07-7770

No. 07A230

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

CHRISTOPHER ADAM GEIER, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Christopher Adam Geier, asks leave to file the accompanying petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner has been granted leave to so proceed before the California Supreme Court. Petitioner's declaration in support of this motion is attached.

Dated: November 14, 2007

Respectfully submitted,

MICHAEL J. HERSEK
California State Public Defender

BARRY P. HELFT
Chief Deputy State Public Defender
Counsel of Record
221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Counsel for Petitioner

ORIGINAL

(10)

DECLARATION OF CHRISTOPHER ADAM GEIER

I, Christopher Adam Geier, do hereby declare and state that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further state that the responses which I have made below relating to my inability to pay the cost of proceeding in this Court are true.

1. I am not presently employed, and have been incarcerated on death row at San Quentin State Prison, San Quentin, California since 1995.

2. I have not received within the last twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other source.

3. There is approximately $ 25.00 in my prison account. I own no other cash, and have no other checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. There are no persons who are dependent upon me for support.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of September, 2007.

Christopher Adam Geier

CHRISTOPHER ADAM GEIER

No. 07A230

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ADAM GEIER, *Petitioner,*
v.
STATE OF CALIFORNIA, *Respondent.*

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

CERTIFICATE OF SERVICE

I, Barry P. Helft, a member of the Bar of this Court, hereby certify that my business address is 221 Main Street, 10th Floor, in the City and County of San Francisco, California, Telephone (415) 904-5600; that on November 14, 2007, I served, pursuant to Supreme Court Rule 29, one true copy of the **MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*** and **DECLARATION IN SUPPORT OF MOTION** in the above-entitled matter on the following parties by placing same in an envelope addressed as follows:

Andrew Mestman
Office of the Attorney General
110 W. A Street, Suite 1100
San Diego, California 92101

Christopher Adam Geier
(Petitioner)

Supreme Court of California
Attn: Mary Jameson
350 McAllister Street, 1st Floor
San Francisco, CA 94102

The envelope was then sealed and deposited in the United States mail at San Francisco, California with the postage thereon fully prepaid. All persons required to be served have been served.

I declare under the penalty of perjury that the above is true and correct.

Signed on November 14, 2007

BARRY P. HELFT
Chief Deputy State Public Defender
Counsel of Record for Petitioner

07-7770

ORIGINAL

No. 07A230

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ADAM GEIER, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

MICHAEL J. HERSEK
STATE PUBLIC DEFENDER
FOR THE STATE OF CALIFORNIA

BARRY P. HELFT
Chief Deputy State Public Defender
Counsel of Record

221 Main Street, 10th Floor
San Francisco, CA 94105
(415) 904-5600

Counsel for Petitioner
CHRISTOPHER ADAM GEIER

(6)

QUESTION PRESENTED

Whether the Sixth Amendment's Confrontation Clause permits the prosecution to introduce against a defendant the results of DNA tests without producing the person who actually conducted the tests, when the person who conducted the tests is neither unavailable nor has been previously subject to cross-examination by the defendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

FEDERAL STATUTES

TABLE OF AUTHORITIES

Pages

TEXTS AND OTHER AUTHORITIES

No. 07A230

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ADAM GEIER, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Christopher Adam Geier respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of California affirming his conviction and sentence of death.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner, Christopher Adam Geier, and Respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on July 2, 2007, reported as *People v. Geier*, 41 Cal.4th 555 (2007). A copy of that opinion is attached as Appendix A.

JURISDICTION

The California Supreme Court entered its judgment on July 2, 2007. On September 17, 2007, Justice Kennedy signed an order extending the time for filing this petition for certiorari to and including November 15, 2007. This court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution 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 may have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; 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.

STATEMENT OF THE CASE

Petitioner was convicted of the capital murder of Erin Tynan; a murder that allegedly occurred during the commission of a rape.[1] CT 2238, 2240.[2] During the course of investigating this crime, law enforcement recovered multiple items from the crime scene and took blood samples from seven individuals in addition to the deceased. These were all sent to Cellmark Diagnostics for DNA testing. RT 5245-5250.

