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3047-09T2

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION - MIDDLESEX COUNTY
INDICTMENT NO. 07-10-1579
APP. DIV. DOCKET NO. A-3047-09-T2

STATE OF NEW JERSEY,

Complainant,

vs.

Transcript of Proceedings
(Motion)

PABLO MACHADO,

Defendant.

(With An Interpreter)

FILED
APPELLATE DIVISION

OCT 29 2010

Place: Middlesex County Courthouse
56 Paterson Street
New Brunswick, N.J. 08903

Date: DECEMBER 16, 2008

B E F O R E:

ASD
CLERK

THE HONORABLE BARBARA STOLTE, J.S.C.

TRANSCRIPT ORDERED BY: STEPHEN KIRSCH, ESQ., A.D.P.D.
(Designated Counsel Section)

A P P E A R A N C E S:

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Attorney for the State

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(Perez & Gonzalez)
Attorney for the Defendant

RECEIVED
APPELLATE DIVISION

OCT 29 2010

SUPERIOR COURT
OF NEW JERSEY

Georgeann Crowell, C.C.R.
Official Court Reporter
Middlesex County Courthouse
P.O. Box 964
New Brunswick, New Jersey



1 (Whereupon, the following hearing took place
2 with the use of a Spanish Interpreter.)

3 (Whereupon, the following discussion occurred
4 outside the presence of the jury.)

5 THE COURT: Thank you, folks. Please have a
6 seat.

7 All right. I wanted to come out, because I
8 know we had that issue before we left last evening,
9 regarding the phone number and the information coming
10 out before the jury.

11 I know we talked about some of the possible
12 issues. I wanted to hear Counsel regarding their
13 positions.

14 MR. SAMEIRO: I think I made my position
15 clear yesterday. I know that the defendant's phone
16 number was captured by the dispatcher. This was
17 presented to the police in a very, very reliable
18 manner. You know, doing a little research, as to the
19 comments to the hearsay rule. And, frankly, the
20 catch-all exception that applies to any situation, it
21 would be that, unfortunately, the New Jersey Rules
22 don't adopt that because --

23 THE COURT: Right --

24 MR. SAMEIRO: Because they do follow the
25 Federal counterpart, which is the basis for the rules

1 in the first place. You'll recall, back in the day,
2 when you talked about Rule 55 and Rule 63. I remember,
3 in those days, there is the switch to the Federal
4 Rules. But the Court, I guess, the Legislature,
5 specifically, those who take out the catch-all -- this
6 is what I think is interesting -- the catch-all deals
7 with scenarios like this. When you have the inherent
8 reliability, and I hate to say this, if it fit under
9 one of the other exceptions, and I think that is the
10 case. I can make it fit.

11 But it is obvious that, when the dispatcher
12 conveyed the information to the victim, he read it from
13 the actual caller ID. Let's start with the
14 proposition, that the caller ID technology is one
15 hundred percent reliable. I don't think anyone here is
16 going to dispute that. I'm not going to tell Counsel
17 or tell you, that any number, trapped in that caller
18 ID, doesn't one hundred percent, at all times, reflect
19 the actual number on the actual phone. Again, we have
20 to start with the premise that the evidence in the
21 actual electronic recordation from the phone, is from
22 the origin to this point, is one hundred percent
23 reliable.

24 So, with that, you have a dispatcher, looking
25 at his caller ID screen, and recording that



1 information, and giving it to the victim in this case.
2 I want to correct what I said a little bit yesterday.
3 I didn't have the benefit of my notes. We dealt with
4 this late in the afternoon. I want to tell you that,
5 the victim will say, that he was told, directly by the
6 dispatcher, what the number was. He was the one who
7 wrote it down on the piece of paper.

8 THE COURT: Okay. All right.

9 MR. SAMEIRO: And then gave that information
10 to Officer Bobadilla. There is absolutely nothing to
11 suggest that the number is not reliable. When you look
12 at the totality of the circumstances in this case, we
13 have a number given to the police, on the date of the
14 incident. And it matches the defendant's phone number,
15 which he, himself, provided two months later, when he
16 is arrested on the subsequent matter, not related.

17 It turns out that when the defendant was
18 arrested two months later, he gave the police the
19 address of 400 Lee Avenue, which is a unique address.
20 It is the same location where the victim was told to
21 drive to in this case. The victim, at four something
22 in the morning, got a call to pick somebody up at 58
23 Lee Avenue, to drive them to 400 Lee Avenue. 400 Lee
24 Avenue happens to be the defendant's address. How much
25 more reliable being that information be? We know that

1 the defendant gave us this same phone number when he
2 was arrested in June.

3 We know that he reported to the police, as
4 part of the pedigree information, contained in the
5 arrest report, that he lived at 400 Lee Avenue. So,
6 therefore, you'd have to think that the odds of the
7 victim, who doesn't know the defendant, getting the
8 defendant's very same phone number, would be one in a
9 million to get that right. And, frankly, it's the way
10 that they solved the case. I think that the jury needs
11 to know that. Now, let me say that, the fact that the
12 number was used doesn't eliminate the defenses that Mr.
13 Gonzalez can raise, regarding the number. He might say
14 that someone else had used the phone.

15 THE COURT: Right.

16 MR. SAMEIRO: That they responded to the
17 subpoena, and this is the information we got, the very
18 phone number. It doesn't have the defendant's name.
19 You see, the fact that I can admit that information,
20 doesn't deprive him of his right to argue, that it's
21 not the defendant's phone number.

22 THE COURT: Right.

23 MR. SAMEIRO: Based upon the other extrinsic
24 information, Judge, I don't know how else to say this,
25 to respond to that. I mean, it's that obvious, that



1 it's reliable.

2 THE COURT: Let me ask you this: This is
3 what I've been kind of wrestling with. If you had to
4 put it into an exception, what exception would you put
5 it into?

6 MR. SAMEIRO: Arguably, if somebody came in,
7 I think it could come in under a business record
8 potentially.

9 THE COURT: Then you need somebody just to
10 testify --

11 MR. SAMEIRO: We don't have the dispatcher.
12 It is unfortunate. And I was told by the victim, that
13 it is their normal practice. This, perhaps, adds to
14 the reliability. I shouldn't forget this part. That
15 it was the dispatcher's normal practice to record every
16 call that came in, and keep this information for two
17 weeks.

