

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2010-2260
Plaintiff-Appellee,	:	On Appeal from the Cuyahoga
v.	:	County Court of Appeals,
JAMES D. HOOD,	:	Eighth Appellate District
Defendant-Appellant.	:	Court of Appeals
	:	Case No. 93854

REPLY BRIEF OF APPELLANT JAMES D. HOOD

OFFICE OF THE
OHIO PUBLIC DEFENDER

MELISSA M. PRENDERGAST #0075482
Assistant State Public Defender
(Counsel of Record)

250 East Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - FAX
melissa.prendergast@opd.ohio.gov

Counsel for Appellant James. D. Hood

WILLIAM D. MASON #0037540
Cuyahoga County Prosecutor

KRISTIN L. SOBIESKI #0071523
Assistant Prosecuting Attorney
(Counsel of Record)

The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7619
(216) 698-2270 – FAX

Counsel for Appellee State of Ohio

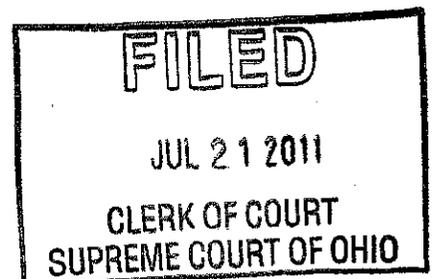


TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE AND FACTS.....1

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....1

Proposition of Law: Cell phone records are not admissible as business records without proper authentication. The admission of unauthenticated cell phone records under the business records exception violates the Confrontation Clause of the Sixth Amendment to the United States Constitution.....1

I. Introduction1

II. Under *Melendez-Diaz*, the admission of the cell phone records without cross-examination of the preparer of the records violated the Sixth Amendment.....3

III. The admission of the cellular telephone records was prejudicial.....7

IV. This appeal was not improvidently allowed.....10

V. Conclusion.....11

CERTIFICATE OF SERVICE12

TABLE OF AUTHORITIES

Page No.

CASES:

<i>Crawford v. Washington</i> (2004), 541 U.S. 36.....	<i>passim</i>
<i>Melendez-Diaz v. Massachusetts</i> (2009), 557 U.S. ___, 129 S.Ct. 2527	<i>passim</i>
<i>State v. Madrigal</i> , 87 Ohio St.3d 378 (2000).....	8
<i>Smith v. State</i> , 839 N.E.2d 780 (Ind. Ct. App. 2005)	6
<i>State v. Hood</i> , Cuyahoga App. No. 93854, 2010-Ohio-5477.....	3
<i>Tabaka v. Dist. of Columbia</i> , 976 A.2d 173 (D.C. Ct. App. 2009)	5
<i>U.S. v. Green</i> , 396 Fed. Appx. 573 (11th Cir. 2010).....	6
<i>U.S. v. Yeley-Davis</i> , 632 F.3d 673 (10th Cir. 2011).....	6
<i>United States v. Madarikan</i> , 356 Fed. Appx. 532, 534 (2nd Cir. 2009)	5
<i>United States v. Martinez-Rios</i> , 595 F.3d 581 (5th Cir. 2010)	4
<i>United States v. Orozco-Acosta</i> , 607 F.3d 1156 (9th Cir. 2010).....	4
<i>Virgin Islands v. Gumbs</i> , No. 10-3342, 2011 U.S. App. LEXIS 9322 (3rd Cir. May 4, 2011)	4

CONSTITUTIONAL PROVISIONS:

Sixth Amendment, United States Constitution	<i>passim</i>
---	---------------

STATEMENT OF THE CASE AND FACTS

Mr. Hood adheres to both the statement of the case and the statement of the facts contained within his previously filed merit brief.

ARGUMENT

PROPOSITION OF LAW

Cell phone records are not admissible as business records without proper authentication. The admission of unauthenticated cell phone records under the business records exception violates the Confrontation Clause of the Sixth Amendment to the United States Constitution.

