IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

LORENZO CEPHUS JOHNSON,

Respondent.

Case No. SC06-86

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. KRAUSS
Chief—Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 238538

MARILYN MUIR BECCUE
Assistant Attorney General
Florida Bar No. 0119581
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent was charged with Possession of Cocaine, Introduction of Contraband Into a Detention Facility, Possession of Cannabis (less than 20 grams), and Resisting a Law Enforcement Officer Without Violence. (V1/R15).

At the time of trial James Silbert had been employed by the Florida Department of Law Enforcement for twenty years, sixteen of which as a crime laboratory analyst supervisor. (V2/T116). Mr. Silbert holds a Bachelor of Science degree in forensic science. (V2/T117). Mr. Silbert supervises the eight analysts, two forensic technologists, and support staff in the chemistry section of the Tampa crime lab. (V2/T117). The analysts of the chemistry section are responsible for testing and identifying suspected controlled substances. (V2/T117). In addition to his supervisory duties, Mr. Silbert is also an analyst. (V2/T117).

Mr. Silbert explained to the jury the procedure by which evidence is obtained, secured, and analyzed by the crime lab. (V2/T118). Specifically, Mr. Silbert testified that various law enforcement agencies bring suspected narcotics to the crime lab in sealed containers. (V2/T118). The crime lab's intake division documents the condition of the substances and their containers and assigns a FDLE case number. (V2/T118). Intake

also seals the evidence in FDLE packaging upon which the FDLE case number is documented. (V2/T119). The evidence is stored in a vault and the case file reflecting the FDLE case number is given to Mr. Silbert as lab supervisor. (V2/T119). Mr. Silbert then assigns the case to one of the analysts. (V2/T119). When the analyst gets the file, he or she will request that the evidence corresponding to the assigned FDLE case number be released from the vault for testing. (V2/T119).

When the analyst obtains the substance he or she will open the packaging without breaking the original seal. (V2/T119). The analyst will perform an analysis, generate data, and record test results. (V2/T119). The evidence is resealed, marked for identification purposes by the analyst, and returned to the vault. (V2/T119). After the analysis is complete, the analyst's report is given to Mr. Silbert for review. (V2/T119).

Mr. Silbert testified Anna Deakin initialed the FDLE seal in this case. (V2/T120). Ms. Deakin was an analyst with FDLE for five years before leaving to take a job with the Federal Bureau of Investigations in 2004. (V2/T145). Furthermore, Mr. Silbert testified the evidence packaging bore the FDLE case number corresponding to Ms. Deakin's report and case file. (V2/T120). After confirming Ms. Deakin's report is kept in the regular

course of business at the FDLE lab, the state moved to introduce the report into evidence. (V2/T121). Defense counsel objected to the introduction of the lab report arguing it was hearsay and its introduction would violate Respondent's right to cross examine Ms. Deakin. (V2/T122). The court excused the jury and heard argument on the issue. (V2/T123).

Defense counsel stated he understood Ms. Deakin was no longer with FDLE and currently out of state. (V2/T123). Nonetheless, defense counsel was under the impression that Ms. Deakin was going travel to Florida for the trial. (V2/T123). Counsel stated he was surprised Ms. Deakin was not at the trial. (V2/T123). After hearing argument, the court overruled counsel's objection and allowed the state to introduce the report as a business record. (V2/T139).

Mr. Silbert retook the stand and confirmed Ms. Deakin generated the report at the time of the analysis or shortly thereafter. (V2/T141). Mr. Silbert also reiterated that it is the regular practice of the FDLE crime lab chemistry division to make and keep such records. (V2/T141). Based on his review of the report and case file, Mr. Silbert testified the off-white substance was identified as cocaine, and the plant material was identified as cannabis. (V2/T142).

On cross examination Mr. Silbert acknowledged he did not "stand over Ms. Deakin and watch her" conduct the analysis. (V2/T143). When asked if there was any way to know whether Ms. Deakin followed the correct procedure in conducting her analysis, Mr. Silbert stated, ". . . based on my observation of the case file . . . she did follow procedure." (V2/T144). On redirect, Mr. Silbert explained that it is FDLE lab protocol that all analysts' reports are submitted to a supervisor for review before the results are released to law enforcement. (V2/T146).

