - -
19 true. Is it in the middle of the windshield or is it in
20 the lower corner? Is it a clear one that a person can see
21 through looking in the mirror, or is it white or blue or
22 red or any one of those colors? Those are the sort of
23 issues you would get into that you avoid by having - - -

24 JUDGE PIGOTT: No - - -

25 MR. COOK: - - - a simple - - -

1 JUDGE PIGOTT: - - - you ignore it. I mean,
2 that's what the police constabulary in this state have
3 been doing for years and years and years and years. And
4 to say that at 1 o'clock in the morning or 1:40 in the
5 morning this was a violation that deserved the police
6 officer's attention is highly suspect.

7 MR. COOK: I understand, but the argument - - -

8 JUDGE PIGOTT: Next the police officer is going
9 to say a .02 to me, you're drunk, I'm writing you up, and
10 here comes the common law, as Judge - - - as Mr. Cirando
11 said.

12 MR. COOK: I understand, but the argument that
13 that's too technical a violation, really, the merits of
14 that - - -

15 CHIEF JUDGE LIPPMAN: Can it ever be too
16 technical a violation?

17 MR. COOK: If it is written as - - -

18 CHIEF JUDGE LIPPMAN: If it's the most innocuous
19 sticker in the lower corner on the right-hand side that
20 says - - -

21 MR. COOK: NYU.

22 CHIEF JUDGE LIPPMAN: - - - Yale or Buffalo or
23 NYU or - - -

24 JUDGE PIGOTT: Support Your Local Police.

25 CHIEF JUDGE LIPPMAN: Right, Support Your Local

1 Police, can it be so totally innocuous that - - -

2 MR. COOK: Well, I think, as we articulated in
3 our brief, there are certain stickers that are permitted.
4 Right? It's not a per se no sticker on the back window.
5 There are certain taxi emblems and other things - - -

6 CHIEF JUDGE LIPPMAN: Say it says "NYU", or
7 whatever it is - - -

8 MR. COOK: Right.

9 CHIEF JUDGE LIPPMAN: - - - in the lower corner
10 that clearly can't block anything.

11 MR. COOK: Right.

12 CHIEF JUDGE LIPPMAN: Could there come a point
13 where it's so innocuous that - - -

14 MR. COOK: Well - - -

15 CHIEF JUDGE LIPPMAN: - - - it would be so
16 obviously pretextual?

17 MR. COOK: I think if it is not one of the
18 authorized stickers provided for, then it is technically a
19 violation.

20 CHIEF JUDGE LIPPMAN: It can never be.

21 JUDGE SMITH: And technically is all you need?

22 MR. COOK: And technically lets you - - - lets
23 all - - - lets the prosecutors, lets police, lets the
24 courts avoid the subjective inquiry of a reasonable police
25 officer.

1 JUDGE SMITH: Can I bring you back to the
2 confrontation clause - - -

3 MR. COOK: Sure.

4 JUDGE SMITH: - - - for a minute?

5 MR. COOK: Sure.

6 JUDGE SMITH: Suppose there's a guy in Albany
7 who tests these machines and he's a little lazy and he's
8 decided that it's a lot simpler, instead of testing the
9 machines and filling out the form, he'll just fill out the
10 form and not bother with the testing. It is - - - yeah -
11 - isn't there - - - isn't the defendant - - - doesn't the
12 defendant have a right - - - doesn't he have a
13 Constitutional right to confront that guy and say - - -
14 and try to prove that he didn't really test the machine?

15 MR. COOK: I think the distinction - - - the
16 testing of the machine is not - - - does not accuse the
17 defendant of - - - the machine being operational is not an
18 element of the crime. It does not accuse the defendant of
19 anything. So by any interpretation, by what I would
20 submit, as we put in our brief, by any interpretation of
21 this court's prior rulings in Brown or Rawlins or even as
22 recently as Williams v. Illinois, that would not be
23 testimonial. Would it be helpful?

