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Section 32-624 and Neb. Rev. Stat. § 32-801 (Reissue 2008) are such statutes. As stated in the affidavit of the Secretary of State, attached to his response to this court's order to show cause,

> [i]n reliance on Neb. Rev. Stat. § 32-624, and on the Order of the District Court for Lancaster County entered March 21, 2012, [he] began certification of the May 15, 2012 primary election ballot at approximately noon on Thursday, March 22, and completed the process of ballot certification on that same day for all 93 Nebraska counties at approximately 1:30 p.m.

That certification duty is imposed upon the Secretary of State by § 32-801, and no one asserts he should disregard that statutory obligation.

Thus, for the reasons stated above, this court determines that under the statutory procedure established by the Legislature, it lacks authority to grant the relief sought by appellant. This appeal is therefore dismissed.

APPEAL DISMISSED.

WRIGHT and STEPHAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
TYLER W. BRITT, APPELLANT.
813 N.W.2d 434

Filed March 30, 2012. No. S-10-998.

1. **Constitutional Law: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error.
2. **Constitutional Law: Hearsay.** Where testimonial statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination.
3. ____: ____. Statements that are nontestimonial can be admitted without further Confrontation Clause analysis.
4. ____: ____. The initial step in a Confrontation Clause analysis is to determine whether the statements at issue are testimonial in nature and subject to a Confrontation Clause analysis. If the statements are nontestimonial, then no further Confrontation Clause analysis is required.

5. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Dawson County, JAMES E. DOYLE IV, Judge, on appeal thereto from the County Court for Dawson County, CARLTON E. CLARK, Judge. Judgment of Court of Appeals affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Tyler W. Britt was convicted in the county court for Dawson County of first-offense driving under the influence with a concentration of more than .15 of 1 gram of alcohol per 210 liters of breath. The district court for Dawson County affirmed the conviction. On appeal, the Nebraska Court of Appeals concluded, inter alia, that the admission of a certificate containing a chemical analysis certification of the alcohol breath simulator solution used to test the machine that was used to test Britt's breath did not violate the Confrontation Clause and affirmed the district court order. We granted Britt's petition for further review. We affirm.

STATEMENT OF FACTS

Britt was charged on February 20, 2009, in the county court with first-offense driving under the influence over .15 stemming from events occurring on February 13. Prior to trial, Britt filed a second motion in limine asking the court to prohibit the State from offering into evidence the results of any chemical test unless the person who prepared the breath simulator solution which was used to calibrate the breath testing device was

available for cross-examination. Britt relied on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), in support of his assertion that admission of a certificate regarding such matter would violate his right of confrontation. The State argued at a hearing on the motion in limine that a certificate signed by Cecil B. Garner, the person who prepared the known breath simulator solution used to test the device that was used to test Britt's breath, was admissible, because in *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007), we held that such certificate was nontestimonial and not prepared for the purpose of trial and that therefore, it was not subject to the Confrontation Clause. The county court denied Britt's motion in limine.

Britt renewed his motion in limine at the start of trial and made a continuing objection based on the motion. He specifically objected to exhibits 16 and 18. Exhibit 16 is a report of a 190-day check of the breath testing device. Exhibit 18 is a certificate sworn to by Garner on August 7, 2008, certifying the analysis of the solution prepared on the same date. It is entitled "Chemical Analysis Certification of Alcohol Breath Simulator Solution." This solution was later used to test the device. The county court admitted both exhibits over Britt's objections based on hearsay and confrontation. The jury found Britt guilty.

After sentencing, Britt appealed the county court judgment to the district court. Britt asserted on appeal to the district court that the county court erred when it, inter alia, denied his motion in limine and admitted exhibits 16 and 18, in violation of his confrontation rights. Britt did not assert error based on his hearsay objections. The district court concluded that, even taking into consideration *Melendez-Diaz, supra*, which was decided in 2009, our opinion in *Fischer, supra*, filed in 2007, "remains good law." The district court rejected Britt's arguments and affirmed his conviction and sentence on September 14, 2010.

Britt appealed the affirmance to the Court of Appeals. He assigned error to, inter alia, the district court's determination that Garner's certificate was not testimonial and that therefore, Britt did not have a right to confront and cross-examine Garner.

Britt also asserted that the county court erred when it concluded that exhibits 16 and 18 were not inadmissible hearsay. The Court of Appeals rejected Britt's assignments of error and affirmed the district court's order affirming his conviction and sentence. *State v. Britt*, No. A-10-998, 2011 WL 4388224 (Neb. App. Sept. 13, 2011) (selected for posting to court Web site). Britt does not assign error in his petition for further review of the Court of Appeals' ruling on any issue other than his confrontation and hearsay objections to Garner's certificate, and therefore no other issues are discussed herein.

We granted Britt's petition for further review.

ASSIGNMENTS OF ERROR

Britt claims on further review that the Court of Appeals erred when it (1) concluded that Garner's certificate was not testimonial in nature and (2) failed to conclude that plain error occurred when the county court admitted the certificate over his hearsay objection.