Respondent was convicted on all counts and appealed his convictions and sentences to the Second District Court of Appeal arguing his Sixth Amendment right to confrontation was violated because he could not cross examine Ms. Deakin. The Second District Court of Appeal agreed and reversed the drug-related convictions and sentences. Thereafter, the court granted the state's Motion for Rehearing in part and certified the following question to this Court as a question of great public importance:

> **DOES THE ADMISSION OF A FLORIDA DEPARTMENT OF LAW ENFORCEMENT LAB REPORT ESTABLISHING THE ILLEGAL NATURE OF THE SUBSTANCES POSSESSED BY A DEFEENDANT VIOLATE THE CONFRONTATION CLAUSE AND *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004), WHEN THE PERSON WHO PERFORMED THE LAB TEST DID NOT TESTIFY?**

SUMMARY OF THE ARGUMENT

The Supreme Court of the United States in Crawford v. Washinton, 541 U.S. 36 (2004), determined the Sixth Amendment Confrontation Clause=s guarantee is procedural rather than substantive. That is, the Clause Acommands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.@ 541 U.S. at 61. This required testing, though, applies only to ***testimonial*** statements of an unavailable witness. Id.

The Court did not provide a comprehensive list of all statements that are considered testimonial; but, the Court did provide certain examples that can be used by way of comparison to determine whether a statement is testimonial. The Court stated, that whatever else the term means, it applies, at a minimum, to the following: 1) prior testimony at a preliminary hearing; 2) prior testimony before a grand jury; 3) prior testimony at a former trial; and, 4) statements made during a police interrogation. 541 U.S. at 68. AThese are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.@ Crawford, 541 U.S. at 61.

The Court mandated that the Clause be interpreted with a focus on these types of statements, which are the principle evil

the Clause was meant to address. Similarly, the Court noted the Clause should be read with reference to exceptions to the hearsay rule that were well established at the time of the founding – specifically noting the business records exception. Id. at 56.

Lab reports bear no resemblance to the types of statements identified in Crawford as testimonial. Lab reports do not contain descriptive information that would generally be presented through narrative testimony. While lab reports contain a defendant's name, they contain no directly accusatorial statement against the defendant. The report itself merely states the result of a well-recognized scientific test to determine the composition of a substance. This is not the type of testimonial statements discussed in Crawford. The cross examination of the specific analyst who conducted the test would yield little, if any, valuable information to the defendant. Rather, it is more likely the cross examination would consist of the chemist referring to his or her report.

The Second District Court of Appeal's analysis in this case perpetrates rather than eliminates the concerns of the Supreme Court of the United States, which was the elimination of Aopen-ended balancing tests@ with regard to the Confrontation Clause=s protections. The Second District Court of found support for its

decision in Belvin v. State, (4th DCA March 8, 2006), and Shiver v. State, 900 So. 2d 615 (Fla. 1st DCA 2005). Belvin and Shiver both analyzed whether a statement is testimonial by considering whether "one would reasonably expect [the statement] to be used prosecutorially, and . . . was made under circumstances which would lead an objective witness to reasonably believe [it] would be available for trial." Shiver, 900 So. 2d at 618.

This is not the test for determining whether a statement is testimonial. This definition of "testimonial" was proffered to the United States Supreme Court by the National Criminal Defense Lawyers Association in their Amicus Brief, and by Crawford himself. Had the Court accepted this definition it would have specifically stated such. Rather, the Court provided a historical analysis and examples of the types of statements the Clause was meant to address. It is by comparison to these examples, not the amorphous test of whether the declarant would reasonably believe the statement would be used at a later trial, that one determines whether a statement is "testimonial" for Confrontation Clause purposes.

Lab reports do not fall within the core class of statements at which the Clause is directed, and with which the Crawford Court was concerned. Rather, they are more akin to business records, which are admissible without regard to the

Confrontation Clause.

ARGUMENT

THE ADMISSION OF A FLORIDA DEPARMTENT OF LAW ENFORCEMENT LAB REPORT GENERATED BY A NON-TESTIFYING ANALYST DOES NOT VIOLATE THE CONFRONTATION CLAUSE OR CRAWFORD V. WASHINGTON, 541 US. 36 (2004).