The analysis of the samples was conducted by Paula Yates, one of Cellmark's biologists. It was Ms. Yates who processed the DNA in order to produce the autorads indicating the length of the polymorphic fragments which were then utilized to determine a match. This procedure involved seven distinct substeps: extraction, restriction, electrophoresis, denaturing, "Southern transfer," hybridization, and autoradiography. App. 47, n. 11.

Viewing the genetic profiles established by Yates, Robin Cotton, Cellmark's laboratory director, testified that DNA samples from a vaginal swab taken from Ms. Tynan matched DNA samples taken from Petitioner. She provided frequency calculations using both the interim ceiling method and the product rule; under the former, the frequency of the profile in the general population was 1 in 53,000, and under the latter,

---

[1] Petitioner was also charged and convicted of a second capital murder, but the evidence that is the subject of this petition was not used to prove Petitioner's guilt of that crime.

[2] "CT" refers to the Clerk's Transcript of the trial; "RT" refers to the Reporter's Transcript of the trial.

the frequency among Caucasians was 1 in 5.7 million. App. 49. Cotton testified before the jury that the match between Petitioner's samples and the vaginal swabs taken from Ms. Tynan was a rare event. RT 5454.

Petitioner objected to Cotton's trial testimony about the results of the testing because she was not the person who actually conducted the tests which formed the basis for her opinion, and permitting her to testify regarding Yates's test results deprived him of the opportunity to cross-examine Yates. He also objected that the test results were inadmissible because the testing was done for the purpose of litigation. The trial court overruled these objections and admitted the evidence. RT 5350-5351, 5383. Petitioner renewed his objections in a motion for new trial, and reiterated that admitting the test results without producing the person who actually conducted the tests violated the Confrontation Clause. CT 2465-2466.

This claim was renewed on direct appeal to the California Supreme Court. That court found there was no Confrontation Clause violation in permitting an expert to testify regarding the match between Petitioner's DNA and that extracted from the vaginal swabs, despite the fact that this testimony was based upon the acceptance of the accuracy of the test results and the person who conducted the testing was not produced as a witness by the state. The court reached this conclusion by finding that the test results were not testimonial evidence. App. 45-67.

REASONS FOR GRANTING THE WRIT

The California Supreme Court has held that the Confrontation Clause permits a conviction and sentence of death where a prosecutor introduces into evidence the results of DNA tests prepared at the behest of the state via the expert who relied upon the truth of those tests in formulating her opinion that there was a match linking the defendant to the commission of the crime, rather than by producing for cross-examination the person who conducted the actual testing; a procedure that isolates from confrontation the person responsible for developing the crucial evidence against the defendant. The California Supreme Court's holding that this type of evidence is outside the reach of this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) because it is nontestimonial evidence highlights a significant split in authority among courts across the country. Because the use of scientific testing such as the DNA tests conducted in this case are playing an ever-increasing role in criminal prosecutions, this Court should resolve the deep split in how this evidence is to be treated, and make clear that the Confrontation Clause dictates that live testimony must be presented at trial from the person who conducted such tests, absent a showing that the person is unavailable to testify and the defendant had a prior opportunity for cross-examination.

I. Federal and State Courts are Severely Split Regarding Whether Laboratory Test Results Constitute Testimonial Evidence Subject to Confrontation Clause Scrutiny.

In *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), this Court held that trial courts could admit out-of-court statements as evidence against criminal defendants as long as the statements bore particularized guarantees of trustworthiness or constituted a firmly rooted hearsay exception. Then, in 2004, this Court abrogated *Roberts,* held that the Confrontation Clause was not that malleable, and directed that "testimonial" hearsay statements be admitted only when the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 54. In both *Crawford* and *Davis v. Washington*, 126 S.Ct. 2266 (2006), this Court chose to specifically save for another day any effort to assert a comprehensive definition of the term "testimonial." This Court did note, however, that a paradigmatic testimonial statement is one that constitutes a solemn declaration or affirmation made for the purpose of establishing or proving some fact in a criminal trial. *Crawford*, 541 U.S. at 51.

