IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No.SC06-86
LORENZO CEPHUS JOHNSON,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The lab report which is the subject of this appeal is not part of the appellate record. It was filed by counsel for Petitioner along with a notice of filing after the motion for rehearing was filed. Therefore, a motion to supplement is being filed at the same time as this brief. A copy of the lab report is included in the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as substantially correct for purposes of this appeal.

SUMMARY OF THE ARGUMENT

The trial judge violated the Respondent's Sixth Amendment right to confront the evidence against him when the court suggested and allowed, over defense objection, the admission of the FDLE lab report when the analyst was willing and able to appear in court the next day. The Second District Court of Appeal correctly found The Florida Department of Law Enforcement lab report to be testimonial.

While the lab report is not testimony from a preliminary hearing, grand jury, former trial, or police interrogation, the lab report is the functional equivalent of an affidavit which the framers of the Sixth Amendment to the United States Constitution sought to bar from use at a criminal trial. The report was used as substitute for the live opinion testimony of the analyst. Respondent was denied his Sixth Amendment right to confront the evidence used at his trial because he had no prior opportunity to for cross-examination and could not cross-examine the lab report.

The ruling of the Second District Court of Appeal should be affirmed and the certified question answered in the affirmative.

ARGUMENT

ISSUE

> ADMISSION OF THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT LAB REPORT ESTABLISHING THE ILLEGAL NATURE OF SUBSTANCES POSSESSED BY MR. JOHNSON VIOLATED HIS RIGHT TO CONFRONT THE EVIDENCE AGAINST HIM AND CONTRAVENED THE RULE SET FORTH IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004).

Mr. Johnson was denied his right guaranteed by the Sixth Amendment to the United States Constitution to confront the evidence used against him at his trial. Despite the fact that the analyst who conducted the test was ready, willing, and able to appear in court the next day, the prosecutor accepted the trial court's invitation (over defense objection) to admit the Florida Department of Law Enforcement lab report as a business record and proceed without the testimony of the person who actually tested the substances in this case. The Second District held that the lab report was testimonial hearsay which violated Respondent's right to confront the evidence against him because there was no opportunity for prior cross-examination and certified a question of great public importance:

> DOES THE ADMISSION OF A FLORIDA DEPARTMENT OF LAW ENFORCEMENT LAB REPORT ESTABLISHING THE ILLEGAL NATURE OF SUBSTANCES POSSESSED BY A DEFENDANT VIOLATE THE CONFRONTATION CLAUSE AND CRAWFORD V. WASHINGTON, 541 U.S. 36, 124 S.CT. 1354, 158 L.ED.2D 177 (2004), WHEN THE PERSON WHO PERFORMED THE LAB TEST DID NOT TESTIFY?

Therefore, the ruling of the Second District Court of

Appeal should be affirmed and the certified question answered in the affirmative.

The case of Crawford v. Washington, 541 U.S. 36 (2004), represents a major shift in the analysis of whether testimonial hearsay which might be otherwise admissible under the rules of evidence violates a defendant's rights under the Confrontation Clause of the United State's Constitution. Prior to Crawford, under Ohio v. Roberts, 448 U.S. 56 (1980), hearsay evidence that was sufficiently reliable could be admitted against a defendant without a confrontation clause violation. Crawford represents a dramatic change because it requires an opportunity for cross-examination of testimonial hearsay in order to satisfy the requirements of the Confrontation Clause.

Mr. Johnson was denied the right to confront the evidence against him by admission of the Florida Department of Law Enforcement lab report under the standards of both Crawford and Roberts. The State was required to prove as elements of the charges against Mr. Johnson, that he possessed cocaine, marijuana, and that he introduced contraband into a detention facility. The lab report was used instead of live testimony that could be cross-examined.

Under Crawford, admission of the lab report violates the confrontation clause because the lab report is testimonial hearsay admitted without the opportunity for cross-examination. Under Roberts, the confrontation clause is

violated because the lab report does not qualify as the "firmly rooted" exception of a business record since it is prepared for litigation purposes. Therefore, it should not be considered reliable.

1. A Violation Of the Right To Confrontation Occurred Under A Previous Decision Of This Court Excising Prior To Crawford.

This Court has previously held that admission of a hospital lab report as a business record did not violate the Sixth Amendment right of confrontation. However, the lab report at issue in this case is distinguishable because it was prepared for litigation by a law enforcement agency to be used in a criminal case.

In Baber v. State, 775 So. 2d 258 (Fla. 2000), this Court held that a hospital record of a blood test made for medical purposes may be admitted against a criminal defendant under the business records exception to the hearsay rule without a violation of the confrontation clause. Because the lab report qualified for the firmly rooted exception for business records there was no confrontation clause violation under Ohio v. Roberts because reliability could be presumed. The basis for the decision in Baber is that the lab report is presumed reliable and qualifies as a business record because the blood was drawn for medical purposes to treat the patient by a neutral party during the ordinary course of hospital business.

The Fifth District Court of Appeal has decided a case on facts almost identical to the instant case and found a

violation of the right to confrontation when a Florida Department of Law Enforcement lab report was admitted without testimony of the analyst who did the testing.