24 JUDGE SMITH: But I mean, what you just said
25 sounds like it's taken out of the paragraph of Melendez-

1 Diaz: "Respondent first argues that the analysts are not
2 subject to confrontation because they are not accusatory
3 witnesses and that they do not directly accuse petitioner
4 of wrongdoing. Rather, their testimony is inculpatory
5 only when taken together with other evidence." And then
6 they reject that argument. They say there's no such thing
7 as accusatory and nonaccusatory; there's just prosecution
8 witnesses.

9 MR. COOK: Well, that's certainly true, but I
10 would argue that the machine being operational certainly -
11 - -

12 CHIEF JUDGE LIPPMAN: When does it become
13 accusatory, beyond the machine being operational?

14 MR. COOK: When it goes towards an element of
15 the crime. When it - - -

16 CHIEF JUDGE LIPPMAN: Like what?

17 MR. COOK: Like drug possession in Melendez, was
18 that cocaine or was that baking powder? And if it was
19 cocaine, what was the weight? In Bullcoming, what was
20 that defendant - - - on that day, that defendant, what was
21 his blood alcohol count?

22 JUDGE PIGOTT: Was that alcoholic breath or was
23 it not?

24 MR. COOK: Pardon?

25 JUDGE PIGOTT: Was the breath that was taken

1 sufficiently an indication of alcohol or not?

2 MR. COOK: In Bullcoming?

3 JUDGE PIGOTT: I'm just giving you one of your -
4 - - you're saying that the machine decides one size - - -

5 MR. COOK: Oh, yes.

6 JUDGE PIGOTT: - - - and weight.

7 MR. COOK: Yes.

8 JUDGE PIGOTT: This decides whether it's a .02
9 or a .06.

10 MR. COOK: Yes, but that goes towards - - - and
11 certainly who testified in the People's trial here was the
12 breath test operator, Antonia Lerch, she testified and was
13 fully cross-examined as to this defendant's blood alcohol
14 content.

15 JUDGE PIGOTT: But I raised the radar gun with
16 Mr. Cirando, and in my experience, even with radar, the
17 officer usually testified to a tuning fork test, to his
18 personal estimation of the speed, and then he would say
19 and the car came within the range of the - - - and I'd
20 estimated it at 72 and the radar gun said 71. So you have
21 a test before they use the radar gun, and then I think
22 they test even after. None of that happens in these
23 cases, right? Just - - -

24 MR. COOK: Well, that's a very good point that I
25 want to make, because one of the documents that was

1 admitted was the calibration test that was done after this
2 defendant was arrested, after the trial - - - I'm sorry,
3 after the arrest but before the trial, People's Exhibit 8
4 from March of 2009. And I think what cuts to the core to
5 show - - - to demonstrate that this wasn't accusatory, was
6 the printout for that calibration, after it had done the
7 test, after the defendant had been arrested, is that it
8 made no reference to him at all. If it had printed out a
9 printout: "The tests that we have done for Mr. Pealer,
10 this is to certify that it was working properly." It made
11 no reference to him at all, so to certainly show that it
12 was equipment maintenance, it was done before him and had
13 no reference to him; it was done well after and had no
14 reference to him. I would concede that certainly if it
15 mentioned him at all in that subsequent calibration, that
16 would present a very different issue to this court.

17 JUDGE SMITH: Can you give us - - -

18 MR. COOK: The fact that it doesn't, I suggest,
19 gives an insight as to that it is maintenance - - -
20 equipment maintenance and business records.

21 JUDGE SMITH: Assuming we go the other way,
22 assuming we buy Mr. Cirando's argument, can you give us a
23 - - - do you have some sense of what kind - - - how big
24 are the practical problems we'll be causing would be?

25 MR. COOK: I think there would be very

1 significant practical problems.