When called upon to apply *Crawford* to scientific testing, courts across the country have taken diametrically opposed views as to whether such tests constitute testimonial evidence. In *State v. Crager*, 844 N.E.2d 390 (Ohio Ct. App. 2005), a case remarkably similar to this case, the court found a constitutional violation where a DNA report was admitted without the testimony of the analyst who actually conducted the DNA testing. The report was deemed testimonial evidence because it was prepared as part of a police

investigation and a reasonable person would have concluded that it later would be available for use at a trial. Thus, a Confrontation Clause violation was present even though an analyst who reviewed the report testified, because the reviewer lacked personal knowledge regarding the testing itself, and there was no showing that the analyst who conducted the testing was unavailable or had been previously cross-examined by the defendant. *Id.* at 394-398. A similar result was reached in *Roberts v. United States*, 916 A.2d 922, 938-939 (D.C. App. 2007), where the court found that a defendant is entitled to be confronted with the laboratory scientists who did the actual tests and reached conclusions regarding DNA analysis when those tests and conclusions were used by an expert at trial to provide critical evidence against him.

Other state courts have found that various types of reports detailing the results of scientific testing are testimonial. The common basis for such holdings is that the reports are prepared for the purpose of litigation and are the equivalent of testimony. *See, e.g., State v. Caulfield*, 722 N.W.2d 304, 309 (Minn. 2006) (forensic examiner's report identifying substance as illegal drug); *State v. Miller*, 144 P.3d 1052, 1058 (Or. Ct. App. 2006) (urinalysis and drug residue report); *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005) (nurse's affidavit outlining blood testing procedures); *State v. Rogers*, 780 N.Y.2d 393, 397 (N.Y. App. Div. 2004) (blood test); *Martin v. State*, 936 So.2d 1190, 1192 (Fla. Ct. App. 2006) (drug analysis report); *People v. Lonsby*, 707 N.W.2d 610, 620-621 (Mich. App. 2005) (test for semen); *State v. Berezansky*, 899 A.2d 306, 312-313

(N.J. Super. Ct. App. Div. 2006) (blood-alcohol content); *State v. March*, 216 S.W.3d 663, 666 (Mo. 2007) (drug analysis report).

Contrary to the result reached by the courts above, other courts have found that reports regarding scientific tests do not constitute testimonial evidence. *See, e.g., State v. Forte*, 629 S.E.2d 137, 142-144 (N.C. 2005) (DNA analysis); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (drug analysis); *United States v. Ellis*, 460 F.3d 920, 925 (C.A.7 2006) (drug analysis of bodily fluids); *State v. Dedmon*, 102 P.3d 628, 636 (N.M. 2004) (drug analysis of blood); *Pruitt v. State*, 954 So.2d 611, 616 (Ala. Crim. App. 2006) (drug analysis).

The courts that find these types of reports to be nontestimonial generally do so by using one of two theories. The first is that these types of reports are neither discretionary nor based on opinion; therefore, they are so trustworthy they do not implicate government manipulation of testimony–the principal evil at which the Confrontation Clause is directed. *See Verde*, 827 N.E.2d at 706; *Pruitt*, 954 So.2d at 617. The second theory is that laboratory reports are considered to be business records and the *Crawford* Court acknowledged in passing that business records are nontestimonial by nature. *See Ellis*, 460 F.3d at 925; *Forte*, 629 S.E.2d at 143-144.

Apart from these diametrically opposed views regarding the testimonial character of scientific reports, there is a middle ground that has been staked out by some courts. These courts have taken the view that scientific reports may or may not be testimonial

depending upon how they are used. *See People v. Jambor*, 729 N.W.2d 569, 575 (Mich. App. 2007) (*Crawford* violation not reflected in admission of fingerprint card where no information was included on the card that purported to match the print taken at the scene to defendant and card contained no subjective information); *Rollins v. State*, 897 A.2d 821, 844-846 (Md. 2006) (that autopsy report might be classified as business record not determinative and contents of report must be examined; if report contains statements which can be categorized as contested opinions or conclusions, or are central to the determination of the defendant's guilt, they are testimonial and trigger the protections of the Confrontation Clause); *State v. Lackey*, 120 P.3d 332, 348-352 (Kan. 2005), overruled on other grounds *State v. Davis*, 158 P.3d 317 (2007) (objective observations in autopsy report nontestimonial, but opinions considered testimonial).

The conflict among jurisdictions in how *Crawford* applies when it comes to scientific testing is clear. At this point, all courts are doing is falling into one or the other of the above-listed categories. The result is that defendants in different jurisdictions are receiving disparate treatment because the Confrontation Clause is being applied in markedly different ways. Consequently, a defendant in Ohio is being set free while a defendant in California is being sentenced to death because the Confrontation Clause is being applied differently to virtually identical sets of facts. The manner in which this needs to be reconciled is clear: this Court must step in and resolve this issue.