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

In Crawford v. Washington, 541 U.S. 36 (2004), Crawford was accused of stabbing a man who had allegedly tried to rape Crawford=s wife, Sylvia. During the police investigation, both Crawford and Sylvia made statements to detectives. Sylvia=s statement generally corroborated Crawford=s except with respect to whether the victim had drawn a weapon prior to the stabbing. This difference was significant because Crawford was claiming self-defense.

Because of Washington=s marital privilege, Sylvia could not

be called to testify against Crawford unless Crawford agreed to waive the privilege. See, Wash. Rev. Code § 5.60.060(1), (1994). The privilege does not apply, though, to a spouse=s out-of-court statements. See, State v. Burden, 841 P. 2d 758 (Wash. 1992). Therefore, the only way Crawford would have been able to cross examine Sylvia=s statement, either at trial, or pretrial, would be to waive the privilege.

In deciding Crawford, the United States Supreme Court rejected the rationale of Ohio v. Roberts, 448 U.S. 56 (1980), which intermingled the rules of evidence, specifically as to hearsay, with the Confrontation Clause of the Sixth Amendment. According to the Roberts Court, the Clause's purpose is to test the reliability of statements through cross examination. Id. at 63. "This reflects the truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values, . . . and 'stem from the same roots.'" 448 U.S. at 66, quoting, Mattox v. United States, 156 U.S. 237, 244 (1895), and California v. Green, 399 U.S. 149, 155 (1970). The Court held, essentially, all hearsay statements are subject to the Confrontation Clause, but certain hearsay is admissible without being subject to cross examination if it bears "particularized guarantees of trustworthiness," or is a "firmly rooted" exception to the hearsay rule. Roberts, 448 U.S. at 66. If the

statement fell into either category the statement was deemed to have an "adequate indicia of reliability; therefore, according to Roberts, cross examination would do little to test the statement's reliability. Id.

According to the Crawford Court, the flaw of the Roberts rationale is two-fold. First, the adequate-indicia-of-reliability test is too broad in that it applies the "same mode of analysis whether or not the hearsay consists of ex parte testimony." 541 U.S. at 60. Secondly, it is too narrow in that it admits statements that "*do* consist of ex parte testimony upon a mere finding of reliability." Id. In rejecting Roberts, the Crawford Court determined the Confrontation Clause=s guarantee is procedural rather than substantive. That is, the Clause Acommands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.@ 541 U.S. at 61. This required testing, though, applies only to ***testimonial*** statements of an unavailable witness. Id.

Crawford represents a shift from an evidentiary reading of the Clause whereby *all* hearsay statements were subject to its protections but some of which were admissible, absent cross examination, if deemed reliable; to a more narrow reading that

requires cross examination of only statements that are at the core of the Clause's protection and, therefore, *must* be subject to confrontation. Consequently, the Constitution does not mandate confrontation for hearsay statements that are not of the type at the core of the Clause's protections. While those statements might still be hearsay and, therefore, may present issues of an evidentiary nature, they present no constitutional concern. 541 U.S. at 51; See also, W. Jeremy Counseller & Shannon Rickett, The Confrontation Clause After Crawford v. Washington: Smaller Mouth, Bigger Teeth, 57 Baylor L. Rev. 1 (Winter 2005).

As further evidence of the Court's intent to divorce the Confrontation Clause from the rules of evidence Justice Scalia points out:

> . . . not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, over-heard remark might be unreliable and thus a good candidate for exclusion under the hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

Crawford, 541 U.S. at 51.

The Court did not provide a comprehensive list of all

statements that are to be considered testimonial, but the Court did provide certain examples that can be used by way of comparison to determine whether a particular statement is testimonial. The Court stated, that whatever else the term means, it applies, at a minimum, to the following: 1) prior testimony at a preliminary hearing; 2) prior testimony before a grand jury; 3) prior testimony at a former trial; and, 4) statements made during a police interrogation. 541 U.S. at 68. AThese are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.@ Id. A *testimonial setting* "is the trigger that makes the Clause's demands most urgent." 541 U.S. at 65.