18 THE COURT: Okay.

19 MR. SAMEIRO: They recorded it in a log book.

20 THE COURT: I kind of assumed that they did.

21 MR. SAMEIRO: They did. But then, after two
22 weeks --

23 MR. GONZALEZ: We don't know if that is a
24 fact though.

25 MR. SAMEIRO: That is what they're saying,

1 what the victim is saying.

2 THE COURT: Okay.

3 MR. SAMEIRO: That is what was received by
4 Victoria Taxicab Company. That the dispatcher keeps
5 that information in a book.

6 THE COURT: Okay.

7 MR. SAMEIRO: After a while, they tape over
8 the surveillance tape, and they dispose of those
9 records. They keep them for two weeks, if any problems
10 may develop. That's what I learned about afterwards.
11 Then they have some sort of identifying information. I
12 mean, they do keep these records, but not forever.
13 There is some reliability as to their record-keeping,
14 or their note-taking.

15 THE COURT: What would be the defense to that
16 claim, that they got it wrong?

17 MR. SAMEIRO: Well, the defendant can simply
18 say, there is a mistake in the transcription. Hearsay
19 is prohibited, ostensibly. You don't have someone to
20 cross-examine on the stand.

21 THE COURT: What would change in the case, if
22 Counsel were to simply argue, that you got it wrong,
23 that they made a mistake? It is easy to transpose a
24 digit. Because, after all, if the dispatcher is going
25 to say, this is the number I recorded, and I wrote it,



1 he could challenge him. You'd go back and forth. He
2 would say, no, that is what I wrote.

3 MR. SAMEIRO: The victim is going to say,
4 this is what I gave the police. Officer Bobadilla is
5 going to say, this is what I recorded. By the way, the
6 entry of that information, in the police report is a
7 government record. The fact that we maintain that
8 information, and utilize it in the photo array process,
9 as a function of the Court -- government records or
10 business records exception. But this number was taken
11 down. It's not just that the victim reported the
12 number to the police. It's the best method, by which
13 the defendant was identified by the victim. The photo
14 array was put together. It is an important piece of
15 the puzzle.

16 THE COURT: Right.

17 MR. SAMEIRO: Everything that I'm saying to
18 the Court is reliable. It has to be reliable.

19 THE COURT: Your argument is that, there is
20 an exception, as to the business records. That is your
21 argument. That then it shouldn't be hearsay.

22 MR. SAMEIRO: I think we all agree that it's
23 hearsay. I would like to offer it for the truth of its
24 content. That's what I would like to do. But, as
25 Counsel alluded to yesterday, I could offer the

1 information, for a different reason, to explain why the
2 defendant's photograph appeared in the photo array.

3 THE COURT: Right.

4 MR. SAMEIRO: I'm entitled to do that, I
5 would argue.

6 THE COURT: Okay.

7 MR. SAMEIRO: You could then give a limiting
8 instruction on the nature and utilization of that phone
9 number.

10 THE COURT: That's right.

11 MR. SAMEIRO: But that's not my first
12 argument. I want it to come in substantively, as
13 identifiable and reliable. This case is all about
14 identification.

15 THE COURT: My question is: It doesn't fit
16 into one of the exceptions. But it is reliable. It's
17 hearsay, it's reliable. How does it come in?

18 MR. SAMEIRO: Well, I would say that, it
19 couldn't, because we're stuck with the exceptions as
20 the mechanism.

21 THE COURT: Okay.

22 MR. SAMEIRO: Because I will argue to the
23 Court, this is a present sense impression. Because
24 that's the only way the witness, slash, declarant -- he
25 is not really a witness -- it is a declarant -- that



1 the taxi dispatcher would be able to convey the
2 information. It is not as if he memorize that, and
3 then convey it at a different time. That is not what
4 the taxicab driver, the victim, that is why I say
5 present sense impression. I think, also, this is not
6 unlike a surveillance tape.

7 I think, if you give me a minute -- I am not
8 done -- if I can add --

9 MR. GONZALEZ: I would argue 803(c)(1),
10 present sense impression --

11 MR. SAMEIRO: I am not done with my argument,
12 Counsel.

13 THE COURT: Hold that thought. I'm reviewing
14 803(c)(5), to see if recorded recollection fits.

15 Okay.

16 MR. SAMEIRO: I don't know if that would
17 necessarily apply. Because I'm talking about a
18 witness, who, I guess, is unable to testify, fully,
19 accurately about the information. But, I think,
20 reading between the lines, the drafters of that
21 section, were trying to get at this notion. When you
22 put something in writing, it takes on value. And, in
23 this case, the number was recorded multiple times.

24 First of all, it was recorded by the
25 electronic instrument on the phone, of the taxicab

1 company's phone. Then they related the information,
2 and it was recorded on a piece of paper. Then it was
3 given to the police officer at headquarters, who put it
4 in his report. I guess the trend of this case would be
5 present sense impression.

6 Thank you, Judge.

7 THE COURT: All right. Thank you.

8 Mr. Gonzalez?

9 MR. GONZALEZ: First and foremost, Mr.
10 Sameiro had to search for an exception, in thinking
11 that there is an exception that existed in this
12 particular case. An exception does not exist. With
13 regard to the present sense impression, a present sense
14 impression is when a declarant says something directly
15 to the police. That is what the case law, that we have
16 looked at, says. And the key is, it doesn't have to be
17 a declarant, the police, to someone.

18 THE COURT: No, that's not true. You can
19 have hearsay that doesn't involve the police to
20 someone.

21 MR. GONZALEZ: To someone.

22 THE COURT: It just says --

23 MR. GONZALEZ: That is the way I looked at
24 it, Judge. First and foremost, Crawford is the key
25 case. What we should be focusing on period is the



1 reliability of that number. It cannot be challenged by
2 me, because I do not have the opportunity to
3 cross-examine that person.

4 THE COURT: The dispatcher.

5 MR. GONZALEZ: The dispatcher. The person
6 who actually saw what the number was on the phone.
7 Very simply, Mr. Sameiro said in his own argument, it
8 went from the phone to the person. To who? We don't
9 know who it was. Who was it? Then it went to Mr.
10 Cedillo. Then it went to the report. Far removed
11 hearsay, as far as Crawford is concerned.