STANDARDS OF REVIEW

[1] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error. *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

ANALYSIS

The Court of Appeals Did Not Err When It Concluded That the Certificate Was Not Testimonial and Therefore Not Subject to the Confrontation Clause.

Britt first claims that the Court of Appeals erred when it concluded that Garner's certificate was not testimonial in nature. We conclude that, based on our holding in *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007), which holding was not abrogated by subsequent case law, the Court of Appeals did not err in its determination that the certificate was not testimonial and therefore not subject to confrontation analysis.

[2-4] The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the

witnesses against him . . . .” In *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court held that where “testimonial” statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. Later, in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court determined that statements that were nontestimonial could be admitted without further Confrontation Clause analysis. We have therefore stated that the initial step in our Confrontation Clause analysis is to determine whether the statements at issue are testimonial in nature and subject to a Confrontation Clause analysis. *Fischer, supra*. If the statements are nontestimonial, then no further Confrontation Clause analysis is required. *Id*.

As the Court of Appeals noted, *Fischer* involved “the same issue and virtually the same facts” as in the present case. *Britt*, 2011 WL 4388224 at *4. *Fischer* was filed in 2007. In *Fischer*, after reviewing existing precedent regarding the meaning of testimonial for Confrontation Clause purposes, we concluded that a certificate verifying the concentration of simulator solution was not testimonial in nature and therefore not subject to confrontation analysis. We noted that the statements in the certificate did not occur in the context of structured police questioning and did not pertain to any particular pending matter. We further noted that the primary purpose of the certification was to ensure that a solution used to calibrate breath testing devices was of the proper concentration and that such certification was required for administrative reasons regardless of whether the certificate would later be used in a criminal proceeding. We reasoned that the certificate did not pertain to any particular pending criminal matter and was too attenuated from the prosecution of charges against the defendant to be considered testimonial in the sense required under *Crawford, supra*; *Davis, supra*; and the Confrontation Clause. *Fischer, supra.*

Britt argues that *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), requires a different result from that in *Fischer*. We do not agree.

Melendez-Diaz involved a prosecution for distribution and trafficking in cocaine. In *Melendez-Diaz*, the U.S. Supreme Court concluded that certificates containing the results of forensic analyses of a seized substance showing that the substance was cocaine were testimonial in nature and that the analysts who made the certificates used to establish the results were witnesses for Confrontation Clause purposes and thus required to be present. The Court reasoned that the certificates were prepared under circumstances such that it was reasonably understood they would be used at a later trial and that the sole purpose of the certificates was to provide evidence for the identified prosecution. The Court made it clear that not all testing-related evidence is testimonial. In a footnote in *Melendez-Diaz*, the Court stated:

> [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the . . . accuracy of the testing device, must appear in person as part of the prosecution's case. . . . Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

129 S. Ct. at 2532 n.1.

Britt argues that the Court of Appeals erred when it focused on the *Melendez-Diaz* footnote and erred when it concluded that the certificate in this case was not testimonial. He notes that another part of the same footnote stated that "what testimony [regarding steps in the chain of custody] is introduced must, 'if the Appellant objects', be introduced live." Brief on petition for further review for appellant at 2. He argues that the Garner certificate regarding the solution in the instant case was testimony regarding "the chain of custody" and was therefore subject to confrontation analysis. *Id.* Britt misconstrues *Melendez-Diaz*, which involved forensic tests performed on a seized substance, which tests determined that the substance was cocaine. The substance being tested in *Melendez-Diaz* was principal evidence for the prosecution, and therefore its chain of custody was vital. We read the "chain of custody" comment in footnote 1 in *Melendez-Diaz* as referring to principal evidence sought to be introduced by the prosecution; it was not a reference to evidence in general.

We note that *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), is a case decided after *Melendez-Diaz*. *Bullcoming* involved a prosecution for driving under the influence, and the principal evidence consisted of a forensic laboratory report certifying that the defendant's blood alcohol concentration was above the legal limit. The report was made specifically for the case, was intended to substitute for testimony, and was critical evidence. The report was deemed testimonial, and the Court concluded that the defendant had a right to confront the analyst who made the report. A concurring opinion refers favorably to footnote 1 in *Melendez-Diaz*, discussed above, and again stresses that "it is not the case 'that anyone whose testimony may be relevant in establishing the chain of custody . . . or accuracy of the testing device, must appear in person as part of the prosecution's case . . . .'" 131 S. Ct. at 2721 n.2 (Sotomayor, J., concurring in part).

In contrast to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and *Bullcoming, supra*, in the instant case, the solution itself is not principal evidence and its chain of custody is not at issue; instead, the solution is merely used as part of the routine testing of the accuracy of the breath testing device, and Garner's certificate merely concerns the concentration of the solution. The solution is not evidence of the crime; it was analyzed on August 7, 2008, which was more than 6 months before the complaint was filed on February 20, 2009, charging a crime committed on February 13, 2009. The language Britt relies on from footnote 1 in *Melendez-Diaz* is not applicable. The Court of Appeals correctly relied on the relevant language from the *Melendez-Diaz* footnote regarding documents prepared in connection with the accuracy of testing devices and properly concluded the Garner certificate was not testimonial.