Furthermore, the Court examined the nature of testimonial statements by resorting to the historical underpinnings of the Sixth Amendment itself. 541 U.S. at 41-51. At the time of the founding, the common-law tradition with regard to criminal trials required a witness=s live in-court testimony subject to adversarial testing. 541 U.S. at 42. Conversely, the civil law permitted the use at trial of statements made during ex parte interrogations of witnesses. Id.

Despite this alleged difference, justices of the peace or other government officials would often conduct formal pretrial

interrogations of witnesses in criminal cases only to introduce those statements at trial without producing the witnesses themselves. Id. The Court discussed a number of historically significant cases in which out-of-court statements made in response to interrogation by officials were subsequently used against an accused in a criminal trial. See, 541 U.S. at 41-51. The Court then stated:

> First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

541 U.S. at 50.

In addition to the requirement that the Clause be read with reference to the types of practices at which it was directed, the Court also stated that the Clause should be interpreted with reference to the exceptions that were well established at the time of the founding. 541 U.S. at 54.

> This is not to deny, as the Chief Justice notes, that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence. (citation omitted). Several had become well established by 1791.

> (citation omitted). But there is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case. **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 (emphasis added).

The recognition of business records as non-testimonial was a point on which both the majority and concurring opinions in Crawford agreed. Chief Justice Rehnquist wrote in his concurring opinion that, Ato hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process.@ 541 U.S. at 76.

Section 90.803(6), Fla. Stat. (2004), permits the introduction of business records, and reads in part:

> a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack

> of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Business records are presumed accurate because they are relied upon by a business in the conduct of its daily affairs and the records are customarily checked for correctness during the course of business activities. See, Hawthorn v. State, 399 So. 2d 1088 (Fla. 1st DCA 1981); See also, Charles W. Earhardt, Florida Evidence, § 803.6, West Publishing 2004 Ed.

In determining what is testimonial for purposes of the Confrontation Clause it is also helpful to look to United States Supreme Court precedent prior to Crawford. In White v. Illinios, 501 U.S. 346, 359 (1992) Justice Thomas=s concurring opinion, in which Justice Scalia joined, foreshadowed the Court=s ultimate decision in Crawford. Justice Thomas wrote that the critical phrase within the Clause is Awitness against him.@ Justice Thomas went on to note, AUnfortunately, in recent cases in this area, the Court has *assumed* all hearsay declarants are >witnesses against= a defendant within the meaning of the Clause . . . an assumption that is neither warranted nor supported by the history or text of the Confrontation Clause.@ 501 U.S. at 359 (internal citations omitted).

Moreover, Justice Thomas stated that a definition of the term Awitness against him@ that included a consideration of whether the statement was made in contemplation of legal proceedings Awould entangle the courts in a multitude of difficulties.@ 502 U.S. at 364. Among other things, Justice Thomas noted the approach does not clarify who must be contemplating legal proceedings, the declarant or the listener - or both. Id. Rather, Justice Thomas opted for a definition more in line with formalized testimonial evidence, which is at the core of the Clause=s protections. 502 U.S. at 365. Under this approach, Justice Thomas argued, the Clause would not be construed to extend Abeyond the historical evils at which it was directed.@ 502 U.S. at 365.

Earlier in the Court=s Confrontation Clause jurisprudence, Justice Harlan struggled with the concept the Clause protects against overly broad exceptions to the hearsay rule. Dutton v. Evans, 400 U.S. 74, 94-5 (Harlan, J. concurring). Justice Harlan argued the Clause does not prescribe what kind of statements must be the subject of live, in-court testimony, but rather it mandates the procedure by which statements that *must* be given infra-judicially are to be tested - i.e. cross examination. 400 U.S. at 94, citing, J. Wigmore, Evidence ' 1397

(3d Ed. 1940). In other words, as the Court ultimately decided in Crawford, the Confrontation Clause=s guarantee is procedural rather than substantive. Crawford, 541 U.S. at 61. Justice Harlan went on to state,