12 It's cited in the -- at the end of the notes
13 section. Crawford is right across the board. The
14 hearsay issues in Crawford, I would say, doesn't apply.
15 This is not testimonial in nature. I don't believe the
16 dispatcher offered the information. What he was
17 thinking, he would have to testify about this, or in
18 any manner, shape, or form, did it come to the police
19 by way of any formal statement.

20 THE COURT: It doesn't have to -- Crawford
21 doesn't have to be a formal statement.

22 MR. GONZALEZ: But I'm arguing, as I
23 understand the citation, whether it is testimonial or
24 isn't. This is not testimonial in nature.

25 THE COURT: Okay.

1 MR. GONZALEZ: Well, first and foremost,
2 Crawford applies in this particular case. I think it's
3 clear. We don't have the opportunity -- He has the
4 right of confrontation, Sixth Amendment. We know --
5 You know Crawford. I'm not going to get into it. To
6 really test the reliability of that phone number, we
7 would have to be able to speak to the person who saw
8 that phone number in the caller ID, if it, in fact,
9 happened.

10 We don't know even know if he called the
11 number on the caller ID. We don't know if the caller
12 ID is there. We don't know all these different things.
13 The only person that could testify to that is the
14 person who, allegedly, told Mr. Cedillo about that
15 number. About the present sense impression, the guy
16 writes it down on a piece of paper. The alleged
17 victim, Wilmer Cedillo, writes it down on a piece of
18 paper. That piece of paper doesn't exist.

19 THE COURT: Maybe you can make that argument,
20 if that piece of paper existed. But it doesn't.

21 MR. GONZALEZ: Now, it's to the next level.
22 The only recordation of that number is now Officer
23 Bobadilla's recordation of that number, which is two
24 times removed now. Arguably, three. Because the first
25 time is on the phone. So, the only recordation, if



1 there is a recordation, there may have been a different
2 number. There may have been something else.

3 Now, it's nice for Mr. Sameiro to tell me how
4 to argue my case. If the phone number comes in, oh,
5 Mr. Gonzalez can then say, oh, it wasn't his phone. It
6 wasn't his phone number. Now, it is just 400 Lee
7 Avenue. So, you know, it is not a single address.
8 400 Lee Avenue is an address for a 124-unit apartment
9 complex.

10 So, although it is a coincidence, that we're
11 saying is reliable, it is not that reliable a
12 coincidence. They're bringing in facts and other
13 inconsistencies, that I am not going to get into. But
14 the reliable information can only be gleaned from,
15 again, the person who observed it. And it's not as
16 reliable as we think. Because many people live at 400
17 Lee Avenue.

18 MR. SAMEIRO: Judge, that's simply not true.
19 There will be no one here to testify as to that fact,
20 that 400 Lee Avenue is an address that applies to a
21 hundred different units. That is simply not true. And
22 no one will be here to testify to that fact. I would
23 invite Counsel to add a witness today from the
24 apartment complex, to say that. I would invite him.

25 MR. GONZALEZ: I will go at lunch time and

1 grab a person.

2 MR. SAMEIRO: That would be fine with me.

3 MR. GONZALEZ: If you allowed me to, I would.

4 MR. SAMEIRO: 400 Lee Avenue is written in
5 the police report.

6 MR. GONZALEZ: Just so you know, what he's
7 saying is entirely not true. In their own police
8 report, the address that was given by him -- I've been
9 to the complex. 400 Lee Avenue does not exist. The
10 building starts at 401. And the third building starts
11 at 301. The second building starts at 201. 400 Lee
12 Avenue is a house, not even a house. 400 Lee Avenue,
13 it's an entire complex. And, chances are, I won't get
14 into that.

15 THE COURT: All right.

16 MR. GONZALEZ: But that's what it is. It's
17 not a 124-unit apartment complex. It's a huge place.
18 I don't know how that is; but I'll get into it in other
19 ways.

20 Now, with regard to 803(c).

21 MR. SAMEIRO: Judge, I was there this
22 morning, and I told Counsel he would not be able to get
23 his information in. I photographed the scene. And I
24 have my own independent pictures that prove otherwise.
25 You may see those in rebuttal.



1 THE COURT: Okay. If we get that far.

2 MR. SAMEIRO: If we get that far.

3 THE COURT: Okay.

4 MR. SAMEIRO: Now, I'm saying that, because I
5 told Counsel, that I was there this morning, that I
6 took some pictures. I wasn't going to use them,
7 because he could never prove his allegations. We'll
8 deal with the other discovery violations in a minute.
9 We're touching on that. I got more information today
10 from the defense.

11 THE COURT: All right.

12 MR. GONZALEZ: I just want to get into the
13 certain cases, where in State vs. Marsh, in the notes
14 section of 803(c)(1), on a telephone statement from, I
15 believe, a police informant, someone who then tells the
16 police officer what's going on; but they want to remain
17 anonymous.

18 THE COURT: That's Marsh.

19 MR. GONZALEZ: Right. That is Marsh. They
20 want to remain anonymous. That statement can be deemed
21 reliable. A 911 call could be deemed reliable, if it
22 comes in. If it's an informant, there is inherent
23 reliability. The case law says, 911 calls are
24 inherently reliable.

25 Now, the present sense impression speaks to

1 the declarant. The declarant, in this particular case,
2 is not the person who made the observation, when we
3 look at this.

4 THE COURT: It says a statement of
5 observation, description or explanation of the event or
6 condition, made while, or immediately after, the
7 declarant was perceiving the event. It wasn't the
8 declarant, it was the dispatcher.

9 MR. GONZALEZ: Exactly. That would be the
10 declarant.

11 THE COURT: Right.

12 MR. GONZALEZ: So, we need the dispatcher.
13 Then you could use the present sense impression.

14 THE COURT: If the dispatcher was here.

15 MR. GONZALEZ: Wilmer Cedillo is not the
16 declarant.

17 THE COURT: He's the one who heard it.

18 MR. GONZALEZ: But he's not the declarant,
19 who saw something.

20 THE COURT: No, you are right.

21 MR. GONZALEZ: I think he perceived --

22 THE COURT: You are right. The dispatcher is
23 that individual.

24 MR. GONZALEZ: Any declarant. We're talking
25 about the declarant, your Honor. He came in and



1 perceived that, and wrote it down.