In Rivera v. State, 917 So. 2d 210 (Fla. 5th DCA 2006), the State called the supervisor of an FDLE analyst who conducted the actual tests and wrote a report on a sample of alleged cocaine. The analyst was unavailable for trial because he was in training to become an FDLE field agent. The State attempted to introduce the report as a business record through the supervisor's testimony. Defense counsel objected on grounds that he could not cross-examine the supervisor about the chemist's technique, testing procedures, and handling of contraband. On appeal the Fifth District Court of Appeal reversed holding that extending Baber to an FDLE records custodian would violate Rivera's right to confrontation:

> Julian [the supervisor] could not have answered questions concerning chain of custody, methods of scientific testing, and analytical procedures regarding the contraband at issue. Here, the chemist's report lacks the indicia of reliability characteristic of hospital record cases. The hospital tests the patient's blood alcohol for the benefit of the patient's treatment; in contrast, the State tests alleged drug samples to incriminate and convict the accused.

Rivera, 917 So. 2d at 212.

The basis for presuming reliability as a business record in Baber is missing from this case, just like it was in

Rivera. Therefore, the lab report should not be treated as a business record. In contrast to the medical blood which was analyzed for purposes of medical treatment by a hospital chemist in Baber, the material tested in this case was seized from Mr. Johnson for the purposes of a criminal case against him and tested by law enforcement chemist who was not a neutral party just like the chemist in Rivera. Like the Court in Rivera, this Court should find a violation of the right to confrontation.

The Florida Department of Law Enforcement analyst bears no resemblance to analyst in the hospital lab who is seeking information critical to providing proper care for a patient. The analyst in this case is employed by a law enforcement agency seeking evidence against a criminal defendant. The mission of the Florida Department of Law Enforcement according to its own website[1] is:

> To promote public safety and strengthen domestic security by providing services in partnership with local, state, and federal criminal justice agencies to prevent, investigate, and solve crimes while protecting Florida's citizens and visitors.

The Florida Department of Law Enforcement is a law enforcement agency. Providing expert testimony in Court is a duty of an analyst at the Florida Department of Law Enforcement.[2] Forensic experts have an institutional bias in favor of the prosecution. See Ramirez v. State, 810 So. 2d

[1] http://www.fdle.state.fl.us/publications/lrpp_2005-06.pdf
[2] http://www.fdle.state.fl.us/CrimeLab/CLA%20Position.htm

836, 847-48 and 850 n.37 (Fla. 2001), which cites the following works:

> See, e.g., Michael J. Saks, Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science, 49 Hastings L.J. 1069, 1092-93 (1998) ("No other fields are as closely affiliated with a single side of litigation as forensic science is to criminal prosecution."); Paul C. Giannelli, The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Labs, 4 Va. J. Soc. Pol'y & L. 439 (1997) (promoting the use of independent crime labs to reduce the effect of bias); Andre A. Moenssens, Novel Scientific Evidence in Criminal Cases: Some Words of Caution, 84 Crim. L. & Criminology 1, 6 (1993) (asserting that most crime lab personnel are "technicians," not trained scientists and are prone to pro-police bias and averse to rigorous scientific investigation).

For an extreme example of how this institutional bias can affect an expert's opinion, see Trepal v. State, 846 So. 2d 405 (Fla. 2003). This argument is not intended to impugn the analyst in this case. Rather, it goes to show why the lab report in this case should not have been admitted as business record when the analyst who prepared the report was not present to testify. The report in this case should not have been admitted as a business record because it was prepared for litigation and not routine medical treatment and thus lacked trustworthiness.

Cases decided prior to Crawford, Rivera, and Baber hold that documents or reports prepared in anticipation of litigation should not be admitted as business records because

they lack trustworthiness required to qualify as business records. In Rae v. State, 638 So. 2d 597 (Fla. 4th DCA 1994), the Fourth District Court of Appeal held that notations made on ledger sheets by a car dealer were not admissible as business records because they were made in anticipation of litigation which suggested a lack of trustworthiness.

In McElroy v. Perry, 753 So. 2d 121 (Fla. 2d DCA 2000), the trial court ruled that compulsory medical exams performed after injuries from a car accident were admissible under the business records exception to the hearsay rule. The Second District Court of Appeal explained the reports were properly excluded since they lacked trustworthiness because they were prepared for litigation:

> The trustworthiness evaluation addresses the circumstances under which the medical examinations were performed. Neither Dr. McCraney nor Dr. Phillips was a treating physician, and while they did examine Perry, they did not do so in the typical doctor/patient circumstance. Their reports are more properly characterized as forensic or advocacy reports. Thus, even if they fall within the literal definition of a business record, they also fall within the provision of the rule that excludes those records in which "the sources of information or other circumstances show lack of trustworthiness." In discussing this hearsay exception, Professor Ehrhardt points out that when a record is made for the purpose of litigation, its trustworthiness is suspect and should be closely scrutinized, and that most of the time, the report of an expert made for the purpose of litigation is not admissible under section 90.803(6). ***See*** Charles W. Ehrhardt, Florida Evidence § 803.6 at 695 (1999 ed.).

> Thus, a trial court may exclude evidence meeting the literal requirements of the business record exception where the underlying circumstances indicate the lack of trustworthiness that is presumed to exist with most business records.

McElroy, 753 So. 2d at 125-126.

Courts in other jurisdictions have similarly concluded that reports generated by law enforcement chemists or other personel should not be admitted as business records due to lack of trustworthiness. In People v. McDaniel, 670 N.W. 2d 659 (Mich. 2003), the Michigan Supreme Court held that admission of a police laboratory report declaring a substance was barred under the business and government records exceptions to the hearsay rule. The court explained police laboratory reports were inadmissible hearsay because their preparation in anticipation of litigation "indicate lack of trustworthiness." McDaniel, 670 N.W. 2d at 661.