> Nor am I now content with the position I took in concurrence in *California v. Green*,[1] supra, that the Confrontation Clause was designed to establish a preferential rule, requiring the prosecutor to avoid the use of hearsay where it is reasonably possible for him to do so -- in other words, to produce available witnesses. Further consideration in the light of facts squarely presenting the issue, as *Green* did not, has led me to conclude that this is not a happy intent to be attributed to the Framers absent compelling linguistic or historical evidence pointing in that direction. It is common ground that the historical understanding of the clause furnishes no solid guide to adjudication.
>
> A rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant. Examples which come to mind are the Business Records Act, 28 U. S. C. '' 1732-1733, and the exceptions to the hearsay rule for official statements, learned treatises, and trade reports. See, e. g., Uniform Rules of Evidence 63 (15), 63 (30), 63 (31); *Gilstrap v. United States*, 389 F.2d

[1] 300 U.S. 149 (1970).

> 6 (CA5 1968) (business records); *Kay v. United States*, 255 F.2d 476 (CA4 1958) (laboratory analysis). If the hearsay exception involved in a given case is such as to commend itself to reasonable men, production of the declarant is likely to be difficult, unavailing, or pointless. In unusual cases, of which the case at hand may be an example, the Sixth Amendment guarantees federal defendants the right of compulsory process to obtain the presence of witnesses, and in *Washington v. Texas*, 388 U.S. 14 (1967), this Court held that the Fourteenth Amendment extends the same protection to state defendants.

Dutton, 400 U.S. at 95-96 (Harlan, J. concurring).

While the United States Supreme Court squarely rejected the adequate-indicia-of-reliability test with reference to testimonial statements, it also made clear that where non-testimonial statements are concerned, reliability factors beyond a prior opportunity for cross examination are to be considered. Crawford, 541 U.S. at 56. Moreover, where non-testimonial statements are concerned, Ait is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.@ 541 U.S. at 68.

Since the United States Supreme Court's decision in Crawford, a number of courts have addressed the issue of what

the term “testimonial” means for purposes of Confrontation Clause analysis.

In addressing the nearly identical issue presented here, the Supreme Court of Massachusetts held a lab report memorializing the procedure used to analyze substances suspected to be contraband are non-testimonial and, therefore, admissible without violating the defendant’s right to confrontation. Commonwealth v. Verde, 827 N.E. 701 (Ma. 2005). In Verde, law enforcement officers executed a search warrant for the defendant’s house and found approximately 102 grams of cocaine in its various forms, and other items commonly used in the drug trade.

At the defendant’s trial for trafficking in cocaine, the state introduced certificates of analysis with respect to the drugs found in the defendant’s house. The analyst who performed the tests on those drugs did not testify; rather, the laboratory manager testified he personally examined the test results and concurred with the results reported on the certificates. On appeal, the defendant argued he was deprived of his constitutional right to confront the analyst who actually performed the tests.

In rejecting the defendant’s argument, the Supreme Court of Massachusetts held:

> Certificates of chemical analysis are 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. (citation omitted). Additionally, the certificate is admissible only as prima facie evidence of the composition, quality, and weight of the substance, (citation omitted), which a defendant may rebut if he doubts its correctness. Accordingly, these drug certificates are well within the public records exception to the confrontation clause.
>
> Furthermore, we do not believe that the admission of these certificates of analysis implicate "the principal evil at which the Confrontation Clause was directed . . . particularly its use of ex parte examinations as evidence against the accused." (citation omitted). The documentary evidence at issue here has very little kinship to the type of hearsay the confrontation clause intended to exclude, absent and opportunity for cross-examination. Rather, it is akin to business or official records, which the Court stated was not testimonial in nature.

827 N.E. at 705-06.

Similarly, Third District Court of Appeal of California found laboratory reports regarding the analysis of alleged rock cocaine were not testimonial. People v. Johnson, 19 Cal. Rpt. 3d 230 (Ca. Dist. Ct. App. 2004). The court made similar findings to the Massachusetts Supreme Court in that lab reports are not within the core class of testimony with which the

Crawford Court was concerned, and at which the Sixth Amendment's Confrontation Clause is directed. Id. at 232-33. Additionally, the court held laboratory reports do not "bear witness" or function as the equivalent of in-court testimony. The court noted that had the report's preparer taken the stand, he or she would likely only to be able to authenticate the document and would not be able to testify from an independent recollection of the test itself. Id. at 233. Citing the Supreme Court of California's decision in People v. Arreola, 875 P. 2d 736 (Ca. 1994), the court further observed:

> In *Arreola*, our Supreme Court explained: "There is an evident distinction between a transcript of former live testimony and the type of traditional 'documentary' evidence involved in [case name ommitted] that does not have, as its source, live testimony.... [T]he need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor. [citation omitted in original.] Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (citation omitted.)