2 THE COURT: That would be different
3 information. If we didn't have the records.

4 MR. GONZALEZ: Right. Then he'd say, oh, I
5 wrote it down. This is what it is. The declarant is
6 the one who perceived the events. That is what is
7 included in 803(c)(1). In this case, Mr. Cedillo would
8 be the declarant.

9 MR. SAMEIRO: No.

10 MR. GONZALEZ: Yes. In this case, what the
11 State is trying to say, he would be the declarant. We
12 know he did not perceive the event, the phone call
13 coming in.

14 THE COURT: This is where I think -- Because
15 if you compare it to Marsh, the telephone statement
16 that comes into the police by the informant, who
17 insisted upon remaining anonymous. Now, witnessing an
18 event, that would be, for our purposes, as to the
19 informant, that would be the dispatcher. Made, while
20 witnessing an event, described in the statement, may be
21 inherently reliable, as to be admissible at trial.
22 It's an exception to the hearsay rule, under present
23 sense. So, I'm comparing the confidential informant to
24 the dispatcher.

25 MR. GONZALEZ: That is an absolutely right

1 comparison. That is who they're talking about. That
2 is being given straight to the police. This is being
3 given straight to Wilmer Cedillo, and then to the
4 police.

5 THE COURT: Well, he's going to bring it in
6 through Mr. Cedillo.

7 MR. GONZALEZ: He can't. What I'm saying is,
8 he can't, because he is not a police officer.

9 MR. SAMEIRO: It is not a requirement.

10 MR. GONZALEZ: But Crawford vs. Washington
11 says, I have the right to cross-examine any person that
12 sits there in that seat. And this is testimonial.

13 THE COURT: Okay.

14 MR. GONZALEZ: He tried to argue that it
15 wasn't testimonial.

16 THE COURT: That's the next step. You are
17 right. That is how the rules are. They refer to --
18 They talk about the exception. But then it says, the
19 rule is subject to Crawford vs. Washington.

20 MR. SAMEIRO: This is not testimonial.

21 THE COURT: It could be, it could not be.
22 It's not the same.

23 MR. SAMEIRO: The declarant would never
24 expect to testify to this event.

25 MR. GONZALEZ: That's one of the factors



1 certainly.

2 THE COURT: It doesn't matter. He's not
3 going to call him. If he had gotten that particular
4 person, we wouldn't even be here arguing this.

5 MR. GONZALEZ: Well, my understanding is, he
6 is not.

7 THE COURT: He is not available?

8 MR. SAMEIRO: No. He's long since left his
9 job. Frankly, the police officers worked with the
10 inherently reliable information that they received, and
11 caught this man. They didn't bother to find out who
12 the dispatcher was. They looked at the caller ID.
13 They didn't have to produce him, because it was that
14 reliable. The nature of the business, being what it
15 is, the dispatcher left. I don't know where he is.
16 Trust me, we have tried to find him. I asked Mr.
17 Cedillo, who knew who he was, where can we find him.
18 He is unavailable. Not that that matters for the
19 exception, the unavailability. That is not a
20 requirement.

21 MR. GONZALEZ: Judge, I think State vs. King
22 indicated that the statement was admissible, only if
23 the declarant actually perceived the event or the
24 condition, which is the statement, narrowly described,
25 the statement at the time of the perception. So, the

1 person perceiving the number is the declarant.

2 THE COURT: Right. Right. But the
3 declarant, that would come to court, would be the
4 declarant.

5 THE COURT: No, he's Wilmer Cedillo, who
6 never --

7 MR. GONZALEZ: But that's not what they're
8 asking. They're asking Mr. Cedillo -- They are asking
9 about the hearsay statement of the dispatcher to come
10 in through Cedillo. Normally, it would be -- not
11 normally -- in some cases, it would be a police
12 officer, who would be saying it. The declarant would
13 be the informant. The declarant, in this case, would
14 be the dispatcher, if he called the police. But he
15 called Mr. Cedillo. So, what the State is saying, they
16 want that out-of-court statement, that was made to Mr.
17 Cedillo, to come in, under a present sense impression.

18 Now, if we take a step forward, even if you
19 believe that, Judge --

20 THE COURT: Okay.

21 MR. GONZALEZ: -- then I still have Crawford.
22 We still have Crawford to deal with. The
23 unavailability of that particular witness has not been
24 stated before the Court. We know about the
25 unavailability and availability of witnesses. What the



1 next step is, did the State make an effort to find this
2 person.

3 THE COURT: It sounds like they did.

4 MR. SAMEIRO: Absolutely.

5 MR. GONZALEZ: It sounds like that. That's
6 what I just heard him say.

7 THE COURT: It sounds to me as if, he just
8 put on the record, the individual is gone from their
9 employment. And the Investigator tried to determine
10 where he is.

11 MR. SAMEIRO: Right. The recording does not
12 go back beyond two weeks. It wouldn't have been kept
13 with the number. Remember, I mentioned that before.

14 THE COURT: You did.

15 MR. GONZALEZ: Mr. Sameiro is making stuff
16 up.

17 THE COURT: I'm sorry?

18 MR. GONZALEZ: The State is clearly making
19 things up on the record. Nobody went there and checked
20 for the 104 Hearing.

21 MR. SAMEIRO: It was stipulated. I told you
22 that.

23 MR. GONZALEZ: With regard --

24 MR. SAMEIRO: Selesky did go out. He did
25 make a report.

1 MR. GONZALEZ: This is the Investigator that
2 actually did what Mr. Sameiro says. But wouldn't it be
3 in a report, if it actually happened? He is coming
4 before the Court saying this. This is unfounded in any
5 report. I would have them.

6 I would say that, whether or not Mr. Sameiro
7 is telling the truth about the unavailability of this
8 particular witness --

9 MR. SAMEIRO: If you want to call John
10 Selesky, he's in the back. He would know. We can do
11 that right now.

12 MR. GONZALEZ: Let's see whether or not --
13 Did he write a report? This is not about John Selesky.
14 He's going to say exactly what Mr. Sameiro said.

15 THE COURT: Certainly you can question him.
16 If he says, whatever he says, you can cross-examine him
17 regarding that.

18 MR. SAMEIRO: Ask him right now. Because he
19 is here. That would be fine. He did, in fact. I
20 think he kind of understood it. Everybody knew the
21 dispatcher was not available.