In State v. Sandoval-Tena, 71 P. 3d 1055 (Idaho 2003), the Idaho Supreme Court held admission of a police crime lab report which identified the substance seized from the defendant and gave its weight was inadmissible under exceptions to the hearsay rule for business records and public records. Similarly, in Cole v. State, 839 S.W. 2d 798 (Tex. Crim. App. 1992), the Court initially concluded that full time chemists with the Department of Public Safety were "law enforcement personnel." Because reports prepared by the

chemists were not prepared in a routine non-adversarial setting, forensic reports by the chemists were not admissible under exceptions to the hearsay rule for business or public records.

In United States v. Oates, 560 F. 2d 45 (2d Cir. 1977), the appellate court held that the report and worksheet of a chemist who analyzed a white powdery substance seized from the defendant were not admissible as business records or under the public records exceptions to the hearsay rule. The court found the report and worksheet were written assertions constituting statements under the hearsay rules. Oates, 560 F. 2d at 65. The Court also found the full-time chemists employed were “other law enforcement personel” for purposes of the evidence code.

> In short, these reports are not "made by persons and for purposes unconnected with a criminal case (but rather they are a direct) result of a test made for the specific purpose of convicting the defendant and conducted by agents of the executive branch, the very department of government which seeks defendant's conviction." State v. Larochelle, 112 N.H. 392, 400, 297 A.2d 223, 228 (1972) (dissenting opinion).

Oates, 560 F. 2d at 45-46.

In State v. Henderson, 554 S.W. 2d 117 (Tenn. 1977), the Tennessee Supreme Court held that the defendant’s right to confront the evidence against his was violated when laboratory assistants who conducted chemical tests to determine the

nature of the drugs sold by the defendant were temporarily unavailable to testify and the test results were admitted as an exhibit through the lab director's testimony.

The chemist who prepared the lab report in this case is an employee of a law enforcement agency just like the chemists in McDaniel, Sandoval-Tena, Cole, and Oates who all conducted chemical tests used against defendants in criminal proceedings. Like the reports at issue in McDaniel, Sandoval-Tena, Cole, and Oates, the report in this case should have been tested by cross-examination since the report is the exact opposite of what a business record is supposed to be. Instead of documenting some routine function of a business or agency, the reports in each of these cases were prepared for purposes of litigation and were offered as substitutes for live testimony at a criminal trial in order to prove essential elements of a criminal case.

Therefore, as in Henderson and Rivera, the lab report should not be considered a business record. Because the lab report lacks indicia of reliability its admission violated the right to confrontation because there was no chance for cross-examination.

2. A Violation Of The Right To Confrontation Occurred Under Crawford Because The Lab Report Was Testimonial And Respondent Had No Prior Opportunity For Cross-Examination.

Under Crawford, the right to confrontation as guaranteed

by the Sixth Amendment to the United States Constitution, is violated by the admission of testimonial hearsay if the declarant is not available for trial and there was no opportunity for cross-examination. The Second District Court of Appeal correctly found a violation of the right to confrontation because the lab report was testimonial and Respondent had no prior opportunity for cross-examination.

The lab report was prepared by an analyst at the Florida Department of Law Enforcement in anticipation of litigation. The lab report was used at trial as a substitute for live testimony from the analyst stating that "in my opinion the substances tested are marijuana and cocaine." Because there was no opportunity to cross-examine the analyst, Mr. Johnson's right to confront the evidence at his trial was violated.

The right to confrontation existed during the Roman Empire and is documented in the Bible. The framers of the Sixth Amendment recognized that confrontation was a critical ingredient required to ensure a fair and reliable trial after analysis of past practices and abuses.

The Book of Acts recites that "[t]he Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: 'It is not the manner of the Romans to deliver any man up to die before the accused has met *his accusers* face to face, and has been given a chance to defend himself against the charges.'" Book of Acts 25:16 (emphasis added), quoted in

Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988). The Book of Deuteronomy commands that, "If a malicious witness takes the stand to accuse a man of a crime, the two men involved in the dispute must stand in the presence of the Lord before the priests and judges who are in office at the time." Deuteronomy 19:15-19.

The Crawford court looked to a dictionary for a definition of the word "testimony" and stated that testimony was "typically" a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S. at 51. The Court looked at several definitions of what might be considered testimonial:

> [E]*x parte* in-court testimony or its functional equivalent-that is, material such as *affidavits,* custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements ··· contained in formalized testimonial materials, such as *affidavits,* depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Crawford, 514 U.S. at 51-52.

The Court left "for another day" further clarification of what was "testimonial" because the statements at issue in Crawford qualified under any possible definition. However, the Court explained:

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury; or at a formal trial; and to police interrogations.

Crawford, 541 U.S. at 68.

The decision in Crawford not does restrict the definition of testimonial to prior testimony at a preliminary hearing, grand jury, trial, or to statements from a police interrogation. It leaves further clarification of the term testimonial "for another day."

Whether a statement is testimonial, depends on whether the right to confrontation, as originally understood, applied to the type of statement being analyzed. Crawford, 541 U.S. at 42-53. If, the statement being analyzed was of a sort that did not exist at the time of the Sixth Amendment's framing, then the reviewing court is to "estimat[e] as accurate[ly] as possible" how the Framers of the Sixth Amendment would have applied the right to confrontation to the statement at issue. Id. at 52 n.3.

Respondent submits that the lab report is exactly what the framers of the Sixth Amendment intended to prohibit. It is the functional equivalent of an affidavit submitted instead of testimony from a live witness. It is a statement prepared for litigation, insulated from cross-examination, written by the analyst used to prove critical elements of the prosecution case. Therefore, it should be considered testimonial.