I. Introduction

This Court must determine whether cell phone records, created for the purpose of proving or establishing some fact at a criminal trial, can be testimonial for purposes of the Sixth Amendment's Confrontation Clause. Appellee and Amicus Curiae Ohio Attorney General Michael DeWine say that cell phone records are never testimonial, that these records are simply business records, regardless of how the records are used at trial or why they are created for that use. In so arguing, both Appellee and Amicus Curiae oversimplify the issue and employ the most widely used rationale to avoid applying *Crawford* to forensic evidence: the business-record exception. However, whether a particular piece of evidence is admissible under the hearsay-rule exception

is beside the point.¹ The issue is whether the evidence is "testimonial." And for the reasons set forth in Mr. Hood's previously filed merit brief and herein, this Court should reject the contentions of the State and Amicus Curiae and hold that cell phone records can be testimonial under *Crawford* and that, absent unavailability, a criminal defendant must be allowed to test the reliability of that evidence through cross-examination of the individual who prepared the records. Further, contrary to the State's hyperbole that the evidence of Mr. Hood's guilt was overwhelming, the evidence offered at his trial, absent the corroborating cell phone records, was unconvincing. Admission of the more tangible cell phone records, offered to corroborate co-defendant Kareem Hill's shaky testimony, was not harmless beyond a reasonable doubt.

¹ Although, in addition to the Confrontation Clause problem brought on by the use and admission of the cell phone records at Mr. Hood's trial, the State failed to authenticate the records under the business-record exception. Thus, should this Court find no Confrontation Clause violation, in the alternative, it should hold that the admission of the records absent authentication was prejudicial error and vacate Mr. Hood's conviction.

II. Under *Melendez-Diaz*, the admission of the cell phone records without cross-examination of the preparer of the records violated the Sixth Amendment.²

The cell phone records admitted at Mr. Hood's trial are a patent example of testimonial hearsay under *Melendez-Diaz*, since the records signify the preparer's attestation to the authenticity of the records, and to the identity and significance of the information contained within the records. See 129 S. Ct. at 2539. Neither the records' routine nature nor their alleged status as business records overcomes the fact that the records were prepared specifically to provide evidence against the defendant in a criminal trial. And because the preparer of the cell phone records was not subject to cross-examination, Mr. Hood had no opportunity to cross-examine on infirmities in the evidence, the breadth of the information searched and provided, the method of collection, or on the substantive significance of the records, i.e. tying specific cell phone numbers to certain locations and times.

In making the sweeping assertion that all business records are "non-testimonial," the State argues that the admission of the cell phone records did not offend the Confrontation Clause because the records "constitute business records."

² Amicus Curiae contends that Mr. Hood failed to object at trial on Confrontation Clause grounds to the admission of the cellular telephone records at issue, yet admits that the State failed to argue waiver on appeal. (Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellee State of Ohio, p. 4, n. 1). Mr. Hood submits that his objection at trial, while vague, was sufficient to raise a Confrontation Clause argument on appeal, as evidenced by the lack of any waiver discussion in the appellate court's decision. *State v. Hood*, Cuyahoga App. No. 93854, 2010-Ohio-5477.

(Merit Brief of Appellee, p. 12). The State's argument seeks to distance its case against Mr. Hood from its request, admission, and use of the cell phone records at his murder trial. The State reasons that the cell phone records have none of the features of a forensic report created in a laboratory to determine whether a substance is an illegal drug and that "the review of cell phone records does not require professional judgment calls on the part of a trained analyst." (Id. at p. 15). However, the State's argument ignores the fact that in *Melendez-Diaz*, the Supreme Court established that neither an attested fact's routine nature nor its being memorialized in a business or public agency record overcomes the confrontation requirements of the Sixth Amendment. *Melendez-Diaz*, 129 S.Ct. at 2536.

Federal and state courts have likewise held that *Crawford* and *Melendez-Diaz* proscribe the use and admission of a "certificate of non-existence of record" ("CNR") at criminal trial if the preparer of the CNR is not subject to cross-examination. See *United States v. Orozco-Acosta* (9th Cir. 2010), 607 F.3d 1156, 1161-62, n. 3 (holding that the government was "well-advised" to concede that the CNR used at Orozco-Acosta's trial was testimonial under *Melendez-Diaz*); see, also, *United States v. Martinez-Rios* (5th Cir. 2010), 595 F.3d 581, 585 (holding that *Melendez-Diaz* called prior cases holding a CNR akin to an ordinary business record and not testimonial into doubt); *Virgin Islands v. Gumbs* (3rd Cir. May 4, 2011), No. 10-3342, 2011 U.S. App. LEXIS 9322, at *7 (holding admission of CNR to prove Gumbs was not licensed to carry a gun violates the Sixth

Amendment); *United States v. Madarikan* (2nd Cir. 2009), 356 Fed. Appx. 532, 534; *Tabaka v. Dist. of Columbia* (D.C. Ct. App. 2009), 976 A.2d 173, 175-76 (“The Supreme Court’s analysis [in *Melendez-Diaz*] conclusively shows that the CNR in this case, ‘a clerk’s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it,’ [internal citation omitted] was inadmissible over objection without corresponding testimony by the DMV official who had performed the search.”).