II. The California Supreme Court's Decision Renders *Crawford* Nugatory When It Comes to Scientific Testing.

After stating that it did not find any single analysis of the applicability of *Crawford* and *Davis* to the admission of DNA test results persuasive, the California Supreme Court set forth a three-part test for determining whether this type of evidence is testimonial. It held that this type of evidence "is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." Failing to meet all three criteria renders such evidence nontestimonial. App. at 61-62. The court went on to find that the first and third criteria were met, but the second was not; thus the DNA report was nontestimonial and not subject to the dictates of *Crawford*. App. at 62.

The California Supreme Court reached this conclusion by misconstruing this Court's holding in *Davis*. It held that because the lab analyst recorded her observations regarding the analysis of the DNA samples while she was performing the tasks necessary to making the analysis, her actions constituted the contemporaneous recordation of observable events and was akin to the statements found nontestimonial in *Davis*. App. at 63-64. *Davis* does not support this holding.

In *Davis*, this Court found statements to be nontestimonial when they are made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing

emergency. On the other hand, they are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis*, 126 S.Ct. at 2273-2274. Using this standard, the Court found nontestimonial a domestic disturbance victim's recorded statements during her call to a 911 emergency operator because she was speaking about events as they were actually happening, rather than describing past events; she was facing an ongoing emergency; and her call was plainly a call for help against a bona fide physical threat. Consequently, the circumstances of the victim's interrogation objectively indicated the primary purpose was to enable police assistance to meet an ongoing emergency, rather than to establish or prove past events potentially relevant to a later criminal prosecution. *Id.* at 2276-2277.

Extracting from *Davis* that it supports the proposition that any contemporaneous recordation of an event, even when done for the purpose of future criminal prosecution, is a nontestimonial statement indicates the extent to which this Court needs to step in to correct the misapplication of its view of the Confrontation Clause.[3] The California Supreme Court's opinion totally removes the "primary purpose" component of the

---

[3] Certainly, the core idea of *Crawford* is that when the state procures evidence with the expectation that it is to be used as substantive evidence at a later criminal trial, that evidence must be considered testimonial. *See People v. So Young Kim,* 859 N.E.2d 92, 94 (Ill. App. 2006) (*Crawford* contemplates that evidence is testimonial when it is compiled during the investigation of a particular crime and focuses on fault or identity).

equation that this Court used in both *Crawford* and *Davis*. Pursuant to the California Supreme Court's reading of *Davis*, a police officer's report prepared at the crime scene would qualify as a nontestimonial statement as long as it was made contemporaneously with the officer's examination of the crime scene. Likewise, an officer's contemporaneous recordation of any statements made at the crime scene would qualify as nontestimonial. *Crawford* and *Davis* simply do not support this view.

In *Davis*, the primary purpose served by obtaining the witness's statement was to address an ongoing emergency. There is no ongoing emergency when a laboratory analyst is conducting tests to be utililized in a future prosecution. The primary purpose in that instance is to create evidence, which is a quintessentially testimonial function. The tests are being conducted to establish or prove a past event that is potentially relevant in a criminal prosecution; in this case the identity of the person who deposited sperm in the victim's vaginal vault. *See Davis*, 126 S.Ct. at 2273-2274. To say, as the California Supreme Court has, that this observation is removed from being the recordation of a past fact because the lab analyst makes a contemporary notation of her observations renders the holding in *Davis* virtually nonexistent.

An additional basis for finding the report nontestimonial centered on the nature of the report itself. The California Supreme Court found that the report was generated as part of a standardized scientific protocol that the laboratory analyst conducted pursuant to her employment; that though the laboratory was hired for the purpose of obtaining

evidence to be used in a criminal prosecution, the analyst made her notes and report as part of her job rather than to incriminate the Petitioner; that the report merely recounts procedures and can be either inculpatory or exculpatory; and that the accusatory opinions in the case were provided by the expert who testified. App. at 65. The court then went on to hold that because *Davis* states that the critical inquiry concerns the circumstances under which the statement was made, rather than whether it might be reasonably anticipated that a statement will be used at trial, a finding that the DNA report was nontestimonial falls within *Davis*'s Confrontation Clause analysis. App. at 66. This holding also misconstrues the import of both *Crawford* and *Davis*, and effectively renders them inapplicable to a large body of evidence that should otherwise be covered by the Confrontation Clause.