22 THE COURT: So, you're not necessarily in
23 agreement with that.

24 MR. GONZALEZ: So, if he did it yesterday,
25 when he determined that this person was unavailable --



1 THE COURT: Well, I haven't heard anything
2 yet. I don't know if it was yesterday, three months
3 ago. I don't know what exactly was done, if anything,
4 to even determine the availability, until I just found
5 out now, that they did it. I didn't know all the
6 aspects of the case. I certainly assumed that the
7 dispatcher was not available. And I didn't know that
8 there was a contention that he might be available, or
9 she. I don't know if it is a "he" or a "she."

10 MR. GONZALEZ: We have a person we can go
11 into a whole other issue, in determining the
12 unavailability of someone, whether or not there was
13 real efforts to find the person.

14 THE COURT: Oh, I agree.

15 In all honestly, I didn't know it was an
16 issue, I guess, that is the best way to put it, between
17 anybody.

18 MR. SAMEIRO: It's not.

19 THE COURT: You are thinking about bringing
20 in some hearsay.

21 MR. GONZALEZ: That shouldn't be entered in
22 through Crawford, through any of the rules.

23 Now, that takes us to the next step, if your
24 Honor even thought about it, we'd have to think about
25 the unavailability. If your Honor rules that the

1 number can't come in, then we don't have to think about
2 the unavailability. If your Honor thinks, under the
3 rules, that the number can come in, then we have to
4 think about the availability. And what the serious,
5 serious burden, that the State must prove, in order to
6 find that particular individual.

7 THE COURT: I think that is part and parcel
8 to making a decision. I don't think I can rule one way
9 or the other until I know that.

10 MR. GONZALEZ: And regarding the
11 unavailability, or lack thereof, does your Honor intend
12 -- based on what we have now -- does your Honor intend
13 on allowing the hearsay statement in? Saying that it's
14 an exception, through present sense impression?

15 THE COURT: Well, not just the present sense
16 impression. If it is present sense impression, then is
17 it testimonial or non-testimonial. That is the next
18 issue. That's what the Court has got to determine.

19 MR. GONZALEZ: I mean, I don't think --

20 THE COURT: But you know what, it's
21 interesting that you should say that. But, in all of
22 the courses, that I have gone to, for this, one would
23 think it was testimonial. It's not as simple as that
24 by any means. You can have a very similar set of
25 facts, where the Courts have ruled it is testimonial on



1 one, and non-testimonial on another. Not because it's
2 a verbal statement. That doesn't mean it is
3 testimonial. That is one of the factors, when somebody
4 says, it is used in a criminal matter or investigation,
5 which arguably --

6 MR. SAMEIRO: By that person.

7 THE COURT: By that person.

8 MR. GONZALEZ: Yes, Judge. That is an
9 example.

10 THE COURT: There are many examples. Courts
11 have gone all different ways with that.

12 MR. GONZALEZ: I want to present an example,
13 just because, how about a person who witnesses a
14 murder?

15 THE COURT: All right.

16 MR. GONZALEZ: Person A -- No one ever points
17 to Person A. Person A calls Person B on the phone.
18 Person B says, oh, he told me this.

19 THE COURT: Right.

20 MR. GONZALEZ: What he saw, whatever. Then
21 Person B says, that is not what he says to the police.
22 He comes into court. In other words, forget this.
23 That person is not deemed to be reliable. Any defense
24 attorney would stand on their head, saying that the
25 most important person that is testifying in this, that

1 can tell us what happened is Person A.

2 THE COURT: Okay.

3 MR. GONZALEZ: That is the most reliable
4 information, Person A.

5 THE COURT: Okay.

6 MR. GONZALEZ: If we are not allowed the
7 opportunity to cross-examine that person, then it can't
8 come in.

9 THE COURT: Okay.

10 MR. GONZALEZ: This is the same thing.

11 THE COURT: That is Crawford.

12 MR. GONZALEZ: This is an exact example of
13 that. That is what I'm talking about here. The person
14 doesn't witness a murder. He witnesses a phone number.

15 THE COURT: Right.

16 MR. GONZALEZ: Now, he then reports that to
17 Person B. Then it gets to the police over here. But
18 it's a description, any description, given --

19 THE COURT: Right.

20 MR. GONZALEZ: -- wouldn't be allowed in.
21 And I'm standing on my head, saying that there's an
22 objection. There is no exception. And Crawford
23 negates that exception. But it's going to be
24 testimonial.

25 THE COURT: I understand what your argument



1 is. I truly do.

2 MR. GONZALEZ: 'I think that's the best
3 example. Your Honor would have let in a statement, or
4 wouldn't have let in a statement in a murder case
5 probably.

6 THE COURT: In every single case ever since.
7 That is one thing, I think, we do learn from Crawford.
8 Every one of them has to be evaluated on their own, as
9 to whether they are testimonial or non-testimonial.

10 MR. GONZALEZ: The fact that it is offered,
11 to prove the truth of the matter asserted, makes it
12 testimonial.

13 THE COURT: No, it does not. Just simply
14 that --

15 MR. GONZALEZ: That would mean that every
16 single item is then subject to not coming in, or always
17 testimonial. Sometimes these statements, certain 911
18 calls, have even been determined to be non-testimonial.
19 Crawford didn't eliminate the exceptions.

20 THE COURT: They're still there. Certainly
21 not hearsay. Because they have to be evaluated, case
22 by case. That we can do it easier.

23 MR. GONZALEZ: Another example is a chemist.
24 In his report, or in the lab report, done by the lab
25 technician. That is where Crawford comes from. It

1 comes from a lab report. Basically, Crawford is all
2 new case law. In New Jersey, with regard to, with
3 regard to Crawford. And Crawford talks about a lab
4 report. That, in order for a person -- although we get
5 that lab report in the future -- which could have been
6 deemed to be a business record.

7 THE COURT: Right.

8 MR. GONZALEZ: It's actually a lab report
9 that comes in as a business record.

10 THE COURT: If you have an exception; but the
11 lab report was totally separate.

12 Okay. Let's get off that subject. There are
13 chemists in the State Police Laboratory. They
14 understand that the lab reports are being used in
15 criminal proceedings. They don't get to be
16 testimonial. In the case of the dispatcher, the
17 dispatcher is trying to help out, by giving the
18 information that is right in front of him, on the
19 caller ID.