> Here, the laboratory report was not a substitute for live testimony at [appellant’s] revocation hearing; it was routine documentary evidence. Thus, it did not amount to "testimonial" hearsay under *Crawford*, and its admission was consistent with the rationale of *Arreola*. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." (citation omitted).

Id. at 1412-13; See also, Oregon v. Thackaberry, 95 P. 3d 1142 (Or. Ct. App.)(2004) (holding a laboratory report of a toxicology test neither qualifies or seems analogous to testimony at a preliminary hearing, before a grand jury, or at a former trial. “Nor, in the least obvious way, is it a statement made during a police interrogation or closely analogous to one.”); New York v. Brown, 2005 N.Y. Slip. Op. 25303 (N.Y., Queens Div. 2005)(holding the records of DNA testing do not contain opinions of a testimonial nature and simply memorialize tests that were conducted and the results reached.)

The Court of Appeals of Colorado, in an unpublished opinion, also dealt with the issue of whether lab reports are testimonial under Crawford. Colorado v. Hinojos-Menendez, Case No. 03CA0645

(Co. Ct. App. July 28, 2005).[2] The court noted the majority of jurisdictions that have reached this issue have held lab reports are non-testimonial.[3] Additionally, the court noted, citing the Second District Court of Appeal's decision in the instant case, Florida has thus far aligned itself with the minority of jurisdictions that treat various documents prepared at the behest of law enforcement as testimonial. The court declined the appellant's invitation to join the minority finding the majority cases to be better reasoned.

In aligning itself with the majority reasoning, the court noted that lab reports bear no resemblance to the types of statements identified in Crawford as testimonial. The court further reasoned that lab reports do not contain descriptive information that would generally be presented through narrative testimony. Finally, while lab reports contain a defendant's name, they contain no directly accusatorial statement against the defendant. Based on the foregoing, the court held lab

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[2] Petitioner has included in the appendix copies of the unpublished opinions referenced in the Initial Brief for the Court's convenience.

[3] Other jurisdictions have held that a testifying expert can rely on a report of a non-testifying expert in forming his or her opinion without violating Crawford. See, North Carolina v. Bunn, 619 S.E. 2d 918 (N.C. Dist. Ct. App. 2005); Wisconsin v. Barton, 709 N.W. 93 (Wis. Dist. Ct. App. 2005).

reports are not testimonial and neither Crawford, nor the Sixth Amendment Confrontation Clause, mandates confrontation. See also, Denoso v. Texas, 156 S.W. 3d 166 (Tx. Ct. App. 2005)(holding autopsy report is admissible without the testimony of the pathologist who conducted the autopsy and related tests because the report is not akin to the types of statements with which the Confrontation Clause is concerned.)

The Second District Court of Appeal's decision in this case is contrary to the United States Supreme Court's interpretation of the Confrontation Clause. According to the Second District Court of Appeal, "technically, an FDLE lab report is a record kept in the regular course of business, *but by its nature is it intended to bear witness against an accused*." Johnson v. State, 31 Fla. L. Weekly D 125 (Fla. 2d DCA Dec. 30, 2005)(emphasis added). The court does not specify what in the reports nature causes it to be accusatory. The court does cite as comparison, this Court's holding in Baber v. State, 775 So. 2d 258,(Fla. 2000) that permitted the admission of hospital blood test. In Baber, this Court noted the "hospital . . . did not have an interest in the outcome of the future criminal case lodged against the defendant." 775 So. 2d at 262.