The cell phone records used and admitted in Mr. Hood’s trial are directly analogous to the CNRs involved in the above-cited cases, and this Court should take guidance from the holdings in those cases. The focus of the Confrontation Clause/*Melendez-Diaz* inquiry should be primarily on how the two tasks—certifying the non-existence of a record and certifying the existence of certain cellular phone activity—are roughly equivalent in terms of their ministerial and clerical nature. Despite the State’s suggestion that in order for a record to be testimonial under *Melendez-Diaz* it must require some “form of expert forensic testing, examination, or analysis” (Merit Brief of Appellee, p. 15), the certifier of the non-existence of a record is most certainly not an “expert,” yet that certificate requires that the certifier be cross-examined. The same logic applies to the cellular phone records at issue in this case. Keeping in mind that the State failed to produce certified copies of the records (and thus also failed to satisfy the Ohio Rules of Evidence regarding hearsay and authentication), there is

virtually no justification for the trial court's decision to admit those records and permit the State's lay witness to refer to those records without first requiring the testimony and cross-examination of the certifier of the records.

In support of its argument that the cellular phone records are not testimonial, the State relies upon various federal and state court decisions holding that certified cell phone records and other evidence admitted in connection with the cell phone records do not violate the Confrontation Clause. See State's Brief, p. 14 (citing *U.S. v. Yeley-Davis*, 632 F.3d 673, 679 (10th Cir. 2011); *U.S. v. Green*, 396 Fed. Appx. 573, 575 (11th Cir. 2010); *Smith v. State*, 839 N.E.2d 780, 784 at FN4 (Ind. Ct. App. 2005)). But each of those cases is distinguishable—the State attempts to read them so broadly that they detach the rule of each case from its reasoning. For example, the *Yeley-Davis* and *Green* courts concluded that the records admitted in those cases were created for the administration of the cell phone company's affairs and *not* solely for use at trial, and thus concluded that they were not testimonial and subject to confrontation. *Yeley-Davis*, 632 F.3d at 679; *Green*, 396 Fed. Appx. at 575. And the *Smith* decision addresses certified records of calls, rather than uncertified records of cell tower use. *Smith*, 839 N.E.2d at 784-87.

Moreover, it predates *Melendez-Diaz*, and its Confrontation Clause "analysis" is dicta found in a two-sentence footnote. *Id.* at 784 FN4 ("Although *Smith* does not challenge the admissibility of the cell phone records under a *Crawford* theory, we note that these

records are not testimonial in nature, and they fall under the business records exception to the hearsay rule”).

In conclusion, the Supreme Court signified in *Melendez-Diaz* that routine documents that merely catalog objective facts can indeed be “testimonial” when admitted in place of testimony, and contrary to the State’s suggestion, *Crawford* and its progeny do require that the preparer of the documents testify at trial. See 129 S. Ct. at 2532. The Confrontation Clause’s “ultimate goal is to ensure reliability of evidence,” *Melendez-Diaz*, 129 S.Ct. at 2536 (citing *Crawford*, 541 U.S. at 61), and requires that reliability be “assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61. The right to, and importance of, cross-examination is well-established, and “solemn declarations or affirmation[s] made for the purpose of establishing or proving some fact,” are exactly the types of testimonial statements that must be tested by cross-examination. *Id.*

III. The admission of the cellular telephone records was prejudicial.

The State attempts to downplay the significance of the cellular telephone records admitted at Mr. Hood’s trial to support its argument. But, Kareem Hill’s confession and testimony renders the cellular telephone records extremely significant in the wider picture of Mr. Hood’s trial. The cellular telephone records were the only evidence the State had to corroborate the portion of Hill’s otherwise incredible testimony that linked his exploits to Mr. Hood. The State cannot meet its burden of

establishing that the error in admitting the records was harmless beyond a reasonable doubt. *State v. Madrigal*, 87 Ohio St.3d 378, 388 (2000).

The laundry list of facts the State offers as evidence that the admission of the cellular phone records was harmless is both misleading and unconvincing. The State's assertions regarding the "substantial credible evidence of Hood's guilt" can be organized into three categories: irrelevant, entirely dependent on the credibility of co-defendant Kareem Hill's testimony, and not conclusive as to Hood's guilt. (State's Brief, p. 19).