20 I think it's important, in Crawford, it also
21 talks about statements are non-testimonial, when they
22 are made in the course of police interrogation, under
23 circumstances objectively indicating, that the primary
24 purpose of the interrogation is to enable the police
25 and to assist the police in an ongoing emergency. They



1 are testimonial, when the circumstances objectively
2 indicate, in such an ongoing emergency, that the
3 primary purpose of the investigation is to establish
4 proof of past events, that are potentially relevant to
5 the later prosecution.

6 So, there is no blanket rule, whether the
7 statement, that anybody obtained, by the police, from
8 witnesses, or victims, are testimonial or not. In this
9 case, we don't have the police. Being the individual,
10 Mr. Cedillo, received this from the person who received
11 the information.

12 MR. GONZALEZ: Perhaps, the best way to
13 determine that statement, that you were reading from
14 the opinion, is the former is really the
15 fact-gathering, and the latter is the evidence
16 collection. When you are collecting evidence for a
17 prosecution, you're collecting information that you're
18 going to be putting forth.

19 The police, of course, are the
20 fact-gatherers. Well, they took the report from the
21 victim, concerning the event. The victim walked in and
22 reported what occurred. Officer Bobadilla was there.
23 He took it down. They didn't make an arrest until the
24 reliability of that number was proven, when the
25 defendant, himself, gave the number to them, two months

1 later, in a subsequent arrest.

2 Judge, the case of State vs. Boretsky, that
3 was a 911 call. I believe, Judge Mulvihill. It was
4 Joe Benedict. Where that case came from a 911 call.
5 Whether the 911 call was inherently reliable. If the
6 dispatcher had called 911, and said this happened,
7 then, I think, you could let it in. But the dispatcher
8 didn't call 911. In fact, there is no 911 call
9 whatsoever. It's a walk-in.

10 So, you're taking it a step further. If we
11 just go to the statements made to Cedillo, no police
12 involvement. But there doesn't have to be police
13 involvement, when there is a hearsay statement made.
14 And Cedillo is the declarant. And he makes it to Mr.
15 Cedillo.

16 THE COURT: Okay.

17 MR. GONZALEZ: I think that is paramount to
18 the case. If your Honor needs a moment, I'm not
19 saying, because it's such a difficult decision. I
20 think this decision will dictate where the case goes.
21 How it's defended. What's going on in the case.

22 I would like, personally, on behalf of my
23 client, on behalf of this Court, so, it won't come
24 back, so, we don't make a mistake. I would ask your
25 Honor to think about it. Maybe speak to other Judges.



1 THE COURT: I think it's right here. I
2 really think it's right here. I think that you just
3 have to look at the facts. You have got to take one
4 step at a time. Does it, in fact, meet the
5 requirements of present sense impression. If it does,
6 does it violate the law from Crawford. That's how it
7 is to me. That's simply how it is. How it plays out.

8 Again, every Court, when they are faced with
9 an issue, has to look at the facts, determine whether
10 it is testimonial or non-testimonial. Therefore,
11 subject to not being let in, because of the inability
12 to cross-examine.

13 MR. SAMEIRO: Judge, I would ask that you
14 make this very simple call, without talking to any
15 other Judges. I think it is a very straightforward
16 issue. Notwithstanding, the confusion. The confusion
17 that Crawford, has given to the practitioners out
18 there.

19 One thing that Counsel hasn't talked about is
20 the reliability of the phone number. The reason why
21 you should rule in favor of the State. He has not said
22 one iota how this information is not reliable, how it
23 could be mistaken, when it's the same number, that the
24 defendant gave to the police when he was arrested. I
25 feel like a broken record here. But I have to

1 emphasize this point.

2 THE COURT: I'm going to take a few minutes
3 to read through this, and write my position down. Then
4 I'll put it on the record.

5 MR. GONZALEZ: Testing the reliability, as
6 Mr. Sameiro says can only be done, if we're allowed the
7 opportunity to cross-examine the person who actually
8 witnessed the event.

9 THE COURT: Okay. All right. Give me just a
10 little bit. I'll come out and put my decision on the
11 record.

12 MR. SAMEIRO: Thank you.

13 MR. GONZALEZ: Thank you.

14 THE COURT: Thank you.

15 (Whereupon, a short recess was taken.)

16 (Whereupon, the hearing continued outside the
17 presence of the jury.)

18 THE COURT: Okay. We're back on the record
19 with our trial. Okay. There was one thing I was going
20 to get from Mr. Sameiro. You had given my Law Clerk, I
21 think everybody was in agreement regarding the police
22 report. Is that what you gave Mr. Boda?

23 MR. SAMEIRO: I think I gave him three
24 reports. The initial report that Officer Bobadilla
25 took. John Selesky's follow-up report. The



1 supplementary investigation. And then the report from
2 Officer Chang, that memorialized the defendant's phone
3 number and address, from the subsequent arrest that
4 took place sometime in June. This incident taking
5 place in April.

6 THE COURT: Okay.

7 MR. SAMEIRO: Of course, he supplemented his
8 report. Some of the representations may not be
9 reflected in those reports.

10 THE COURT: That's what I wanted to
11 specifically look at. I just wanted to ask. I don't
12 see that.

13 Here is my question to you: Mr. Cedillo
14 contacts the dispatcher himself; correct?

15 MR. SAMEIRO: Right after the crime.

16 THE COURT: Do you know what he says to him
17 generally?

18 MR. SAMEIRO: Well, generally, it's "I've
19 been robbed. They took my money." They have a
20 conversation about it. Generally, "I've been robbed of
21 my money."

22 THE COURT: Does he ask him for his phone
23 number? How does that go?

24 MR. SAMEIRO: I, frankly, don't know whether
25 he asked him, or whether the dispatcher told him. But

1 it came up in the conversation, you know, of the
2 victim, who, obviously, recovered from this traumatic
3 event. And he did the best that he could to report to
4 his employer what happened. And it took time to get
5 ready to go to the police.

6 He didn't go to the police immediately. He
7 did it within an hour, if I'm not mistaken. He went
8 home, cleaned up a little bit, because he had been
9 struck in the face. And, so, he may have had one more
10 conversation with the dispatcher. We'll get that out
11 from him. I just didn't write it down, as to how it
12 came out.