The intent of the Sixth Amendment Confrontation Clause

was to bar the use of the "civil law mode" of criminal procedure and the specific use of *ex parte* affidavits such as those used at the trial of Sir Walter Raleigh. Crawford v. Washington, 124 S. Ct. at 1363. In 1603, Sir Walter Raleigh was charged with treason. An alleged accomplice, Lord Cobham, implicated Raleigh in an examination before the Privy Council and in a letter. Both items were read during the trial. Raleigh accused Cobham of lying to help his own cause and demanded the right to confront him face to face. The Court refused and Raleigh was convicted. Crawford v. Washington, 541 U.S. at 44.

The Confrontation clause was designed to stop the use of out-of-court evidence of affidavits and other documentary evidence which could not be tested for reliability at a trial by cross-examination:

> It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. Prosecuting attorneys 'would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' i.e. the witnesses against him, brought before him face to face.

California v. Green, 344 U.S. 149, 156-57 (1970)(Harlan J., concurring), quoting 1 James Stephen, A history of the Criminal Law in 326 (1883)(emphasis added); see also United States v. Diaz, 223 U.S. 442, 450 (1912)(where the court noted that an autopsy report could not be used against the defendant (absent his consent) without allowing the defendant "to meet the witness [who wrote the report] face to face.")

The lab report in this case is the functional equivalent of an affidavit or letter submitted from an expert stating the opinion of the expert. The only purpose it served was to excuse the State from providing live testimony on a critical element of the case while avoiding testing of the opinion by cross-examination. The effect of using the report as it was in this case was to shift the State's burden of proof to the defense:

> Most analysis of the confrontation issue as applied to lab reports commences by characterizing these reports as business or public records. Yet, it is as valid to begin the analysis by characterizing lab reports as nothing more than an "affidavit of an expert." Lab reports share the attributes of affidavits; they are typically prepared by the prosecution in anticipation of trial. Moreover, due to their aura of "expertise" and the "official" imprimatur of the government, lab reports are a particularly dangerous affidavit. The effect of the use of the expert's affidavit by the prosecution is to shift the burden to the defendant, who, due to indigency, is often not equipped to contest the reliability of scientific evidence.

Paul C. Giannelli, Expert Testimony and the Confrontation Clause 22 Cap. U. L. Rev. 45, 83 (1993).

The lab report is a substitute for the author of the report to coming to court and testifying "In my opinion the substances tested are cocaine and marijuana." The introduction of such evidence without cross-examination is exactly what the Sixth Amendment was designed to prohibit:

> By contrast the [lab] records here realistically cannot be said to have been prepared for any reason other than their potential litigation value. Therefore, when they are produced at trial in lieu of personal testimony, and are offered to prove the single most damaging fact against this defendant, they fall into the category of the dreaded ex parte affidavit. It was to prevent the use of just such documents that the Confrontation Clause was adopted. Mattox v. United States, 156 U.S. [149 (1970)] at 242-43 (15 S.Ct. 337).

Henderson v. State, 554 S.W. 2d 117, 120 (Tenn. 1977)

The lab report should be considered testimonial because it was prepared in anticipation of litigation and is a substitute for the testimony of the analyst in Court. The lab report is testimonial under tests used by Federal, Florida and other State courts.

Florida District Courts of Appeal have found government generated documentary evidence to be testimonial under Crawford. In Belvin v. State, 922 So. 2d 1046 (Fla. 4th DCA 2006)(en banc), review granted, (Fla. April 28, 2006), the Petitioner was arrested for the offense of driving under the influence. He submitted to a breath test which showed blood

alcohol levels of .165, .144, and .15. At trial, the arresting officer testified that he conducted a traffic stop and requested a breath test. The breath test technician did not testify at trial. Belvin objected to the introduction of the breath test result affidavit without the technician being called at trial and subjected to cross-examination. Id. at 1047.

After conviction, Belvin appealed to the circuit court. Initially, the circuit court concluded the affidavit was testimonial hearsay which violated Crawford. On rehearing the circuit court concluded the affidavit was not testimonial hearsay, and thus did not violate Crawford. Belvin then sought certiorari review at the Fourth District Court of Appeal. The Fourth District quoted from Crawford to explain that the Confrontation Clause:

> [A]pplies to "witnesses" against the accused-in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of "testimonial" statements exist: " *ex parte* in-court testimony or its functional equivalent-that is, material such as *affidavits,* custodial examinations, prior

> testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements ··· contained in formalized testimonial materials, such as *affidavits,* depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"

Belvin, 922 So. 2d at 1050, quoting, Crawford, at 51-52. (citations omitted) (emphasis added).

The district court found that breath test affidavits were generated for use at trial or in license revocation proceedings. Therefore, they qualified as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. The Court found the affidavits to be testimonial because they documented procedures required for accurate testing including observation of the defendant, obtaining the required samples in a certain period of time, and procedures followed in conducting the tests. The Court then went on to reject arguments by the state that the affidavit was admissible as a public record pursuant to section 90.803(8), or under section 316.1934(5), Florida Statutes which allows introduction of the affidavit into evidence. The Fourth District found that those portions of the breath test result affidavit documenting procedures followed by the technician were "precisely the type of

evidence considered testimonial in Crawford." Belvin, 922 So. 2d at 1051.