The holding of the California Supreme Court seems to be a mixture of theories: both a business record act finding and some form of finding that the laboratory analyst's report is not actually bearing witness against the defendant at trial, but is merely some type of neutral recordation of facts. This holding does not logically fit within the boundaries set by *Crawford* and *Davis* for Confrontation Clause analysis.

This Court observed in *Crawford* that "[i]nvolvement 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 aware." *Crawford*, 541 U.S. at 56, n. 7. A forensic report like the

one at issue here falls within this class of evidence. It is a report prepared at the behest of law enforcement for use at a later trial and is offered in lieu of live testimony. *Walsh*, 124 P.3d at 208. The California Supreme Court's own decision recognizes this. App. 62-63. Yet, it exempts a forensic report from the class of testimonial evidence merely because the analyst is making a contemporary recordation of her observations. There is no logical support for this reasoning.

There is no support for finding some form of business record exception, which the California Supreme Court seems to advert to by addressing the fact that the analyst prepared the report during the conduct of her business activities. The common law exception for regularly kept business records does not encompass records generated for prosecutorial use. *See Palmer v. Hoffman*, 318 U.S. 109, 113-114 (1943) (records calculated for use in litigation fall outside common law rule admitting business records).

Nor do interpretations of the Federal Rules of Evidence permit this type of exception to *Crawford*'s dictates. Under Rule 803(6), federal courts typically find documents prepared for the purpose of litigation, such as the DNA tests and report in this case, to be inadmissible as exceptions to the hearsay rule. (*See Scheerer v. Hardee's Food Systems, Inc.*, 92 F.3d 702, 706-707 (C.A. 8 1998) (incident report prepared in anticipation of litigation found inadmissible); *United States v. Blackburn,* 992 F.2d 666, 670 (C.A.7 1993) (lensometer report prepared at FBI's behest, with knowledge that information produced would be used in ongoing criminal investigation, made in

anticipation of litigation and therefore inadmissible); *Echo Acceptance Corp. v. Household Retail Services,* 267 F.3d 1068, 1091 (C.A.10 2001) (not all business correspondence constitutes business record); *Certain Underwriters at Lloyd's London v. Sinkovich,* 232 F.3d 200, 204, n.2 (C.A.4 2000) (documents prepared in view of litigation not admissible as business records).

This approach mirrors the requirement that records of law enforcement investigations can neither come in under the public records exception (*see* Fed. Rule Evid. 803(8)), nor come in through the "back door" as business records. (See *United States v. Bohrer,* 807 F.2d 159, 162-63 (C.A.10 1986) (IRS contact card not admissible as business record of IRS in prosecution for willful failure to file income tax returns because card maintained for purpose of prosecuting defendant); *United States v. Brown,* 9 F.3d 907, 911 (C.A.11 1993) (business records exception cannot be used as "back door" to introduce investigatory reports).

The *Crawford* Court's choice of words in discussing testimonial evidence protected under the Confrontation Clause (*viz.*, evidence produced with the involvement of government officers, having an eye toward trial), echoes the language of these federal cases defining and restricting the business and public records exceptions to the hearsay rule. Thus, the Court's dicta regarding business records cannot be read as creating a blanket rule permitting the admission of scientific tests and reports. Both the wording and rationale of *Crawford* indicate that evidence obtained by a prosecutorial branch of

government for use in a criminal trial must be tested by the crucible of cross-examination. (*See United States v. Cromer,* 389 F.3d 662, 673-674 (C.A.6 2005) (*Crawford* applicable to any statement made in circumstances in which reasonable person would realize it likely would be used in investigation or prosecution of crime).

The California Supreme Court's adoption of a quasi-business record exception also fails to account for this Court's return to a pre-*Roberts* analysis of the Confrontation Clause. Prior to *Roberts*, this Court's opinions implicitly recognized that scientific reports could not be introduced in lieu of live testimony from the forensic examiner. In addressing the government's use of scientific tests against a defendant, the Court stated in a pre-*Roberts* case that the accused must be afforded the opportunity for meaningful confrontation of the government's case at trial. *United States v. Wade*, 388 U.S. 218, 227-228 (1967). Similarly, in refusing to recognize a due process right to the preservation of breath samples, the Court observed that there was no violation because the defendant had the right at trial to cross-examine the officer who administered the intoxilyzer test. *California v. Trombetta*, 467 U.S. 479, 490 (1984).