13 THE COURT: All right.

14 MR. SAMEIRO: But there is conversation. And
15 I'm sure the initial reason, to call the dispatcher,
16 was to tell him that he had been robbed.

17 THE COURT: Okay. All right.

18 MR. GONZALEZ: Judge, if I can maybe
19 supplement with one more thing. I don't mean to beat a
20 dead horse. In consideration of this, and then going
21 to the Crawford issue, and determining the
22 unavailability of someone, of a particular witness,
23 unavailability is defined in Rule 804.

24 THE COURT: Well, that's fine, if it's a
25 testimonial statement.



1 MR. GONZALEZ: Right. But then I'm not sure
2 -- I, of course, argue that it's testimonial.

3 THE COURT: No. I agree. I know.

4 MR. GONZALEZ: And availability is defined in
5 804. Unavailability deals with people who are already
6 identified. And then they become unavailable as a
7 result of a death, as a result of a privilege, as a
8 result of various other examples.

9 Now, unavailability of an unknown witness
10 can never be determined, because that witness is
11 unknown. So, we don't then know whether he's available
12 or not. We don't know whether he moved out of state.
13 That, essentially, means that we're dealing with a
14 person, that we don't know who they are.

15 In determining the unavailability of that
16 person themselves, it has to satisfy Rule 804. And the
17 State has to make a good faith effort to make that
18 particular person present. But that's an identified
19 person. We're dealing with their unavailability.
20 We're dealing with a non-identified person.

21 Unavailability doesn't apply. So, as far as Crawford,
22 the weighing of the unavailability, the nature of any
23 particular witness, that person needs to have been
24 identified. That's, basically, what I'm saying.

25 THE COURT: Okay.

1 Rob, do you have this police report?

2 I just asked my Law Clerk to grab the police
3 report. That's what I wanted to look at. Because,
4 when the Court is looking to the analysis, regarding
5 whether something is testimonial or non-testimonial,
6 the Court has to look at certain factors that are
7 elicited. And I think that both Counsel would agree,
8 there is certainly a number of examples, of what could
9 be testimonial, what may be non-testimonial.

10 MR. SAMEIRO: Which report do you need? I
11 have copies here.

12 THE COURT: It's not the last one.

13 MR. SAMEIRO: It was probably Bobadilla's
14 report.

15 THE COURT: Okay.

16 MR. SAMEIRO: Here you go.

17 THE COURT: Thank you.

18 Okay. All right. Really at issue is a
19 statement, in this case, from a dispatcher, where the
20 dispatcher gave a phone number to the alleged victim,
21 Mr. Cedillo. The State wants to put in that
22 information. And they're arguing, I think we all
23 agree, a hearsay statement. Asking for it to come in
24 for the truth of it. So, therefore, it is an
25 out-of-court statement, being offered for the truth.



1 The question then becomes, as I have asked
2 the State, what exception are they arguing, that the
3 statement would come in. Their position is, that it is
4 present sense impression. I think I would have marked
5 it. Present sense impression, under 803(c)(1). This
6 is a statement of observations, descriptions or
7 explanations of the events or the condition, made
8 while, or immediately after the declarant was
9 perceiving the event or condition, without an
10 opportunity to deliberate or fabricate.

11 Now, I note that the defendant objects -- the
12 defense objects -- indicating that this is not -- that
13 that particular exception does not apply to this case.
14 As it applies to this case, I'm looking at it, not as
15 to the police officer; but to the statement made to Mr.
16 Cedillo, from the dispatcher. I find that, under the
17 present sense impression requirements for that, that
18 the statements to Mr. Cedillo, from the dispatcher, it
19 could come in as an exception.

20 That statement can come in under the present
21 sense impression of the dispatcher. What the police
22 report indicates is, that the victim, through Patrolman
23 Bobadilla's report, goes through information as to the
24 alleged crime. Towards the end, it says, that the
25 victim then got up, called the job. He asked for the

1 phone number. He called the dispatcher. The
2 dispatcher had caller ID. And the number that he had
3 was -- and it's listed.

4 Therefore, I find that that statement, from
5 the dispatcher, the declarant, is made from his
6 observation of the phone number. Quite candidly, it
7 appears to be not within a long period of time after,
8 and he gave that information to the alleged victim in
9 the case. So, arguably, it meets the requirements of
10 the present sense impression, it can come in under that
11 particular exception.

12 And I look to that State vs. Marsh case,
13 where it talks about -- Now, this is to the police, by
14 an informant, who insisted on remaining anonymous, made
15 while witnessing the event, described in the statement,
16 that may be inherently reliable. So, that is
17 admissible at trial as an exception to the hearsay
18 rule. It's interesting to note, that this is a
19 telephone statement to the police. But a hearsay
20 statement doesn't have to be to the police to be
21 believed. They found it inherently reliable, arguably.
22 But it was made to the police.

23 I think we have something a little different
24 here. I think what makes it also inherently reliable,
25 is that report sometime later, which also has the same



1 phone number, which is the phone number that our
2 defendant gives in the pedigree information of the
3 arrest report. So, I can see an analogy there. And I
4 find, under a present sense impression, the statement
5 could come in as an exception to hearsay. Now, that
6 doesn't end the inquiry. Because the rule, as to the
7 exceptions, subject to Crawford vs. Washington. And
8 that is 54 -- excuse me -- 541 US, a 2004 case, page
9 36.

10 That held that, where a statement is
11 testimonial, it is subject to the confrontation clause,
12 and may only be admitted if the declarant is
13 unavailable, and the defendant has had a prior
14 opportunity to cross-examine the witness. And that's
15 where a statement is deemed testimonial. So, the
16 question is then, under Crawford, was the statement,
17 given by the dispatcher to Mr. Cedillo, testimonial or
18 non-testimonial. Then we turn to the discussion of
19 that under 802, where that expounds, so to speak, on
20 Crawford.

21 Now, when I looked to the evidence rules,
22 here, again, it refers to, nevertheless, the hearsay
23 evidence, that falls within an exception to the hearsay
24 rules, may still not be admissible, where hearsay
25 evidence is considered to be testimonial. The Supreme

1 Court of the United States has a limited index of such
2 evidence, regardless of whether it falls under an
3 exception to the hearsay rule or not.