Similarly, in Shiver v. State, 900 So. 2d 615 (Fla. 1st DCA 2005), the trial court admitted a "breath test affidavit" attesting in part that a breath test machine had been properly calibrated and maintained was admitted at trial. Id. The First District Court of Appeal found the affidavit to be testimonial which was admitted in violation of the right to confrontation under Crawford because there was no opportunity to cross-examine the officer who did the maintenance and calibration. The Court noted:

> Interestingly, this is the precise scenario the United States Supreme Court used to exemplify a Confrontation Clause violation. The Supreme Court discussed Sir Walter Raleigh's trial for treason, wherein an alleged co-conspirator's affidavit was read in court as evidence against Raleigh. Raleigh contested the allegations and demanded an opportunity to confront the attestor, face-to-face, which was denied. The Supreme Court stated that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court."

Shiver, 900 So. 2d at 615, quoting Crawford, 124 S.Ct. at 1364.

The result should be the same in this case based upon the reasoning in Belvin and Shiver. Like the documents in Belvin and Shiver, the document in this was prepared by an employee

of a enforcement agency in anticipation of litigation so it should be considered testimonial. A violation of the right to confrontation based upon Crawford exists because there was no opportunity for cross-examination just like what occurred in Belvin and Shiver.

Several Federal Circuits have found material to be testimonial under Crawford because a reasonable person would have anticipated use of the statements at trial. The FDLE lab report at issue should also be considered testimonial under such a definition because a reasonable person would realize that it could be used in court as evidence against a defendant.

In United States v. Cromer, 389 F. 3d 662 (6th Cir. 2004), the Court was faced with deciding whether information given in an informal setting by a confidential informant about the defendant was testimonial. The Court analyzed competing views of what was testimonial and adopted the view of Professor Richard Friedman and found any statement "made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime." Cromer, 389 F. 3d at 673, quoting, Richard D. Friedman and Bridget McCormack, Dial-In Testimony, 150 P.A. L. Rev. 1171, 1240-1241 (2002).

Other Federal Circuits have adopted similar definitions of what should be considered testimonial. In Horton v. Allen, 370 F. 3d 75, 84 (1st Cir. 2004), the court held that

statements in a private conversation between two citizens were not testimonial because "[t]hey were not ex-parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination" and they were not "made under circumstances in which an objective person would 'reasonable believe that the statement would be available for use at a later trial.'" Horton v. Allen, 370 F. 3d 75, 84 (1st Cir. 2004)(quoting Crawford, 124 S.Ct. at 1364). See also United States v. Saget, 377 So. 2d 223, 228 (2d. Cir 2004)(Crawford suggests that determinative factor in deciding whether a declarant bears testimony is whether the declarant's awareness or expectation that his or her statements may later be used at a trial.)

The cases relied upon by Petitioner to argue that lab reports are not testimonial misconstrue the nature of a lab report and what it represents. Lab reports like the one in this case are not like the ministerial reporting of an accounting ledger, store inventory, or library lending records.

Lab reports are the end result of a complex scientific process and often contain little detail as to how the result was reached. Paul Giannelli, The Admissibility of Laboratory Reports In Criminal Trials: The Reliability of Scientific Proof, 49 Ohio State Law Journal 671, 692. A report may

indicate a substance is marijuana but "might not specify whether this conclusion is based on a visual examination, the Duqenoise-Levine test, thin-layer chromatography, or some other procedure." Id. at 693.

The report in this case exhibits these exact failings. It states in conclusory terms that one sample submitted contained marijuana and that the other was cocaine. There is no explanation as to how or why the conclusion was reached by the analyst who was not called by the State to testify. Confrontation of such evidence by cross-examination would serve to expose the basis for the expert opinion, the qualifications of the person doing the test, the nature of the test or tests used to get the result, as well as the analyst's conduct of the test. Id. at 692-695.

The cases cited by Petitioner for the proposition that the Florida Department of Law Enforcement lab report is not testimonial overlook the complex nature of what is represented in a lab report. The lab report is the end result of a test or series of tests which must presumably be conducted in a precise manner in order to obtain a correct result. The report is used as proof of a critical element at trial of the type of fact not easily understood by the ordinary juror.

The case of Commonwealth v. Verde, 827 N.E. 2d 701 (Ma. 2005), is wrong when it states: "Certificates of chemical analysis neither discretionary, nor based on opinion; rather, they merely state the results of a well-recognized scientific

test determining the composition and quantity of the substance." Id. at 705. The conduct of any recognized scientific test requires the opinion of an analyst that the product of the test is the same as some known sample after comparison by the analyst.

According to the treatise, Scientific Evidence in Criminal Cases, a chemical test requires the analyst to add a reagent and then observe a reaction like a color change. Crystalline tests require the analyst to treat the unidentified sample with a chemical and then look at the crystalline formation in the precipitate for color, shape, and location under a microscope. Spectrophotometric tests require the analyst to process a sample through a machine to produce either a graph or photographic plate to other graphs or photographic plates of known substance to make an identification. Chromatographic tests (paper, thin layer, gas) involves comparison of color bands on filter paper or the chromatograms made after running samples through a thin layer or gas chromatograph to known samples. A. Moenssens, F. Inbau, & J. Starrs, Scientific Evidence in Criminal Cases Section 6.05 at 333-334 (3rd Ed. 1986).

Any test used to analyze an unknown substance requires the analyst to conduct a test and then compare the result of the test to a known sample. This necessarily means that the result in the lab report contains the opinion of the analyst that after being run through some process the unknown sample being

tested is the same thing as the known substance because it looked the same as the known sample.