Apart from the California Supreme Court's inappropriate use of a quasi-business record act exception, the attempt to distinguish *Crawford* based on the seemingly "objective" recordation of facts reflected by the tests is also inapt. The idea that there is no Confrontation Clause violation because the analyst is merely recording neutral or objective findings runs counter to the core principle of *Crawford*. The initial problem is

that it leaves to a trial judge the determination of what type of finding is a finding of fact or matter of opinion or interpretation, or what type of finding is analytical or non-analytical. Apart from the result that the application of an essential constitutional principle will now vary from judge to judge depending on these types of findings, the principle itself is not without controversy: reasonable judgments may differ as to whether otherwise descriptive and non-analytical findings are not actually subject to differences in judgment and interpretation.

Perhaps of even greater concern regarding this view is that it is really no more than a return to the *Roberts* reliability test. The California Supreme Court is really saying that these types of findings are noncontroversial, thus nothing is to be gained by cross-examination and there is no need to afford a defendant that right. Yet, *Crawford* removed that reasoning from the equation when it found fault with *Roberts* by pointing out that it permitted "a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." *Crawford*, 126 S.Ct. at 61. As the Court also observed:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 61.

The test created by the California Supreme Court for determining whether statements are testimonial ignores *Crawford*, misinterprets *Davis*, and refuses to apply long-established principles determined by this Court prior to *Roberts*. This holding renders the Confrontation Clause nugatory in the largest state in the union.

III. The Question Presented by this Case Significantly Affects the Administration of Criminal Justice Across the Country.

The presentation of scientific evidence in support of a prosecution has become increasingly important to securing convictions. Jurors have come to expect it due to the proliferation of information regarding the availability of scientific tests to identify perpetrators and the increasing attention that has been paid to the conviction of innocent persons. The type of testing done in this case, DNA testing, has been a particular focal point of these concerns.

Given the increasing importance being placed upon this type of evidence, replacing live testimony of the person who prepared the incriminatory report with just the results themselves undermines the integrity of the criminal justice system. When statistics show that "bad science" contributes to up to one-third of wrongful convictions in this country, lessening Confrontation Clause rights in this area is a step in the wrong direction. *See* Barry Scheck, et al., Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted 246 (2000); *see also* Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 491-500 (2006). The idea that nothing can be gained by the exercise of cross-examination when the only things at issue are "non-judgmental"

scientific findings is certainly belied by common experience; which tells us that these scientific findings are often subject to serious challenge. *See* Paul C. Giannelli, *Ake v. Oklahoma*: *The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L. Rev. 1305, 1320 (2004); Jim Yardley, *Doubts on Evidence Put Oklahoma City Police Scientist Under Scrutiny*, N.Y. Times, May 2, 2001. Even in the instant case, the testifying expert admitted that Cellmark had produced a false positive result in its own testing only a couple of years before doing the testing in this case. RT 5510-5511.

The reality of criminal prosecutions today demands that the persons who are actually performing the scientific tests that are being used to convict defendants be available for cross-examination. The concept that an expert who may be the ultimate witness against the accused can be cross-examined on the accuracy or conduct of a test she did not herself perform, therefore rendering unnecessary the production of the laboratory person who performed the test, is unwarranted and unacceptable as a matter of constitutional law.

This case presents a perfect example of the type of testimony which arises when this approach is taken. When asked about the protocol used by the laboratory technician who performed the testing which provided the lynchpin of the prosecution's case against petitioner, the testifying expert provided the following answer: "You know, first you do this and then you do this and then you heat it at 37 degrees for a half hour and then you do this other thing." App. 47.

The adversarial process demands that a defendant be allowed to confront and cross-examine the person who is providing testimony against him or her. When the results of scientific testing are being admitted into evidence, that person is the person who performed the tests. Under the dictates of *Crawford* and *Davis*, these test results are testimonial evidence. This Court should now make clear that this constitutional principle must be applied in an even-handed manner in all criminal trials across the country.