We agree with the Court of Appeals and the district court in this case that Garner's certificate was essentially identical to the certificate in *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007), and was not testimonial. The decisions in *Melendez-Diaz* and *Bullcoming* did not abrogate our reasoning in *Fischer*. The certificate was not created in preparation

for a trial and did not pertain to any particular pending matter. Instead, it related to the maintenance process and accuracy of the testing device to ensure that the solution used to calibrate and test the breath testing device was of the proper concentration, and the certificate would have been prepared regardless of whether or not it would later be used in a criminal proceeding. The preparation of the certificate was too attenuated from the prosecution of charges against Britt to be considered testimonial. We conclude that, like the certificate in *Fischer*, the certificate in this case was not testimonial.

Britt asserts that if a defendant does not have a right to examine the individual who prepared the certificate at trial, then the defendant would never be able to challenge the accuracy of a certificate regarding the solution used to test a breath testing device. We disagree. The confrontation analysis under consideration relates to the evidentiary issue of whether the certificate may be admitted as evidence in lieu of live testimony. If the defendant has a basis to call the certificate into question, the defendant could challenge the accuracy of the certificate by presenting such evidence. The defendant could depose the person who prepared the certificate in order to discover evidence to challenge its accuracy. The conclusion that the certificate is not subject to Confrontation Clause analysis does not necessarily prevent the defendant from challenging the accuracy of the certificate.

We conclude that the Court of Appeals did not err when it concluded that Garner's certificate was not testimonial, and therefore not subject to confrontation analysis, and affirmed the district court's decision to the same effect. We reject Britt's assignment of error on further review.

The Court of Appeals Did Not Abuse Its Discretion When It Did Not Find Plain Error in the Trial Court's Overruling Britt's Hearsay Objection.

Britt also claims that the Court of Appeals erred when it failed to note plain error in the county court's rejection of his hearsay objection to the admission of the certificate. Because Britt did not preserve the objection in his appeal to the district court and because the hearsay issue is not encompassed by

Britt's assignment of error regarding a Confrontation Clause violation, we conclude that the Court of Appeals did not abuse its discretion when it did not note plain error with regard to Britt's hearsay objections.

The Court of Appeals noted that although Britt made hearsay objections to the admission of exhibits 16 and 18 at trial in the county court, he failed to assign error in the overruling of his hearsay objections on appeal to the district court. The district court therefore did not address the hearsay issue. The Court of Appeals concluded that because the issue had not been properly presented to and passed upon by the district court, it could not be raised on appeal to the Court of Appeals.

[5] Britt argues that the certificate was clearly hearsay and that it was clear no exception applied and that therefore, the Court of Appeals should have noted such plain error. We have stated that "[c]onsideration of plain error occurs at the discretion of an appellate court." *State v. Young*, 279 Neb. 602, 612, 780 N.W.2d 28, 37 (2010). Because Britt did not preserve the hearsay issue by raising it on appeal to the district court, the Court of Appeals was not required to consider the hearsay issue, and we conclude that the Court of Appeals did not abuse its discretion when it did not find plain error.

Britt alternatively argues that he preserved the confrontation issues and that because the hearsay analysis is a "first cousin" to the confrontation analysis, he effectively preserved the hearsay issue and the Court of Appeals should have considered his hearsay arguments on appeal. Brief on petition for further review for appellant at 8. We note that although under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), and its progeny, there was a great deal of overlap between confrontation analysis and hearsay analysis, beginning with *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court overruled *Ohio v. Roberts* and "divorced" the Confrontation Clause from the hearsay rule. See Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause From the Hearsay Rule*, 56 S.C. L. Rev. 185 (2004). Because confrontation analysis

and hearsay analysis are not the same, we conclude that Britt's preserving the confrontation issue did not also preserve the hearsay issue and that hearsay issues were not encompassed by Britt's assignments of error regarding a purported confrontation violation. The Court of Appeals did not err when it did not consider Britt's hearsay arguments as plain error.

CONCLUSION

We conclude that the Court of Appeals did not err when it determined that the certificate was not testimonial and not subject to confrontation analysis. We further conclude that the Court of Appeals did not abuse its discretion when it did not note plain error with regard to Britt's hearsay objections. We therefore affirm the decision of the Court of Appeals which determined that the admission of the certificate was not error and affirmed the decision of the district court which affirmed Britt's conviction and sentence.

AFFIRMED.

IN RE INTEREST OF SHALEIA M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SHALEIA M. AND JANE M. MCNEIL, GUARDIAN AD LITEM, APPELLEES, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

812 N.W.2d 277

Filed March 30, 2012. Nos. S-11-532, S-11-553.

1. **Judgments: Justiciable Issues: Appeal and Error.** Justiciability issues that do not involve a factual dispute present a question of law, for which an appellate court reaches a conclusion independent of the court below.
2. **Moot Question: Appeal and Error.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
3. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.