2 JUDGE SMITH: Tell us about them.

3 MR. COOK: Because for every county, small, from
4 Erie to St. Lawrence to Clinton to Yates and everywhere -
5 - - and down to the city, the people - - - DCJS would be
6 required to send, for misdemeanors to the aggravated DWI D
7 felonies, Class D felonies, from every local court, city
8 court, county court and supreme court. The practical
9 implication of having to send live witnesses to testify
10 would create a - - -

11 JUDGE SMITH: You'd either have to bring
12 somebody from Albany or you'd have to adopt Mr. Cirando's
13 procedure of sending a local cop to Albany every six
14 months.

15 MR. COOK: Yes. Yes, you would. And I think
16 what it boils down to is what, really, this court
17 concluded its ruling in People v. Freycinet 2008, that you
18 decided around the same that you did Brown, quoting Sir
19 Walter Raleigh, summing up what the confrontation clause
20 is, "Call my accuser before my face."

21 There certainly is no credible argument or
22 suggestion that - - - in my view, that any of these
23 documents even know who Mr. Robert Pealer is, even know
24 who Mr. Robert Pealer was. So to suggest that he - - -
25 that they, People's 6, 7 and 8, were somehow his accuser

1 and somehow that their admission into trial violated his
2 Constitutional right to confront his accuser, we would
3 suggest, is without merit. Based on all the reasons I've
4 articulated and put in our brief, the People would ask
5 that the conviction be affirmed for all of those reasons.

6 CHIEF JUDGE LIPPMAN: Okay, thank you,
7 counselor.

8 MR. COOK: Thank you.

9 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

10 MR. CIRANDO: Very briefly. I think counsel
11 overlooked the fact that the sole purpose of the machine
12 is to accuse the defendant, and the sole purpose of the 6,
13 7, and 8 is to be used at trial against the defendant in
14 violation of Melendez and Brown, where this court says if
15 it's intended for litigation it's testimonial. They don't
16 use it for any other thing.

17 CHIEF JUDGE LIPPMAN: It doesn't matter whether
18 it mentions - - - whether the machine - - -

19 MR. CIRANDO: Has his name on it?

20 CHIEF JUDGE LIPPMAN: - - - mentions his name or
21 - - - anything to do with him?

22 MR. CIRANDO: No. When's the last time you
23 heard someone bringing a breathalyzer to a party so
24 everybody can - - - and the other thing about it's too
25 hard to go to Albany; how does the machine get there?

1 They take it to Albany. So if you take it to Albany - - -

2 JUDGE GRAFFEO: Could you - - -

3 MR. CIRANDO: - - - the person that takes it to
4 Albany - - -

5 JUDGE GRAFFEO: Could you elaborate what you're
6 suggesting, because I'm very concerned. We have hundreds
7 of justice and - - -

8 MR. CIRANDO: I'm not - - -

9 JUDGE GRAFFEO: - - - city courts and - - -

10 MR. CIRANDO: We - - -

11 JUDGE GRAFFEO: - - - village courts that are
12 doing - - -

13 MR. CIRANDO: You can't - - -

14 JUDGE GRAFFEO: - - - these DWI trials every
15 night.

16 MR. CIRANDO: You can't have somebody from
17 Albany testify in every case.

18 JUDGE GRAFFEO: Right, so are you - - -

19 MR. CIRANDO: So what do you do?

20 JUDGE GRAFFEO: Are you saying that the local
21 officer that goes to DCJS, do they just stand there while
22 somebody else calibrates the machine?

23 MR. CIRANDO: That's the way it is now, so they
24 can calibrate - - - they can be taught - - -

25 JUDGE GRAFFEO: But they're just standing there.

1 The defense - - -

2 MR. CIRANDO: No, I'm not saying - - -

3 JUDGE GRAFFEO: The defense attorneys are still
4 going to ask for the person who actually - - -

5 MR. CIRANDO: No, no. No, no.

6 JUDGE GRAFFEO: - - - did the calibration.

7 MR. CIRANDO: I am saying that - - - the first
8 thing, Exhibit 6 is a simulator solution that you run
9 through a machine to say it comes up with that so the lot
10 is okay. So Penn Yan police department gets Lot number 1,
11 which contains a lot of vials. So the officer goes to
12 Albany and he tests that lot for the Penn Yan Police
13 Department. So he comes back home and he can testify as
14 to how he calibrated - - - or that the simulator solution
15 is proper for these - - -

16 JUDGE GRAFFEO: The officers don't need any
17 special training or certification in order to do that
18 testing?

19 MR. CIRANDO: I don't believe so, no. No,
20 because they run it through the machine. I think that's
21 what he says. The certificate says he runs it through the
22 machine.