The court in Verde states that the certificates at issue documented the results of well-recognized scientific tests. That might well have been true of the certificate in Verde, but it is far from clear in this case. The report in this case is silent as to what test or tests were used to reach the conclusions in the report.

Other cases cited by Petitioner also fail to account for the true nature of a lab report. In People v. Johnson, 18 Cal. Rptr. 3d 230 (Cal App. 2004), the court overruled a Crawford objection at a violation of probation hearing on grounds that the hearing was not a "criminal prosecution" to which the Sixth Amendment applied. Id. at 32. The court citing, People v. Arreola, 875 P. 2d 736 (Cal. 1994), went on in dicta to hold that Crawford did not apply to routine "documentary" evidence that was not based upon live testimony.

The California cases like Johnson and Arreola are wrong because they don't acknowledge that an expert opinion is at the heart of the lab report. Applying the logic of the California cases to the trial of Sir Walter Raleigh would lead to admission of the affidavit of Lord Cobham because it was documentary. This of course is the exactly what the Confrontation Clause was intended to prohibit.

In the case of People v. Hinojos-Menendez, ____ P. 3d ___, Case No. 03CA0645, (Col. Ct. App. 2005), a state statute

allowed the prosecution to prove an element of a crime, if the defendant did not give pretrial notice, by either submitting the lab report or by the testimony of the analyst. The Court held that the lab report was not the "sort of evil at which the confrontation clause was directed." Additionally, the court noted the appellant had not disputed that the lab report was a business record or that cocaine was seized from his truck. The only factor disputed was the weight of the substance. Moreover, the defendant did not give the required pretrial notice which would have required the State to use live testimony of the analyst.

In People v. Brown, 801 N.Y.S. 2d 709 (N.Y. Sup. 2005)[3], cited by Petitioner, the court held that notes and records prepared during DNA testing were not testimonial because they were not made exclusively for litigation but were routine entries made to assist in DNA profiling. In doing so the court cited Verde and Johnson as support for the proposition that lab reports did not bear or function as testimony and were the type of business records which Crawford held to be testimonial.

The misreading of Crawford by the courts in Brown, Verde, and Hinojos-Mendoza, was recognized by the court in State v. Crager, 844 N.E. 2d 390 (Ohio App. 2005). In Crager, the court found that a DNA analyst's report was testimonial because it was prepared in anticipation of litigation as part

[3] A trial court opinion.

of a police investigation such that a reasonable person could conclude it would be used at a trial. A violation of the right to confrontation under Crawford was found because the report was admitted through the testimony of a second analyst who had no independent knowledge of the testing done by the first analyst.

The court quoted from Crawford and then explained why the courts in Brown, Verde, and Hinojos-Mendoza were wrong:

> Most of the hearsay exceptions covered statements that by their nature were not testimonial-for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony. 541 U.S. at 56, 124 S.Ct. 1354, 158 L.Ed.2d 177.
>
> The New York, Massachusetts, and Colorado courts have each held that based upon the above statement, a Crawford analysis is inapplicable when business records are at issue. Thus, because lab reports similar to the type of lab reports at issue in this case are business records, these courts have held that Crawford is inapplicable to such reports.
>
> While we acknowledge the above statement in Crawford, we do not find it controlling. First, the statement is purely dictum, as it was made during the majority's historical delineation of the Sixth Amendment right to confrontation. Thus, we do not find that such a statement should control over the court's holding, which involves whether a statement is testimonial or nontestimonial.
>
> Secondly, upon review of the business-records exception and the applicable case law surrounding the issue, we find that while some evidence may fall within the general business-records exception, other business records should nonetheless be

> subject to a Crawford analysis and be excluded from evidence thereunder because they are in fact testimonial.

Crager, 844 N.E. 2d at 396-397.

Courts in other states have recognized that reports, notes, and documents prepared for use in criminal cases should be considered testimonial under Crawford. Therefore, a violation of the right to confrontation occurs when these documents are admitted at trial without the chance for prior cross-examination. In City of Las Vegas v. Walsh, 124 P. 3d 203 (Nev. 2005), the trial court admitted an affidavit from a nurse who withdrew blood for chemical analysis stating that alcohol solution or alcohol-based swabs were not used in drawing blood from the defendant was admissible in a prosecution for driving under the influence of alcohol. However, on appeal the Nevada Supreme Court held that the affidavits were testimonial and their admission in place of live testimony violated the defendant's right to confrontation under Crawford. Id. at 207-208.

In People v. Lonsby, 707 N.W. 2d 610 (Mich. App. 2005), the defendant was on trial for three counts of criminal sexual conduct. A prosecution analyst, David Woodford, testified that he had not performed any testing on the rape kit, the victim's bathing suit, or the defendant's bathing suit.

He then proceeded to testify without objection that another analyst named Jackson found semen on the inside of the defendant's bathing suit. He also testified based on the other

analyst's notes that a test showed a very weak positive for semen which could not be confirmed through a protein test "probably due to the fact that the quantity of semen was just not enough to test." Id. at 614. Woodford also "speculated" that there was no indication of semen in the report because the analyst who conducted the test could not confirm it through a protein test. Id.

Jackson's notes and report did not qualify under the business or public records exceptions because they were prepared in anticipation of litigation by an employee of the police crime lab. Id. at 618,n. 7. The Court then found Jackson's notes and report to be testimonial because it was reasonable for her to expect that they would be used against the defendant at trial. The Court ordered a new trial after finding "plain error" based upon a violation of the defendant's right to confrontation because Jackson was unavailable to testify and there was no indication she had been subject to prior cross-examination. Id. at 621-623.