Presumably, then, the Second District Court of Appeal

determined, in part, that lab reports were "testimonial" because they were generated by chemist employed by the Florida Department of Law Enforcement as opposed to a chemist employed by a hospital or private lab. There are numerous flaws in that logic. First, FDLE chemists have no vested interest in the outcome of a criminal trial. FDLE chemists are not responsible for the "prevention and detection of crime or the enforcement of the penal, criminal, or highway laws of the state." See, § 943.10(1)(2004)(defining "law enforcement officer" for purposes of §§ 943.085-943.255 regarding training and qualifications of law enforcement officers). Contrary to what is depicted in popular television shows such as CSI, FDLE chemists do not conduct investigations, make accusations of criminal conduct, or track down offenders. Nor do FDLE chemists have the power to arrest individuals and subject them to prosecution. Rather, their primary responsibility is to perform a scientific analysis of substances provided by investigating authorities statewide. See, § 943.31, Fla. Stat. (2004)(providing for a state-wide criminal analysis laboratory to met the needs of criminal justice agencies.)[4]

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[4] Notably, the various state-wide criminal analysis laboratories' services "shall also be available to any defendant in a criminal

More importantly, the flaw in this analysis is that is perpetrates rather than eliminates the concerns of the Supreme Court of the United States, which was the elimination of Aopen-ended balancing tests@ with regard to the Confrontation Clause=s protections. The Second District Court of Appeal found support for its decision in Belvin v. State, (4th DCA March 8, 2006), and Shiver v. State, 900 So. 2d 615 (Fla. 1st DCA 2005). Both Belvin and Shiver dealt with breath test affidavits, not lab reports.[5] Further, Belvin and Shiver both determined the breath test affidavit is testimonial because "[i]t contained statements one would reasonably expect to be used prosecutorially, and was made under circumstances which would lead an objective witness to reasonably believe the statements would be available for trial." Shiver, 900 So. 2d at 618.

This is not the test for determining whether a statement is testimonial. In Crawford, the Supreme Court of the United States discussed a number of proposed definitions for the term "testimonial." Specifically, the Court cites the Amicus Brief

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case upon a showing of good cause and upon order of the court . . . ." § 943.33, Fla. Stat. (2004).

[5] The State maintains both Belvin and Shiver were incorrectly decided, nonetheless, lab reports are qualitatively different than breath test affidavits.

of the National Association of Criminal Defense Lawyers. et al. proposed definition that testimonial means, Astatements 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.@ 541 U.S. at 51-52. Rather than adopting this test, the Court stated:

> These formulations all share a common nucleus and then define the Clause's coverage at *various levels of abstraction around it.* Regardless of the precise articulation, some statements *qualify under any definition*--for example, ex parte testimony at a preliminary hearing.
>
> Statements taken by police officers in the course of interrogations are also testimonial under *even a narrow standard*. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive.

Crawford, 541 U.S. at 52. (emphasis added).

Had the Supreme Court of the United States accepted the National Criminal Defense Lawyers' definition it would have specifically stated such. Rather, the Court provided a historical analysis and examples of the types of statements the Clause was meant to address. It is by comparison to these examples, not the amorphous test of whether the declarant would

reasonably believe the statement would be used at a later trial, that one determines whether a statement is "testimonial."

New York v. Fisher, 2005 Slip Opinion 51726U (Rochester Div. 2005) (unpublished), cogently explains the likely reason why the criminal defense attorneys' definition was rejected by the Court.

> There is perhaps a good reason why a majority of Supreme Court Justices did not adopt either Michael Crawford's or the Defense Lawyers' definition. First, since seven of the nine justices in *Crawford* voted to discontinue *Roberts'* amorphous analytical framework, it is unlikely that they would readily embrace an essentially shapeless standard requiring a court to find that "an objective witness [would] reasonably . . . believe that the statement would *be available for use* at trial at a later trial. Nor, does it appear they would be quick to endorse an equally elusive test focusing on "pretrial statements that declarants would *reasonably expect to be used prosecutorially*." Such "vague standards" would spawn schools of inconsistent opinions similar to those bred by *Roberts*.

