

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2008-0875, State of New Hampshire v. John Brooks, the court on November 28, 2012, issued the following order:

The defendant's motion for reconsideration is granted to the following extent:

The slip opinion dated October 30, 2012, is modified by deleting the first sentence of the last paragraph on page 5 and by replacing it with the following:

Although the defendant argues that the State should have presented live testimony regarding the requirements of the business records rule, he conceded at oral argument that if the records had been sponsored by a live witness who gave testimony establishing that they were business records, nearly all of the records admitted in the case would not be testimonial.

Accordingly, the last paragraph on page 5 of the slip opinion, as modified, shall state as follows:

Although the defendant argues that the State should have presented live testimony regarding the requirements of the business records rule, he conceded at oral argument that if the records had been sponsored by a live witness who gave testimony establishing that they were business records, nearly all of the records admitted in the case would not be testimonial. He contends, however, that some of the telephone records "were not records . . . that were maintained in the ordinary course of business by the phone company." We disagree. The defendant's argument relies upon the testimony of a witness who explained that the telephone records that were not billing records were nonetheless part of the telephone company's record system. See Yeley-Davis, 632 F.3d at 679 (finding that, although certain telephone records were not telephone bills, "[t]his does not mean . . . that these records were created simply for litigation – they were not. Rather, these records were kept for [the telephone company's] business purposes" and, therefore, were not testimonial). Because all of the telephone records, including the records that would not normally be provided to a subscriber, were "created for the administration of [the] entity's affairs and not for the purpose of

establishing or proving some fact at trial,” Melendez-Diaz, 557 U.S. at 324, they are not testimonial. See Mallory, 461 Fed. Appx. at 356 (FedEx record); Hudson, 2011 U.S. Dist. LEXIS 126830 at *12-*13 (telephone and financial records).

In all other respects the motion for reconsideration is denied.

Opinion modified; reconsideration
otherwise denied.

Dalianis, C.J., and Hicks and Conboy, JJ., concurred.

**Eileen Fox,
Clerk**