23 Number 2 is talking about the machine itself,
24 okay? Individual would have to be trained to calibrate
25 the machine to - - - what does he say in his certificate?

1 He says that they ran communication diagnostics and
2 supervisor test verified that the calibration was okay.
3 They're taught how to do that.

4 The other one - - - the other individual, "AJA -
5 - - ADJ filter wheel, calibrated instrument, ran subject
6 supervisor technician and diagnostic test, checked setup
7 voltage print and remote operation, verified calibration
8 okay." There's someone that trains them how to do that.
9 The net - - -

10 CHIEF JUDGE LIPPMAN: Okay.

11 MR. CIRANDO: The net - - -

12 CHIEF JUDGE LIPPMAN: Judge Pigott.

13 JUDGE PIGOTT: What's your cross-examination
14 going to be? I mean, if the person comes in and says
15 yeah, that's my signature, yeah, I signed that, and yeah,
16 I certified that.

17 MR. CIRANDO: What did you do?

18 JUDGE PIGOTT: No more questions. Hm?

19 MR. CIRANDO: What did you do?

20 JUDGE PIGOTT: Whatever it says on that paper.

21 MR. CIRANDO: Did you ever work for the Nassau
22 County Lab? Did you ever work for the Massachusetts
23 Criminal Laboratory?

24 JUDGE PIGOTT: Yeah, FBI.

25 MR. CIRANDO: And we'll start from there. But -

1 - -

2 JUDGE SMITH: You're saying every now and then
3 you might hit it lucky on one of these; you get a guy who
4 can't support - - -

5 MR. CIRANDO: We really don't want hit it lucky
6 - - -

7 JUDGE SMITH: - - - his calibration.

8 MR. CIRANDO: We really don't want to hit it
9 luck - - - oh, on that, yeah, but you don't want something
10 to happen where - - - I think the question was is that
11 someone gets lazy and just signs the certificates.

12 JUDGE SMITH: But what about - - - what happens
13 if, God forbid, the guy who's done the last 300
14 calibrations passes away?

15 MR. CIRANDO: No, I mean - - -

16 JUDGE SMITH: Are all the cases dead?

17 MR. CIRANDO: Well, I don't think you'd have 300
18 calibrations, in the sense of, I'm not saying you've got
19 to bring him from Albany, because if - - -

20 JUDGE SMITH: Okay. Here's your - - - your guy
21 in Penn Yan has been going to Albany every six months,
22 whatever it is, for the last seven years. He testifies in
23 every DWI case. Then, God forbid, he has a stroke. Now
24 what happens?

25 MR. CIRANDO: I guess they'll have to get

1 another person to go. I mean, sure - - -

2 JUDGE SMITH: And meanwhile, there's nobody - -
3 - those cases are going to have to be dismissed; they're
4 going to have no witness.

5 MR. CIRANDO: Well, you'd also - - - possibly,
6 you'd have the individual that's also in the lab in
7 Albany. In that case you could utilize that person, if
8 necessary. So I mean, it's not an insurmountable problem.
9 I'm sure that just saying - - - it's too simple an answer
10 to say it's not accusatory when, when you really look at
11 it, the whole picture, it's an accusatory thing.

12 CHIEF JUDGE LIPPMAN: Okay, counselor, thanks.

13 MR. CIRANDO: Thank you very much.

14 CHIEF JUDGE LIPPMAN: Thank you both.

15 MR. CIRANDO: Same to you.

16 CHIEF JUDGE LIPPMAN: Appreciate it.

17 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of PEOPLE v. ROBERT PEALER, No. 9 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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