Fisher also noted Justice Scalia's espoused philosophy, adopted by the majority in Crawford, that it is the Supreme Court of the United States' responsibility "to interpret the Constitution in a way that secures its intended constraint on judicial discretion." Citing, Crawford, 541 U.S. at 67. Consequently, the Court's decision in Crawford does not provide

a limitless confrontation right subject to a court's determination of whether a reasonable person would believe his or her statement would later be used in a criminal trial. Rather, Crawford limits the Clause to its historical purpose of providing the right to confront statements made in a testimonial setting and in response to official interrogation. See also, New Mexico v. Dedman, 102 P. 2d 561 (N.M. 2004), (holding that where the nurse who drew appellant's blood did not testify the report was admissible because although the test was done at the behest of law enforcement, and the report is prepared for use at trial "the process is routine, non-adversarial, and made to ensure an accurate measurement." The report is very different from examples of testimonial hearsay addressed in Crawford.)

The Second District Court of Appeal's opinion does not seem to state all business records are inadmissible testimonial hearsay, just those that *a court* deems to have been compiled at the request of law enforcement and that *might* later be used at trial. The 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. It is not

generated in response to any type of official, governmental, or judicial interrogation. Finally, it is not recorded in a "testimonial setting" but rather in the sterility of a scientific laboratory.

Even if a lab report could be considered an accusatory statement, that does not lead to the conclusion the report is testimonial. The Supreme Court of the United States did not hold that all evidence used to prove an element of an offense, or any other fact, is testimonial and, therefore, subject to confrontation. Rather, the Court mandated that *if* the state is going to use testimonial evidence to prove an element of the offense, or any other fact, *that evidence* must be subject to cross examination. Crawford held the Sixth Amendment provides the procedure by which certain evidence must be tested. The Sixth Amendment does not preclude the state from proving a fact through non-testimonial evidence. Nor does it provide the sole method of testing the reliability, accuracy, or veracity of non-testimonial statements.

Certainly, a defendant can challenge the accuracy of the information contained in a lab report, but it is not mandated by the Sixth Amendment that the challenge be through cross examination. Notably, though, Respondent does not argue he did

not have a *prior opportunity* to cross examine the chemist who conducted the analysis. Respondent=s attorney was provided with not only the lab report, but the name of the analyst who conducted the tests. Counsel raised no objection to the contrary. Therefore, Respondent had a prior opportunity to confront the witness. Respondent was not placed in the untenable position, as was Crawford, to choose between refuting testimonial evidence, or maintaining a long-recognized privilege. Arguably, absent a requirement the defendant be present at the time the Astatement@ is being made - i.e. at the time of the analysis, which would be an unworkable, unnecessary, and overly cumbersome procedure, pretrial depositions provide defendants with an adequate opportunity to examine this type of witness.

In addition to pretrial depositions, there are other avenues by which criminal defendants can challenge the accuracy of a lab report, just as there are many avenues by which to challenge other types of non-testimonial evidence presented against them. A criminal defendant can test the accuracy of a lab report by, among other things, independently testing the substance; calling a defense expert to testify; or, as Justice Harlan noted, compelling the state chemist to testify at trial through

compulsory process. A lab report merely states the result of a well-recognized scientific test to determine the composition of a substance. This is not the type of testimonial statements discussed in Crawford. The cross examination of the specific analyst who conducted the test would yield little, if any, valuable information to the defendant. Rather, it is more likely the cross examination would consist of the chemist referring to his or her report. These reports bear no resemblance to the evils at which the Clause was directed.

The introduction of the lab report is merely prima facie evidence of a substance=s composition, quality, and quantity, which a defendant may rebut if he or she doubts its reliability. It is only where *testimonial* evidence is concerned that the Sixth Amendment=s Confrontation Clause requires reliability testing through the crucible of cross examination. Lab reports are not testimonial, therefore, cross examination of the chemist is not mandated by the Sixth Amendment to the United States Constitution, the rules of evidence, or the United States Supreme Court=s decision in Crawford.

This Court should answer the certified question in the negative.

CONCLUSION

Petitioner respectfully requests that this Honorable Court reverse the holding of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to WILLIAM SHARWELL, Assistant Public Defender, Office of the Public Defender, P.O. Box 9000 Drawer PD, Bartow, Florida 33831 this 30th day of March, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

____
ROBERT J. KRAUSS
Chief—Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 238538

____
MARILYN MUIR BECCUE
Assistant Attorney General
Florida Bar No. 0119581
Concourse Center 4
3507 E. Frontage Road, Suite 200

Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR PETITIONER