4 In Crawford, the Court ruled that a
5 testimonial statement of absence, the statement is
6 subject to the confrontation clause, and may not be
7 admitted against an accused in a criminal trial, unless
8 the declarant is unavailable, and the defendant has had
9 a prior opportunity to cross-examine the declarant.

10 As to the meaning of testimonial, the Court
11 concluded at a minimum, it includes prior testimony, at
12 a preliminary hearing, prior testimony before a Grand
13 Jury, or at an earlier trial, as well as statements
14 made during the police interrogation. All of which
15 has the common nucleus. That is, a declarant would
16 reasonably believe that the statement would be later
17 used at the trial. But the Court didn't give a precise
18 definition to testimonial.

19 It went on further, in Davis vs. Washington,
20 to go through an analysis, at 547, 813, 2006,
21 discussing testimonial and non-testimonial. It says,
22 statements are non-testimonial when made in the course
23 of a police interrogation, under the circumstances,
24 objectively indicating that the primary purpose of the
25 interrogation, is to enable the police assistance, to



1 meet on ongoing emergency.

2 They are testimonial when the circumstances
3 objectively indicating that no such ongoing emergency
4 exists, and that the primary purpose of the
5 interrogation is to establish or prove the past events
6 are, potentially, relevant to later prosecution.

7 The cases further go on, in 2007, which is
8 State vs. JA, 385 New Jersey Super 544. This was an
9 Appellate Division case, 2006. And cert was granted.
10 191 New Jersey 317, 2007, it held that there is no
11 blanket rule whether a statement obtained by the
12 police, or the victims, are testimonial or not.
13 Rather, each case is fact specific, and must be decided
14 on the totality of the circumstances.

15 The factors that may be considered include,
16 the type of statement made, the intent of the
17 declarant, and the purpose of the official procedure,
18 by which that statement was obtained. We don't have an
19 official procedure by which the statement was obtained.
20 But I can then consider, when I compare the testimonial
21 versus the non-testimonial, that guidance.

22 We don't clearly have any prior testimony at
23 a hearing. We don't have a Grand Jury. We don't have
24 testimony regarding a former trial. Or a statement
25 made during a police interrogation. We don't have any

1 circumstances, that I can see, where this statement was
2 made, in furtherance of a potential trial. Instead,
3 what we have, I'm looking to those factors, as a simple
4 statement made by a dispatcher of what the phone number
5 was, to Mr. Cedillo. The intent of the declarant was
6 just some answer to this question that was given, as to
7 what is the phone number, where did you send me to, or
8 where did that come from.

9 So, when I look to these factors, of the type
10 of statement made, it was simply that number. The
11 intent of the declarant is just to give the information
12 to the alleged victim. Not for it to be used in a
13 further, later prosecution. Obtained, somewhat
14 objectively, from this dispatcher. So, there is no
15 sharing of a nucleus. There is no information, that
16 the declarant would reasonably believe, that the
17 statement would be later used at the trial.

18 So, therefore, from the Court's prospective,
19 it looks to this Court, that it's non-testimonial.
20 Then the issue of availability is not an issue here.
21 But if the Court finds it's non-testimonial, the
22 unavailability or availability, is not at issue. It is
23 only at issue if it's testimonial in nature. Since I'm
24 finding that it is non-testimonial, then that issue is
25 not one for this Court to determine.



1 Therefore, I find that the defendant's right
2 of confrontation is not violated, despite the lack of
3 opportunity to cross-examine the declarant. The
4 statement that has been admitted, as a present sense
5 impression, because the statement was non-testimonial.
6 So, therefore, I do allow that statement in, under that
7 reasoning.

8 MR. SAMEIRO: Thank you.

9 THE COURT: All right.

10 Let me give you back your police report.

11 MR. SAMEIRO: Thank you, your Honor.

12 MR. GONZALEZ: Judge, I'd just like to note,
13 for the record, that there is an ongoing objection.

14 THE COURT: I will note that objection. I
15 will incorporate all your arguments into that.

16 MR. GONZALEZ: Right.

17 THE COURT: Okay. Now, it is a little later
18 than we anticipated. Let me ask you, are we ready, at
19 least, to bring the jury in, and I can give them their
20 initial instructions? And you think we can open?

21 It's 20 to 12. My preliminary instructions
22 are about 15, 20 minutes. That will probably take us
23 to 12. I do not like to break up the openings.

24 MR. SAMEIRO: If we break at 12:00 and have
25 them come back at 1:00, then we don't lose the time.

1 And we can roll along. I have all my witnesses here.
2 I'm ready to go forward. So, that would be my
3 preference.

4 MR. GONZALEZ: Just so you know, Judge, I'm
5 not going to be long on my opening.

6 THE COURT: Sometimes openings aren't all
7 that long.

8 MR. SAMEIRO: I expect to be, at least, 30
9 minutes on mine.

10 THE COURT: Then that answers my question.
11 Then what I'll do -- Let me just ask my staff first.
12 Are you okay to break at 12:00, and come back at 1:00?

13 Okay. Then that's what we'll do. We'll
14 bring them up. Let them go to lunch. Have them come
15 back right at 1:00. Then we'll have the openings at
16 that time.

17 MR. SAMEIRO: Judge, can you let them know
18 that both Counsel and I were here. We weren't stuck in
19 traffic. That we had to deal with some issues?

20 THE COURT: I will never have them hold it
21 against you. No. I will take the responsibility. I
22 will tell them that I had to deal with another matter.
23 I will also tell them, that you were all here promptly.

24 That we had other matters, as well as issues
25 regarding our case. We were dealing with other things.



1 We had that sentencing.
2 MR. SAMEIRO: Okay.
3 MR. GONZALEZ: Okay.
4 THE SHERIFF'S OFFICER: They're on the floor.
5 THE COURT: Okay. The jury is on the floor.
6 (Whereupon, the motion concluded.)
7 (Whereupon, the rest of the day's proceedings
8 was previously transcribed in a separate transcript.)
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C E R T I F I C A T I O N

I, **GEORGEANN CROWELL, C.C.R.**, License Number **XI00983**, an Official Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of my stenographic notes taken in the above matter to the best of my knowledge and ability.

Georgeann Crowell, C.C.R.

Georgeann Crowell, C.C.R.
Official Court Reporter
Middlesex County Courthouse
P.O. Box 964
New Brunswick, New Jersey

Date: OCTOBER 21, 2010