In Napier v. State, 820 N.E. 2d 144 (Ind. Ct. App. 2005), the defendant had been convicted of driving with a blood alcohol level of .08 percent or greater. On appeal, Napier argued that the ticket from the breath test machine was improperly admitted in violation of state law and under Crawford without any witness testimony. Id. at 151. The Court noted that Napier was thus precluded from attacking the qualification of the machine's operator, but that he "was not

afforded the opportunity to question or attack the purported results of his breath test." Id. The Court then concluded that Napier's right to confrontation under Crawford had been violated and ordered a reversal. Id.

In People v. Rogers, 780 N.Y.S. 2d 393 (N.Y. App. Div. 2004), the defendant was on trial for a sexual assault. A lab report giving the results of tests on the victim's blood from a private lab that was regularly used by the police was improperly admitted as a business record because it was prepared for litigation. Id. at 396-397. The Court found results of the blood test to be testimonial because the test was initiated by the prosecution with the aim of discovering evidence against the defendant. The Court explained:

> Defendant's 6th Amendment right to cross-examine witnesses was violated by admission of the blood test report. Defendant had the right to cross-examine witnesses regarding the authenticity of the sample for foundation purposes. He also had the right, pursuant to the Confrontation Clause, to cross-examine regarding the testing methodology Because the test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial.
>
> The test result established the victim's blood alcohol content at the time the blood was drawn and was the basis of expert testimony extrapolating her blood alcohol content at the time of the alleged rape. This was especially significant here, as the victim's intoxication level directly related to her capability to consent.
>
> Admission of the blood test results without the ability to cross-examine the report's preparer was a violation of defendant's rights under the 6th Amendment's

> Confrontation Clause, which we cannot deem harmless.

Rogers, 780 N.Y.S. 2d at 397.

This Court should find that lab reports such as the one in this case are testimonial subject to cross-examination like the testimony of any other witness. Otherwise, lab reports by government agencies should be excluded "in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case." Committee Notes Fed. R. Ev. 803(8)(public records).

The lab report in this case is testimonial because was created by an employee of a law enforcement agency such that a reasonable person would anticipate it being used at trial. The analyst in this case was not seeking to aid in medical treatment or advance the cause of science in a neutral manner. Instead, the analyst was a key player in the attempt to convict Respondent.

Petitioner states that "[t]he purpose of a lab report is to document that laboratory procedures and scientific criteria have been followed in determining the composition of a substance. It is not an accusatorial statement by the chemist that the person whose name appears on the report is guilty of an offense." Petitioners Initial Brief at 30.

However, the report in this case does not document that that laboratory procedures were followed or what if any scientific criteria were used in conducting the test. Instead,

in a conclusory manner it states that items submitted to the Florida Department of law Enforcement by Randy Meeks in the case involving Lorenzo Johnson were cocaine and marijuana. Exhibit 1 is described under the heading for exhibits as "off-white chunk." In the results section for Exhibit 1, the only thing stated is "cocaine." Exhibit 2 is described as "Three bags of plant material." The results section for Exhibit 2 states "Cannabis, 1.3 grams. Weight of all three samples with packaging is 4.4 grams."

The Florida Department of Law Enforcement lab report is the product of a government effort to convict Respondent Mr. Johnson. The United States Supreme Court understandably recognized the danger of such a process where government employees are allowed to create testimony for use at a criminal trial:

> Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse-a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Crawford, 541 U.S. at 57 n. 7.

The danger which the Court spoke of in allowing government officers to produce testimony is well founded. Confrontation by cross-examination should be required given

the many instances of crime lab error and fraud in recent years:

> Anyone who would question the value of cross-examination in this context need only look at recent newspaper headlines:
>
> • Jim Yardley, Oklahoma Inquiry Focuses on Scientist Used by Prosecutors, N.Y. TIMES, May 2, 2001, at A1 (discussing Joyce Gilchrist).
>
> • Adam Liptak, 2 States to Review Lab Work of Expert Who Erred on ID, N.Y. TIMES, Dec. 19, 2002, at A24 (discussing erroneous hair evidence in the trial of Jimmy Ray Bromgard, who spent 15 years in prison before being exonerated by DNA).
>
> • Jim Dwyer, Some Officials Shaken by New Central Park Jogger Inquiry, N.Y. TIMES, Sept. 28, 2002, at B1, B3 ("At the trial, the prosecution had argued that hairs found on Mr. Richardson's clothes came from the jogger. Recent DNA tests show that claim to be wrong.").
>
> • Nick Madigan, Houston's Troubled DNA Crime Lab Faces Growing Scrutiny, N.Y. TIMES, Feb. 9, 2003 (operations suspended in December after an audit found numerous problems).
>
> • Ralph Blumental, Double Blow, One Fatal, Strikes Police in Houston, N.Y. TIMES, Oct. 30, 2003, at A23 ("The Houston police chief announced on Wednesday that he had shut down the Police Department's toxicology section after its manager failed a competency test ....").
>
> • Ex-F.B.I. Biologist Falsified DNA Reports, Associated Press, May 19, 2004 (Jacqueline A. Blake, former DNA biologist for the F.B.I., pleads guilty to making false statements on official government reports).
>
> • Sara Kershaw, Spain and U.S. at Odds on Mistaken Terror Arrest, N.Y. TIMES, June 5,

> 2004 at A1 (Spanish clear Portland-area lawyer Brandon Mayfield. Although F.B.I. found fingerprint match, Spanish officials matched the fingerprints to an Algerian national.).