The following facts, as cited to in the State's brief, are irrelevant to Hood's guilt: 1) a latex glove with Kareem Hill's DNA was found at the scene; 2) after the robbery Peet's dead body was discovered just down the street from the home invasion; 3) Peet died of two gunshot wounds; 4) on Peet's body was a sum of cash and cellular telephones that belonged to two of the robbery victims; and 5) cash and cell phones belonging to the robbery victims were also found inside the Jeep.

The following alleged facts, as cited by the State, depend entirely on the credibility of co-defendant Kareem Hill's testimony: 1) Hood, Davis, Peet, and Hill met beforehand and planned to commit the robbery together; 2) Hood supplied weapons and latex gloves for himself and codefendant Hill; 3) Hood was armed at the time of the robbery; and, 4) Hood and co-conspirator Peet argued in the course of the robbery.

And finally, the following facts are entirely dependent on the jury's assessment of credibility, and do not, individually or together, establish Hood's guilt beyond a reasonable doubt: 1) the victims' descriptions of the perpetrators clothing (which matched the items Hood wore at the time of his arrest); 2) Hood was arrested a short time [after the robbery] with Hill in Hill's Jeep; 3) the DNA of both Hood and Peet were recovered from Hill's Jeep; 4) and Hood had \$411.25 on his person at the time of his arrest. Crucially, the State fails to offer even one transcript cite for the foregoing laundry list of allegedly "substantial credible evidence of Hood's guilt." Many of the witnesses could unequivocally identify any of the clothing worn by the robbers, much less the specific clothing worn by Mr. Hood. (See T.p. 470, 510, 513, 525-26, 693, 703-04, 753-54, 764, 775-76, 808, and 841). Hood's mere presence in Hill's Jeep at the time of the arrest is not enough evidence to inculcate him in the armed robbery and ensuing murder of Samuel Peet, especially in light of the fact that William Sparks was also present in the Jeep and arrested along with Hood and Hill. (T.p. 1000). At trial, Hill testified that William Sparks was one of his best friends, and evidence proves that Sparks was also there in the Jeep in the front seat when the arrest took place. (T.p. 1000-01). But no charges were pursued against Sparks in connection with the armed robbery and murder of Samuel Peet.

Kareem Hill was the only one of the alleged robbers who was irrefutably tied to the scene of the crime: his DNA was found in a latex glove caught on a chain-link

fence in the backyard of Sharon Jackson's house. (T.p. 1190). And Hill only received a three-year prison sentence in exchange for his testimony. (T.p. 973-75). His testimony must be viewed with the utmost of suspicion. Accordingly, the prejudice from admitting the cell phone records was magnified by Hill's lack of credibility—the State *had* to find concrete evidence, such as the cell phone records, to corroborate Hill's story. His testimony was the only evidence directly tying Hood to the guns, the robbery, and ultimately Peet's murder.

A review of the record demonstrates that the erroneously admitted records were among the most probative of the State's evidence against Mr. Hood. The cell phone records were the only concrete evidence that corroborated Hill's statements inculcating Hood, and the lay testimony offered to explain those records provided a timeline to further support Hill's accusations of Hood's whereabouts. Given that the cellular phone records were crucial to the State's case against Mr. Hood, the State cannot show that the error in admitting the unauthenticated records was harmless beyond a reasonable doubt.

IV. This appeal was not improvidently allowed.

Mr. Hood incorporates and relies upon the arguments advanced in opposition to the State's Motion to Dismiss, as contained in his Memorandum in Opposition to Appellee's Motion to Dismiss, filed with this Court on June 28, 2011.

V. Conclusion

For the reasons given above, and in Mr. Hood's merit brief and memorandum in opposition to the State's motion to dismiss, his conviction must be reversed for prejudicial violations of the Sixth Amendment, and this Court should hold that cell phone records can be testimonial evidence subject to the Confrontation Clause.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER


MELISSA M. PRENDERGAST #0075482
Assistant State Public Defender

250 East Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - fax
melissa.prendergast@opd.ohio.gov

Counsel for Appellant James D. Hood

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Brief of Appellant James D. Hood** has been sent by regular U.S. mail, postage prepaid to Kristen Sobieski, Assistant Prosecuting Attorney, Cuyahoga County Prosecutor's Office, Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, this 21st day of July, 2011.



MELISSA M. PRENDERGAST #0075482
Assistant State Public Defender

#347962