Paul Giannelli, Admissibility of Lab Reports: The Right Of Confrontation Post-Crawford, 19 Criminal Justice 26 (Fall 2004).

Frederick Whitehurst, a former Special Agent in charge of the FBI crime lab, documents numerous instances of forensic lab fraud including cases where a crime lab director in Maryland altered parameters in mass spectrometers used to analyze drugs as well as a D.E.A. chemist who acknowledged filing false lab reports in drug cases. Frederick Whitehurst, Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 1, Champion (April 2004).

Additionally, the article noted numerous problems documented in a report by the Department of Justice Inspector General at the F.B.I. lab:

> For instance, in 1997 the United States Department of Justice Inspector General's Office, upon the completion of a lengthy investigation of problems within the FBI crime lab, found the following problems within that lab: scientifically flawed testimony, inaccurate testimony, testimony beyond the examiner's expertise, improper preparation of laboratory reports, insufficient documentation of test results, scientifically flawed reports, inadequate record management and retention systems, failures by management to resolve serious and credible allegations of incompetence, and a flawed staffing structure of a unit in the crime lab.

Id. at 8; see also, U.S. Department Of Justice, Office Of The Inspector General, The FBI Laboratory: An Investigation Into Laboratory Practices And Alleged Misconduct In Explosives-Related And Other Cases, April 1997.

The Online Forensic Fraud Archive contains more recent cases of fraud, http://www.corpus-delicti.com/forensic_fraud.html. Other cases of misconduct or error are also documented in legal journals and case law. See J. Herbie DiFonzo, The Crime of Crime Labs, 34 Hofstra L. Rev. 1 (Fall 2005); Paul C. Giannelli, The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories, 4 Va. J. Soc. Pol'y & L. 439 (1997); In re Investigation of W. V. State Police Crime lab, Serology Div., 438 S.E. 2d 501 (W. Va. 1993).

Petitioner's suggestion that Respondent had a prior opportunity to confront the witness based upon the prosecutor below providing the lab report as well as the name of the analyst should not be adopted by this Court. The prosecutor below did nothing but comply with Fla. R. Crim. P. 3.220 by providing mandated discovery.

Respondent, like any other defendant, did not have the burden of producing anything at his trial. The Sixth Amendment Right to Confrontation does not require the accused to do anything to be allowed to exercise his right to confrontation. It should be noted that if Respondent had accepted Petitioner's suggestion to provide testimony through

his own expert at trial, then he would have lost the opportunity for first and last closing argument.

Respondent had every right to exercise his right to confrontation through cross-examination at trial as mandated by Crawford. Yet, he was unable to exercise this right because he could not cross-examine a piece of paper.

Discovery depositions pursuant to Fla. R. Crim. P. 3.220(h), are not a substitute for face to face confrontation required by the Sixth Amendment. Rodriguez v.State, 609 So. 2d 493 (Fla. 1992). By rule, a defendant is excluded from a discovery deposition. In Basiliere v. State, 353 So. 2d 820 (Fla. 1978), a discovery deposition taken without Basiliere's presence was used at trial after the victim died before trial. This Court noted that the defendant was not present at the discovery deposition and lacked any notice that it could be used against him at trial. This Court explained that discovery depositions were taken for the purposes of learning facts upon which a charge is based, not necessarily to challenge the accuracy of statements from a witness. Id. at 824-825.

In this case, the Second District Court of Appeal specifically declined to address whether a discovery deposition was a prior opportunity for cross-examination because the analyst was not unavailable. As noted by the Second District, the analyst was ready and willing to appear in court the next day. However, the State wished to spare the

expense of bringing the analyst to court.

There is nothing in the record to suggest that State made any attempt pursuant to Fla. R. Crim. P. 3.190(j), to perpetuate the testimony of the analyst through a deposition at which Respondent had the right to be present. The opportunity for a discovery deposition is not the same as an opportunity for cross-examination in a face to face manner as required by Crawford. See Lopez v. State, 888 So. 2d 693, 700 (Fla. 1st DCA 2004). As Professor Yetter concludes:

> [I]t seems clear that if the defendant's confrontation of the witness at a discovery deposition is to substitute for cross-examination at trial, then the deposition testimony will have to be admissible as substantive proof to the same extent as it would be if solicited on cross-examination at trial. Because the Florida decisions categorically prohibit this result, the only option for the state would seem to be to anticipate and try to avoid the impediment by waiving on the record, and in advance of the deposition, any objection to the defendant's substantive use of the discovery deposition.

John F. Yetter, Wrestling with Crawford v. Washington And The New Constitutional Law Of Confrontation, 78 Fla. Bar. J. 26, 30-31 (Oct. 2004)

The Second District Court of Appeal was correct when it found the Florida Department of Law Enforcement lab report to be testimonial. The lab report was prepared in a manner such that a reasonable person would anticipate it being used during the trial of this case. Moreover, the prosecutor in closing argument referred to the material analyzed by FDLE, and

specifically to the lab report to argue that marijuana and cocaine were found. (v3:T208-209) The lab report was used as a substitute for live testimony of the analyst. Because the lab report was not subject to a prior opportunity for cross-examination, the Second District Court of Appeal was correct in finding a violation of the Sixth Amendment right to confrontation. Therefore, the ruling below should be affirmed and the certified question answered in the affirmative.

CONCLUSION

Based upon the foregoing argument, authorities, and reasoning, the ruling below should affirmed with the certified question answered in the affirmative.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of May, 2006.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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